



THE DRAKE GROUP

Advancing Positive Legislative Change
In College Athletics



DATE: August 1, 2023

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Department of Education, Office for Civil Rights (ED-OCR)

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RE: **Name, Image, and Likeness (NIL) College Athlete Outside Employment: Entwinement of “NIL Collectives” and Higher Education Institutions Continues to Subvert Intercollegiate Athletic Program Obligations to Ensure Equal Treatment of Female Athletes Under Title IX**

Since our March 9, 2023, memorandum and Zoom meeting, there has been significant evolution in the Name, Image and Likeness “NIL” space that even more clearly demonstrates why ED-OCR guidance is urgently necessary. As we have previously pointed out, NIL collectives are not equally benefitting female athletes, enabling higher education institutions to evade their Title IX recruiting, publicity, promotion, and financial aid obligations. Our earlier conversations mostly focused on demonstrating the relationship between the schools and the collectives and provided explanations on why and how the collectives’ actions (engaging in sex discrimination in recruiting, publicity, promotion, and financial aid), should be attributed to the schools. Higher education institutions and most collectives are now, without a doubt, entangled, entrenched, and integrated with the schools.

“You’ve now got fundraisers at a foundation out raising money for the athletic department and they can now add NIL to the list of what they are asking for and doing it through their athletic clubs. What NIL has become is universities going out through their foundations and collectives and raising dollars to give to athletes. They’re just paying them to come play, and there is no limit on that.”

- [Mississippi State University President, Mark Keegan](https://www.sportsillustrated.com)
SportsIllustrated.com, May 30, 2023

The schools have a true and obvious “hands-on approach” that is no longer murking below the surface. The relationship is direct and obvious. Indeed, this new reality is prompting many

athletics directors and others to argue that the NIL monetization should just be officially brought in-house to avoid the subterfuge.

"I would prefer having control, and at this point, I would not outsource it. Who knows our student-athletes better than us? Who knows our communities better than us? Why not create a system where it not only benefits the student-athlete but potentially ties into sponsorships and overall agreements with the department? I see a lot of opportunities there."

- [Boise State athletic director, Jeremiah Dickey](#)
SportsIllustrated.com, May 30, 2023

The developments in the last four months alone more clearly demonstrate the direct connections between institutions and sex-discriminating collectives. First, a number of states have passed laws or are considering laws that explicitly permit the schools to directly facilitate, negotiate and assist collectives in their NIL endeavors. Second, fundraising arms of schools—that are legally separate from the schools on paper but not in function—are now operating as quasi-collectives, a new business model. Third, the NCAA in its most recent guidance is green lighting more and more involvement by the schools. For example, as long as the same benefits are provided to all sponsors, schools can donate assets such as tickets, suites, etc. to collectives. Fourth, the NCAA continues its failure to enforce its existing rules related to outside employment, involvement of boosters, institutional control rules, as well as their [July 2021](#), [October 26, 2022](#), and [June 27, 2023](#) supplemental NIL rules guidance. This is all causing much confusion and increasing attempts by schools to push NIL collectives to give them a competitive advantage in football and men's basketball, their primary revenue-generating sports, without providing female athletes with equal recruiting, financial aid, promotional or publicity benefits.

It is not the responsibility of ED-OCR to fix the chaotic NIL arena. It is the responsibility of ED-OCR to make it clear to higher education institutions that they cannot use NIL collectives to evade Title IX athletics obligations. The total silence of ED-OCR on the issues of NIL collective entwinement and athletic department group and co-licensing arrangements that favor male athletes, i.e., continuing male athlete preferential treatment in publicity, promotion, recruiting, and financial aid in violation of Title IX, is inexplicable. Thus, we are hopeful that this fourth request of ED-OCR guidance is positively received.

Toward this end, this memorandum provides additional information that we hope is helpful. Part I below reviews these new developments that further demonstrate the significant entwinement of college athletic programs with NIL collectives. Part II reviews recent IRS guidance on NIL collectives and asks that ED-OCR meet its analogous federal agency obligation to insist that institutions comply with Title IX. Part III reviews our previous specific requests for OCR to inform higher education institutions of existing guidance applicable to NIL-related practices.

Part I: Summary of New Developments Further Exacerbating Title IX Concerns

A. State laws, passed or introduced in [Texas](#), [New York](#), [Missouri](#), [Arkansas](#), [Colorado](#), [Michigan](#), [Texas](#) and [Oklahoma](#), permit more direct contact between higher education institutions and NIL collectives in ways that the NCAA rules would not permit. For example, they permit a “hands-on” approach so that the schools can identify, create, facilitate, or otherwise assist athletes and collectives in the NIL space without fear of NCAA punishment. As part of the revenue producing sports’ “arms race,” these collectives are engaged in recruiting and retention as their stated and unstated purposes. [Many coaches and athletic directors now refer to the collective/NIL situation as money laundering](#).

1. Some of these state laws even provide that their laws take priority over the NCAA’s rules. They prohibit the NCAA from penalizing the respective state school if the school participates in activities allowed under the state law but not the NCAA rule. [The Texas A&M athletic director commented](#): “The state law is going to govern how we do business.” “And, we’ll continue to be as aggressive as we can.” “It’s a big shift honestly.”
2. Some of the state laws permit the [school’s](#) fundraising 501 (c)(3)’s to engage in NIL fundraising and compensation (see [Texas A & M 12th Man Fund+](#) and [One Arkansas](#)). For example, donors are given priority points and other school sponsored benefits that the schools previously gave only if donations were made directly to the schools’ athletics department or foundation. Another example is that schools are providing other benefits to the collective to provide to the respective donors, such as dinners and interactions with the athletes (almost always football or men’s basketball; sometimes women’s basketball, courtside seats, etc.).
3. Some of these state laws permit high school students to receive NIL money and permit high school collectives. [See details by state](#) and [Arkansas action to study high school NIL rights](#). There is no reason to believe that high school collectives will not repeat their emphasis on funding NIL opportunities for football and male basketball players.

B. NIL Collectives provide benefits specified in Title IX regulations. Collective money based on roster value or team value rather than outside employment services rendered should be classified as financial aid. Our earlier March 9, 2023, memo focused more on treatment and benefits inequities of **recruiting, marketing and promotion**, but it is becoming even clearer that such NIL monies should also fall in the Title IX bucket of **financial aid**.

1. Texas Tech, the Matador Club will provide over [120 football players](#) with \$25,000 each and significantly smaller numbers of [baseball, softball and women’s basketball players with deals from \\$10,000 to \\$25,000](#). Recently the Texas Tech football coach said “you’re almost, really on scholarship” when referring to the 35 non-scholarship football players who will now receive NIL collective compensation. ([Lubbock Avalanche Journal, May 21, 2023](#)). This is “structured, legal financial support for players who enter a program without a scholarship.” That same article points out the 35 football players are above the 85 NCAA

limit who may be compensated with athletics-related aid. And, Tech's Matador Club will compensate 27 softball players \$10,000; while also compensating 39 baseball players \$10,000. This compensation scheme provides \$3,390,000 to 159 male football and baseball players compared to \$270,000 to 27 female softball players -- an obvious inequity.

2. Athletics administrators readily acknowledge NIL as scholarships (athletics-related financial aid) under Title IX. Pat Kraft, Penn State athletic director [speaking about the Nittany Lions' NIL efforts](#) and how schools are telling their boosters to support *Happy Valley United*, the umbrella Penn State NIL collective:

"The way we look at it is this is the new scholarships. So we've been raising money for scholarships. We will continue to raise money for scholarships. But, the NIL piece is becoming more and more prominent, and it's not just in football. It is now in every sport ... I think we're behind, but I think we're making up ground fast, and at a pretty good clip...so it's just taking us time to move this battleship to say, 'No, it's okay. This is okay.'

3. See similar NIL deals and inequities created by providing fixed NIL compensation for [BYU's entire football team](#) (136 players) and [Oklahoma](#) (all scholarship, walk-on, and transfer football players).
4. These compensation practices also cause a problem with the accuracy of Equity in Athletics Disclosure Act (EADA) obligations. EADA reporting does not include such NIL collective payments as financial aid.

C. Failure of NCAA to stop inequities. NCAA still has not brought any cases against schools based on violations of its NIL rules that require a certain (albeit inadequate) degree of separation between the schools and collectives—this is despite the NCAA's rule to make it easier to bring such cases—[that any circumstantial evidence of an improper relationship or dealing is enough to bring the case and the burden then shifts to the school to prove otherwise](#). We emphasize our March 9, 2023, contention that [failure of the NCAA to enforce its rules](#) allows member institutions to ignore Title IX and is tantamount to permitting sex discrimination. Further, we assert that conferences and national governing organizations that consist of members to which Title IX applies should also be subject to Title IX's requirements. They must not conduct pre- or post-season championships, programs, promotions, or other events that result in the more favorable treatment of male v. female athletes or fail to enforce rules that would prohibit members from doing so.

D. Evidence of disparities. Third parties that gather information from collectives continue to report huge disparities between men's and women's deals, noting there is no single source for the collection of NIL data.

1. Jason Belzer, CEO of Student Athlete NIL (SANIL) that manages 30 collectives, reported at an University of Arizona sponsored conference on June 8, 2023 in Washington, DC, while

sitting on a panel with Charlie Baker, NCAA President, that [95 percent of NIL money is going to men](#)—also noted that the medium collective on the Power 5 level has about \$3 million on hand—with some up to \$10 million.

2. [INFLCR](#), [ON3](#) and [Opendorse](#) and others report significant gender inequities with collectives focusing exclusively or almost exclusively on football and men's basketball. Male athletes are overwhelmingly receiving NIL deals of greater average value and greater numbers of NIL deals.
3. While most NIL collectives represent they [support all sports \(367 of 431\), 69 are organized and advertised as single sex entities](#), their focus is football and men's basketball as evidenced by the actual number and value of NIL deals. Now cognizant of Title IX concerns being expressed more frequently and publicly (Congressional hearings, etc.), collectives are giving donors the option to select the sport of the athlete for which they want to provide NIL compensation. This is absolutely form over substance.
 - a. At the University of Michigan "Hail! Impact" collective, [the designation of women's sports is activated only if a certain dollar threshold of donations is met](#) and, if not met, the donations revert to a general fund that the collective may at its discretion designate to other athletes.
 - b. The "One More Year" fund, officially recognized by the University of Michigan athletic department, conducts an annual crowd funding campaign specifically for football players "to make it lucrative for those pondering NFL careers to remain in Ann Arbor instead of chasing league money":

As one of the officially supported collectives of the University of Michigan athletic department, Valiant Management Group is launching the One More Year Fund, a crowdfunding campaign designed to retain key Michigan football players like Blake Corum, Trevor Keegan, and Zak Zinter, and Cornelius Johnson. Fans have the option to donate any amount of money, but those who donate over \$5,000 will receive exclusive donor benefits. Donations go directly to the One More Year Fund which is a dedicated NIL fund for key football players who return for the 2023 season and a run at the national championship. 100% of fund proceeds go to the players. Valiant's goal is to raise as much money as possible, no donation is too big or too small. Help Valiant show the players how much the Maize and Blue faithful appreciate them and want them back in the winged helmet next year. – [Wolverines Wire, January 8, 2023](#)
 - c. [At Texas A&M male athletes earned \\$8,412,816.96 compared to \\$134,661 for female athletes](#) from NIL collectives over the last two years.

E. "Official" NIL Collectives. Even more schools now have designated "official" collectives—partially so that "unauthorized" collectives do not usurp the school's preferred needs. As

pointed out in our March 9 memo, previous ED-OCR guidance categorizes this “official” relationship as significant institutional support. See for examples: [University of Virginia](#), [Penn State](#) (consolidated all under of its collectives under one brand), [University of Minnesota](#), [University of Central Florida](#), [University of Oklahoma](#).

- F. More Institutions Prominently Advertise Collectives at College Athletic Events.** Many [collectives prominently advertise their existence and provide QR codes on jumbotron and in programs](#) at football and men’s basketball games, and sometimes women’s basketball games. It is unclear whether collectives are paying fair market value or paying at all for such advertising.
- G. Proposed Federal NIL Legislation Paying “Lip Service” to Gender Equity.** Some of the Congressional proposed bills include general gender equity requirements because it is the politically correct thing to do. However, details and enforcement are not included in such bills. See for example [S.238](#), [H.R.850](#) which simply requires NIL support “accessible to all college athletes” and [S.4724](#) requires a Commission established by the bill to report potential violations to OCR. Others do not address gender equity at all.
- H. Lack of Title IX Accountability of NIL Collectives Continues to Provide Boosters with the Opportunity to Direct Funds to Men’s Revenue Sports Instead of Giving to the Institution’s Athletics Program Thereby Endangering Olympic and Other Non-Revenue Sports.** Donors and commercial entities preferring to give to men’s sports reduces athletic department sponsorship and donation revenues, thereby increasing the likelihood of eliminating men’s and women’s non-revenue sports (as evidenced by [athletic department 2019-2021 pandemic response to loss of revenues](#)). Over [75% of the 2020 USA Olympic team](#) and [80% of the 2016 USA Olympic team](#) were either in college or college graduates. College athlete teams represent a farm system/minor league in essence for Olympics. [Our Olympic success will fail if we put all our eggs in the revenue-supporting sport buckets](#).
- I. Continuing Lack of Higher Education Institution Athletics Program Compliance with Title IX Publicity and Promotion over the Last 50 years has Negatively Impacted Development of Female Athlete Brands, NIL Opportunities, and Female Professional Athlete Salaries.** In addition to an impact on the Olympics, professional women’s sports will continue to have gigantic disparities with men’s professional sports (e.g., [WNBA avg. \\$75,181 v. NBA \\$8,321,937; NWSL avg. \\$35,000 v. MLS \\$410,730; golf avg. is \\$48,993 vs. \\$1,235,495 for men; most successful is tennis WTA \\$283,635 v. male pros at \\$335,946](#)). Women continue to have to play on teams overseas to make a living and are subjected to atrocities like what happened to [Brittney Griner](#) and injuries like what happened to Breanna Stewart (tore Achilles tendon playing in Russia). And, still very few charter flights are available or even permitted for women’s teams subjecting them to all kinds of travel frustrations and injuries—and now, even, harassment at airports. Title IX enforcement matters.
- J. Given lack of Title IX Guidance in the NIL Area, States are now Developing Revenue Sharing Laws Designed to Give Funds Primarily to Men’s Football and Basketball Athletes.** Only very

reluctantly, California added an amendment to [General Assembly Bill 252](#) (a college sport revenue-sharing bill designed to benefit “exploited male athletes”) that attempted to equalize revenue-sharing with female athletes but, in fact, it was in a manner that would not comply with Title IX. The bill proposes sharing “degree completion revenues” 50-50 among male and female scholarship athletes when Title IX requires that athletics financial aid be distributed proportional to athletic participation based on duplicated participant counts. Because so few schools might be able to afford such payments, many suspect that schools will be more likely to turn to fuzzy accounting. If adopted by the California Senate in 2024, fewer funds will be available for operating budgets of non-revenue sports which will adversely impact more female compared to male athletes and Olympic sports (see H. above).

Part II: ED-OCR Must Meet its Obligations to Assist Institutions in Complying with Title IX

On May 23, 2023, the [U.S. Internal Revenue Service issued guidance on NIL Collectives](#) clearly stating most NIL collectives should not be entitled to 501(c)(3) status, permitting donations to be tax deductible. It is estimated that there are [200 collectives now; 80 are non-profit](#). Hopefully, this inspires ED-OCR to also issue its existing Title IX guidance as it applies to NIL collective practices and institutional Title IX athletics obligations. Indeed, the link between collectives and recruiting inducements is made clear in the IRS memo; the ED-OCR can use that as additional supporting evidence of the link between NIL payments and recruiting.

More specifically, the IRS general counsel memorandum pointed out that NIL collectives both qualitatively and quantitatively exist to provide funds to athletes (for recruiting and retention purposes) as opposed to being primarily engaged in a public service and providing charitable organizations with assistance. The IRS guidance may result in stopping schools from establishing collective funds within the schools’ existing separately incorporated fundraising foundations (which exist to benefit the institution). These proposed funds within such foundations would exist to provide NIL monies directly to athletes instead of providing contribution to the institution’s athletics department. Whether or not the contributions to these internal foundation collectives are tax deductible, such funds should be considered tantamount to athletics department financial aid. These foundations represent themselves as quasi-official entities of the institution. As these new internal collectives are established, it must be made clear that Title IX applies.

As important, before such collectives formally affiliate with the institutions’ existing fundraising entities (which are currently obligated to directly support athletic programs thereby activating the institution’s obligation to treat male and female athletes equally), like the IRS, ED-OCR must issue guidance that demonstrates that the currently existing subterfuge is impermissible. Specifically, such guidance must make it clear that the institutions or their employees cannot support, through the gifting of their assets or the encouragement of donors to support NIL collectives that discriminate on the basis of sex and/or engage on behalf of the institution, recruiting, publicity, promotion, or financial aid activities that favor male athletes over female athletes.

Further, guidance must be issued to make it clear that athletic departments cannot engage in NIL group or co-licensing agreements (agreements in which the institution and individual athletes or athletic teams respectively grant their NIL rights to a third party that combines them for the sale of a product) in a manner that favors males over female athletes. Such agreements provide recruiting, publicity, promotion, or financial aid benefits. An example of group licensing is Electronic Arts' development of a [college football video game](#) that will involve 120 Football Bowl Subdivision schools and their male players who will receive payments for their NILs. There are no such video games involving women's sports. Co-licensing deals, such as the [University of Michigan's NIL deal with MDen](#) where football players names (athlete NILs) are placed on University of Michigan branded football jerseys (institution NILs) are sold to the public with proceeds paid directly to athletes by MDen, is an example of another sleight of hand to avoid Title IX obligations.

Part III: Practices of NIL Collectives are Supported by Assets, “Official” Designations, and/or Requests of Institutional Representatives and Institutional Group and Co-Licensing Agreements That Require Direct Entwinement of Athlete and Institution NILs are Covered by Existing Title IX Guidance

A. ED-OCR is Aware of New NIL Circumstances and Why Title IX Applies. The Drake Group advised ED-OCR via two memorandums dated January 10, 2023, and March 9, 2023, and a March 9, 2023, Zoom meeting with ED-OCR staff and provided in detail examples of the new NIL circumstances. We explained how athletic department boosters have established external entities (NIL collectives) for the express purpose of providing institutions with recruiting, retention, and athlete financial aid assistance via ill-disguised direct-to-athlete “NIL payments” in order to evade Title IX obligations to treat male and female athletes equally. We also described how these circumstances enable institutions to avoid NCAA booster involvement prohibitions that previously required athletic departments to receive such payments instead. We explained why the institution as the custodian of dollars supporting its recruiting and financial aid benefits enable institutions to comply with Title IX. In addition, we detailed how institutions were directly supporting or directing these NIL collectives to operate on their behalf. Finally, we explained how institutions were engaging in group and co-licensing activities under the guise of protected outside NIL employment without complying with Title IX obligations to treat male and female athletes equally.

B. ED-OCR is Aware of Why and How Existing Title IX Guidance Applies to Identified New NIL Circumstances. The Drake Group devoted its March 9, 2023 memorandum and our March 9, 2023, Zoom conversation with ED-OCE staff to a review of existing Title IX athletics guidance applicable to these new NIL circumstances. Specifically:

- Title IX obligations applicable to publicity, promotions and recruiting and those factors ED-OCR will examine;
- The proportional-to-athletics-participation standard applicable to athletics related financial aid;

- The institution’s obligations to seek equal promotion, publicity, and recruiting exposure for its male and female athletes in any marketplace not controlled by the institution, including NIL opportunities;
- The institution’s obligations to engage in multiple group and/or co-licensing agreements that equally benefit male and female athletes;
- The institution’s obligation to not allow its institutional assets to be used for private gain by a larger proportion of male than female athletes;
- The obligation of the institution to provide equal educational and advisory support related to NIL opportunities and agreements;
- The institution’s obligation, if publicizing or promoting the NIL achievements or opportunities of male athletes, to do so equally for male and female athletes;
- The factors that OCR must examine in any assessment of third parties’ activities, and the standards for determining whether the institution has been sufficiently involved to be found responsible under Title IX for assisting, delegating, or otherwise supporting those third parties such as individuals or collectives that engage in sex discrimination;
- The need for any gender equity restrictions on individuals or individual businesses that enter into NIL agreements with individual athletes or groups of athletes without the involvement of the institution;
- If any institution is out of compliance with Title IX with regard to promotions, publicity, recruiting or athletics-related financial aid, whether it is permitted to provide any assistance to third party organizations such as NIL collectives that provide financial assistance to the school’s students and over which it has no control with regard to the provision of amounts of financial assistance;
- Whether an institution can provide assistance to any third party that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees or that is recruiting on its behalf and over which it does not have control with regard to recruiting, promotion, publicity, or financial aid;
- Whether an institution’s designation of an NIL collective as “the official collective” of the institution automatically results in a determination of providing “significant assistance;”
- Whether an institution is permitted to assist any outside third party that is recruiting on its behalf and over which it does not have control with regard to recruiting, promotion, publicity, financial aid, treatment or benefits;
- Whether Title IX applies to rules or policies of conferences and national governing organizations that consist of members to which Title IX applies with regard to whether its rules or practices result in the discriminatory treatment of the institutions’ athletes at conference and national championship post-season or other events; and
- Whether conferences and national governing organizations that consist of members to which Title IX applies that fail to enforce rules which permit member institutions to comply with Title IX are tantamount to promulgating rules that result in sex discrimination.

As the federal agency charged with the enforcement of Title IX and considering the current chaos being experienced by higher education institutions which are recipients of federal aid with regard to how their Title IX obligations apply to new NIL circumstances, we are hopeful that this request to advance the department's enforcement responsibilities through the issuance of guidance will be positively received.

Thank you for your attention to this fourth request for assistance. The Drake Group is available to collaborate if further information is required.