

The Intersection of Title IX and NIL

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On June 21, 2021, the Supreme Court ruled against the NCAA in an appeal and issued an opinion challenging the long-standing argument that the organization should receive special antitrust treatment because of its academic mission.¹ It did not completely overrule the NCAA’s previous decisions nor create any new standards, but it did strongly suggest that the restrictions could face serious legal challenges in the future.² Universities across the United States took action immediately after the ruling was published. Then, on June 30, 2021, the NCAA’s Board of Directors adopted a temporary rule change to allow schools to set their own policies for what should be allowed with minimal guidelines.³ The very next day, athletes began signing endorsement deals as the rule change went into effect.

Because the Supreme Court’s decision simply recognized the potential for antitrust violations, the NCAA had to act quickly in an attempt to avoid legal complications that surely would have arisen. This concern led to the NCAA’s guidelines being exactly that – a general guide as to how schools should craft their own Name, Image, and Likeness (“NIL”) guidelines. Schools now have vast discretion as to how to implement their protocol for third-party payments to athletes. Since the green light has been given, schools are tasked with navigating any potential legal conflicts that may come from these changes on their own. Administrative and athletic departments have addressed questions about antitrust, intellectual property, contracts, and constitutional law

¹ Dan Murphy, *Everything You Need to Know About the NCAA’s Nil Debate*, ESPN (2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

² *Id.*

³ *Id.*



and continue to address conflicts as they come up. One specific area of law addressed consistently alongside NIL issues is Title IX. It has come to light recently as schools now have to comply with the law's mandate that men and women must be provided the same opportunities in athletics at public universities.

NIL policy and legislation enactment truly opened in 2021 when the Supreme Court issued its opinion in *Alston v. NCAA*. This case began in 2019 as a cumulation of class-action lawsuits by students to challenge the NCAA and universities on their restrictions about educational funds being anti-competitive.⁴ The district court initially required that the NCAA must allow universities to compensate student-athletes with additional educational funding to cover things like internships, tutoring, and other non-cash benefits.⁵ In the Supreme Court's ruling on the case, it held that the NCAA's enjoined rules that restricted the education-related benefits that member institutions could offer student-athletes were unlawful restraints of trade under the Sherman Act, and only some of the challenged NCAA rules served the procompetitive purpose of preserving amateurism.⁶ Additionally, plaintiffs showed that any legitimate objectives could be achieved in a substantially less restrictive manner.⁷ While this decision did not directly rule on whether student-athletes should receive compensation for Name, Image, or Likeness, it dissolved the NCAA's authority to restrict compensation from them.

Now, for the first time in history, the NCAA will allow student-athletes to receive compensation from third-party endorsements. The onset of NIL legislation prioritizes the third-

⁴ *NCAA v. Alston*, 141 S. Ct. 1043 (2021).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

party payor aspect to emphasize the secondary role of universities in the sponsorship process. However, regardless of how the legislation is formulated, these student-athletes are participating in sports utilizing federal funding allocated to universities thus making them subject to any and all federal legislation pertaining to their educational experience. Since the beginning of serious consideration on how to pay players fairly, Title IX has been looming in the background.⁸ Most importantly, because college athletics is considered part of the educational process, any attempt to pay athletes, and to possibly pay men more than women or vice versa, would trigger Title IX protections.⁹ This is why state legislators, colleges, and universities must take extra precaution when drafting legislation and regulations regarding NIL participation so that potential violations can be avoided.

A good starting point to gauge where Title IX may come up regarding NIL regulations is to better understand how something may qualify for scrutiny under Title IX.¹⁰ Hypothetical violations include:

1. The university trains its men's basketball team on how to navigate the world of contracts and agents, but does not similarly train any women's team.
2. The university allows the football team members to use its trademarked logo in an ad for a sports apparel brand, but not any women's team members.
3. The women's swimming and diving team coach holds meetings with various vendors to feature her team members on their website, but no men's team coaches hold similar meetings.

⁸ Jane McManus, *Pressure to Pay Student-Athletes Carries Question of Title IX*, ESPN (2016), https://www.espn.com/espnw/culture/feature/story/_/id/15201865/pressure-pay-student-athletes-carries-question-title-ix.

⁹ Ray Yasser & Carter Fox, *Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes*, 12 Harv. J. of Sports & Ent. Law 175 (2021).

¹⁰ Murphy, *supra* note 1.

4. The men's baseball team members are paid by the university's apparel partner to have jerseys sold with their names on the back, but no female athletes are offered similar deals."¹¹

Situations like these are very probable and practical issues colleges and universities may face when beginning NIL brand sponsorships at their schools. It would be highly beneficial for schools to contemplate issues like these and craft protocols or plans in case these issues arise. These plans should include not just steps for how an issue already occurring should be handled, but additional steps to help mitigate and avoid potential violations in the first place. NIL brand deals can bring forth legal implications in a variety of areas such as business and contract law, intellectual property law, and trademark and copyright law. In preparation for these situations, it is best for colleges and universities to be forward-thinking in anticipating how questions about NIL should be handled.

¹¹ *Id.*

