TITLE IX AND ATHLETE COMPENSATION IN THE POSTAMATEURISM ERA

*Erin Buzuvis**

* Associate Dean for Academic Affairs and Professor of Law, Western New England University School of Law. This Essay was prepared for the Symposium entitled *Reforming College Sports* hosted by the *Fordham Law Review* on November 1, 2024, at Fordham University School of Law.

INTRODUCTION

For over a century, the National Collegiate Athletics Association (NCAA) espoused the amateur status of its athletes as an ideal and core value.[1] Universities could not remunerate athletes other than in the form of scholarships to offset tuition.[2] Nor could athletes accept compensation from third parties connected to their athletic participation.[3] But in recent years, amateurism has yielded to new concerns about fairness and exploitation, which have driven athletes and their supporters to litigate and lobby against the NCAA's amateurism policies on a variety of fronts.[4] Antitrust litigation has already toppled the NCAA's restriction on third parties paying athletes to license their name, image, and likeness (NIL).[5] Soon, universities in the most lucrative conferences will be required to share revenue directly with players.[6] Meanwhile, numerous state laws have emerged to protect an athlete's right to capitalize on the value of their name, image, and likeness, and a few states have permitted universities to directly compensate athletes for their NIL.[7] As another tactic, athletes have also sought to leverage labor law with notable success this year. A regional decision of the National Labor Relations Board (NLRB) recognized the right of athletes at private colleges to form unions and engage in collective bargaining,[8] while a federal appellate court ruled that athletes are protected by federal wage and hour law as well.[9] Clearly the postamateurism era has arrived.

The question addressed here is how an old law applies to this new era. Title IX, a fifty-year-old civil rights law prohibiting sex discrimination in education, does not expressly address how principles of gender equity apply to compensation for students participating in college sports. It is reasonably clear that bona fide third parties are not subject to Title IX when they negotiate with athletes to license their NIL, as Title IX by its terms only applies to educational institutions that accept federal funds.[10] But what happens when a third party is working on behalf of the university and offers

1. RANDY R. GRANT, JOHN LEADLEY & ZENON ZYGMONT, THE ECONOMICS OF INTERCOLLEGIATE SPORTS 24–26, 31–35 (2008).

2. *Id.* at 22–23.

3. *Id.*

4. *See infra* Part II.

5. *See infra* Part II.

6. *See infra* Part II.

7. Dennis Romboy, *Georgia Governor Signs Order Allowing Universities to Directly Pay Athletes*, DESERET NEWS (Sept. 18, 2024, 11:16 AM), https://www.deseret.com/sports/2024/09/18/college-athletes-direct-payment-nil-georgia-ncaa/ [https://perma.cc/LDG2-7TRJ].

8. Jennifer S. Cluverius, *Collegiate Athletes Deemed "Employees" Under the NLRA: Dartmouth Basketball Players Cleared for Unionization Vote*, MAYNARD NEXSEN (Feb. 7, 2024), https://www.maynardnexsen.com/publication-collegiate-athletes-deemed-employees-under-the-nlra-dartmouth-basketball-players-cleared-for-unionization-vote [https://perma.cc/7F6M-CJHF].

9. Ryan Golden, *College Athletes May Be Employees Under the FLSA, 3rd Circuit Holds*, HR DIVE (July 15, 2024), https://www.hrdive.com/news/college-athletes-may-be-employees-under-flsa/721411/ [https://perma.cc/QD23-6AW5].

10. Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107, 1124–25 (2023).

NIL compensation as part of the recruiting process? Like many others, this Essay argues that Title IX must apply to these situations. But the application of Title IX to collaborations between universities and their parties only raises more questions, some of which converge with the questions surrounding Title IX's application when schools directly compensate athletes for their NIL or pay them an hourly wage. Does Title IX apply like it does in other employment situations? Or does it apply like it does to other aspects of athletic participation? The former would give schools more flexibility to pay athletes based on a market rate and pay male athletes more due to the higher public demand for tickets and broadcasts of men's sports. The latter would treat compensation like any other benefit of participation, such as access to coaching, facilities, equipment, and other resources, as something that must be equitably distributed to men's and women's programs.

This Essay argues that Title IX applies to all manners of compensation that universities provide and facilitate to their athletes because of their athletic participation. This includes paying wages (when and if that becomes permissible), paying for NIL (when that permission takes effect), and facilitating payments from booster collectives that are working on those universities' behalf (as happens now). The statute and its implementing regulations create a structure of substantive equality that is flexible enough to address even the changing landscape of college athletics as it applies to matters of compensation that were not contemplated by the drafters of the statute or the regulations. The purpose of Title IX, as of any civil rights law, is to constrain market forces in the interest of fairness and equity. The fact that athletic participation may now come with a paycheck is more of a reason, not less, to ensure gender equity and apply Title IX.

I. TITLE IX BACKGROUND

Relevant to the discussion of Title IX's application to athlete compensation, this part considers both congressional history and the equality frameworks adopted by early Title IX regulators.

A. Congress Affirms Title IX's Application to Athletics Notwithstanding Their Commercial Nature

In 1972, Congress passed an omnibus education reform act that included Title IX: "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."[11] Though the statute does not expressly address athletics, Congress later confirmed its intent for the law to so apply. In 1974, Congress passed the Javits Amendment,[12] which authorized the Department

11. 20 U.S.C. § 1681.

12. Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (codified as amended in scattered sections of 20 U.S.C.).

of Health, Education, and Welfare's Office for Civil Rights[13] (OCR) to promulgate regulations implementing Title IX that would take into account "the nature of particular sports."[14] It also passed the Civil Rights Restoration Act of 1987[15] to confirm that Title IX applies to all programs of an institution that receives federal funds for any of its programs.[16] In so doing, Congress overrode *Grove City College v. Bell*,[17] in which the U.S. Supreme Court read Title IX to only apply to those programs in an educational institution that directly received federal funds. The legislative history shows that Congress specifically considered the lack of Title IX enforcement in athletics in the wake of *Grove City College* to be a problem of urgent concern.[18]

Congress has also taken the opportunity to clarify that Title IX is intended to apply to college athletics notwithstanding their commercial nature, and it has expressly rejected efforts to modify Title IX in light of the commercial reality of college sports. In 1974, it rejected an amendment proposed by Senator John G. Tower that would have exempted revenue sports from Title IX.[19] Later, when Congress reviewed and affirmed the implementing regulations promulgated by the OCR, Congress rebuffed renewed attempts to exempt revenue sports and protect the commercial interests in college sports.[20] During that process, one of Title IX's proponents, Representative Patsy T. Mink, characterized these efforts as implying that "sex discrimination is acceptable when someone profits from it and that moneymaking propositions should be given congressional absolution from Title IX."[21] Congress ultimately agreed that commercialization of college sports is not a reason to limit Title IX's application.

B. Title IX Regulations Mix Formal and Substantive Equality

The OCR promulgated Title IX's implementing regulations in 1975.[22] The process of drafting these rules served as a battleground for various competing

13. When Congress created the U.S. Department of Education in 1979, responsibility for Title IX enforcement was transferred to its Office for Civil Rights.

14. 120 CONG. REC. 15322–23 (daily ed. May 20, 1974); Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1947); Pub. L. No. 93-568, § 3(a), 88 Stat. 1855, 1862 (1974).

15. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687).

16. *Id.* This amendment to Title IX nullified *Grove City College v. Bell*, 465 U.S. 555 (1984), a U.S. Supreme Court decision holding that Title IX only prohibited sex discrimination within those programs that received federal funding to the exclusion of other programs like athletics.

17. 465 U.S. 555 (1984).

18. S. REP. NO. 100-64, at 11 (1987) (citing nonenforcement of gender equity complaint against University of Maryland's athletics department as its first example of why the Civil Rights Restoration Act was urgently needed).

19. 120 CONG. REC. 15322–23 (daily ed. May 20, 1974).

20. Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 20–22 (2003).

21. *Sex Discrimination Regulations: Hearings Before the House Subcomm. on Postsecondary Educ. of the Comm. on Educ. & Lab.*, 94th Cong. 166 (1975) (statement of Rep. Patsy T. Mink).

22. Samuels & Galles, *supra* note 20, at 20.

theories of equality that could be reflected in a regulation addressing sex discrimination in the education setting.[23] Formal equality is the idea prevalent in civil rights law that certain characteristics, such as race, religion, national origin, or, here, sex, should be neutral and not impinge on access to opportunity.[24] Formal equality is reflected in some aspects of Title IX's implementing regulations, such as admissions (subject to some exceptions for single-sex private colleges) and employment.[25] In these contexts, a university's obligation under Title IX is to evaluate candidates for admission or employment using factors other than sex.[26] Title IX is not violated if gender imbalance happens to result in the institution's workforce or student body, as long as the decision criteria is neutral with regard to sex.[27]

But the OCR pragmatically determined that athletics was not a good candidate for the formal equality model because men and women were dissimilar when it came to athletic ability, not just due to generalized physical differences, but also the fact that women's opportunities to cultivate interest and talent had been suppressed by the lack of opportunity to date.[28] A formal equality model, which would have only required schools to hold open tryouts and select the best athlete from the pool of candidates who showed up, would have simply served to reinforce the disparities that existed at that time.[29]

Instead of formal equality, the OCR incorporated substantive equality into the Title IX regulations.[30] Substantive equality is measured by outcomes rather than access.[31] As applied to athletics, it means programs may be separate but must be equal (equitable) in terms of numbers of opportunities offered to students of each sex, as well as the quality of those opportunities.[32] The OCR later defined equitable participation opportunities with a test that, subject to a couple of safety valves, requires those separate programs to provide athletic opportunities that are proportionate in number to the percentage of each sex in the student body.[33] This standard has been challenged by schools that sought to adjust the number of opportunities for each sex to match perceived higher levels of interest and ability among male students.[34] But courts have remained faithful to the substantive equality

23. Erin Buzuvis, *Title IX: Separate but Equal for Women and Girls in Athletics*, *in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES 388, 389 (Deborah L. Brake, Martha Chamallas & Verna L. Williams eds., 2023).

24. *Id.*

25. *Id.*

26. 34 C.F.R. § 106.21 (2024); *id.* § 106.51.

27. Unless this imbalance constitutes an actionable disparate impact due to absence of an educational necessity for the criteria that is producing a disparate effect. *See* Sharif *ex rel.* Salahuddin v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 360 (S.D.N.Y. 1989).

28. Buzuvis, *supra* note 23, at 390–91.

29. *Id.* at 390.

30. Dionne L. Koller, *Not Just One of the Boys: A Post-feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 U. CONN. L. REV. 401, 421 (2010).

31. *Id.*

32. *Id.* at 423.

33. *Id.*

34. *See, e.g.*, Mia. Univ. Wrestling Club v. Mia. Univ., 302 F.3d 608 (6th Cir. 2002); Chalenor v. Univ. of N.D., 291 F.3d 1042 (8th Cir. 2002); Pederson v. La. State Univ., 213

principle that measures equity in terms of outcomes. Thus, they consider equity to be achieved by the same rate of athletic opportunity for each sex, even where men and women are differently situated by virtue of having different levels of interest and ability.[35] Otherwise, women's interests and abilities would forever be limited by the lack of opportunity.[36]

Courts and regulators have similarly upheld substantive equality as the measure of program quality.[37] The 1975 regulations enumerate various aspects of an athletic program that must be considered when measuring whether the men's and women's programs are equitable.[38] Men's and women's athletic programs in the aggregate must receive comparable equipment, facilities, practice and competition schedules, coaching and other staff, recruiting resources, and other benefits that are of comparable quality.[39] However, recognizing the unique "nature of particular sports," the regulations do not require identical treatment.[40] Different sports may be selected as sources of men's opportunities rather than women's, and different sports have different needs. But if a school is providing "first-class" facilities and equipment, for example, to its men's program, it must (for example) provide first-class facilities to its women's program—even though what it means to provide a first-class football facility differs in terms of structure and cost, from what it means to provide a first-class softball or volleyball facility.

Substantive equality pervades the Title IX regulations related to athletics in one final context: scholarships. For athletic financial aid, Title IX's regulations foreclose the possibility of awarding those dollars purely based on the athlete's value to the institution's athletics program and instead require that institutions distribute athletic financial aid in proportion to the gender ratio of student athletes.[41] In this way, Title IX ensures that female athletes at an institution categorically receive the same opportunity for scholarship dollars as their male counterparts.

C. Title IX Implementation Has Consistently Treated Athletics as an Opportunity Not a Commodity

Title IX's implementation, both by the courts and the OCR, has consistently treated athletics as an aspect of educational opportunity to which equality applies from the standpoint of the students receiving the opportunity.

F.3d 858, 878 (5th Cir. 2000); Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999); Neal v. Bd. of Trs. of the Ca. State Univs., 198 F.3d 763 (9th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155, 170, 177 (1st Cir. 1996).

35. *See* cases cited *supra* note 34.

36. *See, e.g.*, *Cohen*, 101 F.3d 179–80.

37. 34 C.F.R § 106.41(c)(2)–(10) (2024); *see, e.g.*, McCormick *ex rel.* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 293 (2d Cir. 2004).

38. 34 C.F.R § 106.41(c)(2)–(10).

39. *Id.*

40. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86).

41. 34 C.F.R § 106.37(c).

Omitted from the Title IX framework are considerations based on athletics as a commodity for the benefit of others besides participating students. Donors, live fans, and TV viewers may be willing to pay more for the opportunity to watch men's sports, but courts and regulators have consistently rejected that Title IX permits schools to provide male athletes with a higher quality experience for that reason.[42] Although schools are permitted to "tier" their athletic programs—that is, to offer higher quality opportunities to some more than others—those tiers themselves must be Title IX compliant.[43] If a school decides to extend more favorable treatment to its revenue-generating sports, it must extend that favorable treatment to other sports as needed to ensure that the same proportion of male and female athletes benefit from it.

Moreover, athletic opportunities in the Title IX context are attached to education and, therefore, remain the responsibility of the educational institution to which Title IX applies.[44] Title IX operates to insulate these institutions from the impact of sexism in the marketplace, just as civil rights laws generally exist to constrain market forces that would otherwise produce discriminatory results.

II. RECENT CHANGES AND CURRENT CHALLENGES TO THE AMATEURISM PRINCIPLE IN COLLEGE SPORTS

Title IX and its regulations were created at a time when college sports were strictly amateur.[45] Under NCAA rules, students could not receive compensation from their institutions or third parties for participating in college sports.[46] Only athletic financial aid was permitted, which did not necessarily cover the student's full cost of attendance at their university.[47]

---

42. *E.g.*, Chalenor v. Univ. of N.D., 291 F.3d 1042, 1048 (8th Cir. 2002); Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71421; Letter from Peter E. Holmes, Dir., U.S. Dep't of Educ., Off. for C.R., to Chief State Sch. Offs., Superintendents of Local Educ. Agencies and Coll. and Univ. Presidents (Nov. 11, 1975), https://www.ed.gov/about/offices/list/ocr/docs/holmes [https://perma.cc/YK99-BAUV] ("Thus, the fact that a particular segment of an athletic program is supported by funds received from various other sources (such as student fees, general revenues, gate receipts, alumni donations, booster clubs, and non-profit foundations) does not remove it from the reach of the statute and hence of the regulatory requirements."); *see also* Charlotte Franklin, *Title IX Administers a Booster Shot: The Effect of Private Donations on Title IX*, 16 NW J.L & SOC. POL'Y 145, 153–56 (2021).

43. JANET JUDGE & TIMOTHY O'BRIEN, NCAA, EQUITY AND TITLE IX IN INTERCOLLEGIATE ATHLETICS: A PRACTICAL GUIDE FOR COLLEGES AND UNIVERSITIES 54–55 (2011), https://www.ncaapublications.com/productdownloads/EQTI12.pdf [https://perma.cc/GCP9-YFDG].

44. *Cf.* Daniels v. Sch. Bd. of Brevard Cnty., 985 F. Supp. 1458, 1462 (M.D. Fla. 1997) ("The Defendant suggests that it cannot be held responsible if the fund-raising activities of one booster club are more successful than those of another. The Court rejects this argument. It is the Defendant's responsibility to ensure equal athletic opportunities, in accordance with Title IX. This funding system is one to which Defendant has acquiesced; Defendant is responsible for the consequences of that approach.").

45. GRANT ET AL., *supra* note 1, at 31.

46. *Id.*

47. *Id.*

A. New Rules Allow Students to Receive NIL Payments from Third Parties

Historically the NCAA's insistence on athlete amateurism included rules that prohibited them from receiving payments for the use of their NIL. This meant athletes could not receive compensation for such things as appearing in television broadcasts and video games, endorsing products, signing autographs, and sponsored posts on social media.[48] In 2014, present and former NCAA athletes filed a class action lawsuit, *O'Bannon v. National Collegiate Athletics Ass'n*,[49] that challenged these rules, which had the effect of allowing colleges instead to profit from athletes' NIL in deals with third parties, such as video game companies that use athletes' NIL in their sports-based games.[50] The athletes argued that the NCAA's rules violated federal antitrust law. After a lower court decision in the athletes' favor was affirmed by the U.S. Court of Appeals for the Ninth Circuit,[51] the NCAA began to examine its NIL policies, eventually issuing an interim policy in 2021 that allowed athletes to receive such payments from third parties so long as they followed state law.[52] Hastening the NCAA's decision to authorize such "self-facilitated" NIL (arrangements between the athlete and third party, without the involvement of the athlete's school) was the 2021 Supreme Court decision in *National Collegiate Athletics Ass'n v. Alston*,[53] a successful antitrust challenge to another of the NCAA's amateurism rules,[54] as well as the proliferation of state laws in the wake of *O'Bannon* that permit students to capitalize on NIL without losing their athletic eligibility.[55]

Earlier this year, the NCAA issued more rules pertaining to NIL. Though schools are still prohibited from making NIL deals with their own students, the new rules allow them to engage in activities designed to support their students' access to NIL, such as identifying opportunities and facilitating agreements between athletes and third-parties.[56] Now such "school-facilitated" NIL deals will be permissible so long as students agree to disclose their NIL deals to their schools when such deals exceed $600 in

48. O'Bannon v. Nat'l Collegiate Athletics Ass'n, 802 F.3d 1049, 1055 (9th Cir. 2015).
49. 802 F.3d 1049 (9th Cir. 2015).
50. *Id.* at 1057.
51. *Id.* at 1053.
52. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (Jun. 30, 2021), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/S7KB-X95U].
53. 594 U.S. 69 (2021).
54. *Id.* (challenging NCAA rules that prohibited schools from providing athletes with noncash compensation for academic-related purposes).
55. *NIL Legislation Tracker*, SAUL EWING, https://www.saul.com/nil-legislation-tracker [https://perma.cc/QEP8-7VUA] (last visited Mar. 7, 2025).
56. Meghan Durham Wright, *DI Council Approves NIL Reforms, Permits School Assistance with NIL Activity*, NCAA (Apr. 17, 2024, 6:32 PM), https://www.ncaa.org/news/2024/4/17/media-center-di-council-approves-nil-reforms-permits-school-assistance-with-nil-activity.aspx [https://perma.cc/3QD4-YJKN].

value.[57] In turn, universities must provide deidentified data on such deals to the NCAA.[58]

Booster clubs and collectives are increasingly relevant facilitators of NIL deals between third parties and athletes. Whereas booster clubs traditionally existed to raise funds for a school's athletic department, today booster collectives exist to raise funds for individual athletes in the form of NIL deals. Today, hundreds of collectives operate on behalf of university athletic departments in the most competitive football conferences.[59] They raise funds from sources such as donations, membership fees, and merchandise sales to pay athletes to use their NIL to promote local businesses and charities.

B. Athletes Will Soon Have a Right to Share in Their Universities' NIL Revenue

Other antitrust litigation continues to challenge NCAA's restrictions on universities from directly compensating athletes for NIL in such contexts as television broadcasts and video games. The plaintiffs in these class actions, consolidated under the name *House v. National Collegiate Athletics Ass'n*,[60] also seek retroactive damages for revenue denied in the past.[61] A settlement of this litigation received preliminary approval in October of 2024 after pending for much of this year.[62] If the settlement is eventually finalized in its current form, former athletes dating back to 2016 who did not have the opportunity to earn compensation for NIL will receive a total of $278 billion in retroactive damages from the NCAA and Power Five conferences.[63] The NCAA also agrees to permit college athletic departments going forward to opt into revenue sharing with current and future athletes.[64] The NCAA will, however, strengthen enforcement of its rules that target direct compensation masquerading as NIL through booster-affiliated "NIL collectives."[65] In these arrangements, individual athletic program boosters collaborate to aggregate donated funds to offer athletes as an inducement to sign with their affiliated program.[66] For example, local businesses might offer monthly stipends to members of a team to license those athletes' NIL in some way. Though this

57. *Id.*
58. *Id.*
59. Boston, *supra* note 10, at 1129–30.
60. 545 F. Supp. 3d 804 (N.D. Cal. 2021).
61. Justin Williams, House v. NCAA *Settlement Granted Preliminary Approval, Bringing New Financial Model Closer*, THE ATHLETIC (Oct. 7, 2024), https://www.nytimes.com/athletic/5826004/2024/10/07/house-ncaa-settlement-approval-claudia-wilken/ [https://perma.cc/FT77-SPME].
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*; *see also* Letter from Andrew Zimbalist, President, The Drake Grp., to Susan E. Rice, Dir., Domestic Pol'y Council, Catherine Lhamon, Assistant Sec'y for C.R., Miguel Cardona, Sec'y of Educ., Off. for C.R., Suzanne B. Goldberg, Deputy Assistant Sec'y for Strategic Operations & Outreach, Off. for C.R. (Jan. 10, 2023), https://www.thedrakegroup.org/wp-content/uploads/2023/01/FINAL-Drake-Letter-to-OCR-1-10-23-1.pdf [https://perma.cc/4PUR-RXCT].

money does not directly pass through the university, NIL collectives coordinate with university athletic departments to ensure that such deals have an impact on recruiting.[67]

State legislatures, having already pressured the NCAA to give in on third-party NIL, are now starting to target direct NIL compensation as well. Two states so far, Georgia and Virginia, have passed laws that purport to prevent the NCAA from punishing schools in their states that make direct NIL payments to their athletes.[68]

C. Direct Compensation Is Still Prohibited, but Targeted by Wage and Hour Litigation

Ongoing litigation under the Fair Labor Standards Act[69] (FLSA) is also pressuring the NCAA to yield its amateurism policy to allow its member institutions to pay wages to athletes, separate from NIL.[70] In 2019, athletes filed a lawsuit alleging that they are entitled to FLSA's minimum wage protections by virtue of their status as employees.[71]

In 2021, the district court denied the NCAA's motion to dismiss the case after finding potential merit to the athletes' claimed employee status using a test from a federal appellate decision about unpaid interns.[72] This test, from a case called *Glatt v. Fox Searchlight Pictures*,[73] considers several factors to assess the economic reality and determine which side is the primary beneficiary of the relationship. Applying these factors, the district court held that the institutions benefit more from their relationship with student athletes, thus rendering the athletes employees.[74] Ruling on an interlocutory appeal, the U.S. Court of Appeals for the Third Circuit rejected that *Glatt* was the appropriate test. Instead, it instructed the district court to apply the common law definition of employee which takes a broader focus and considers whether the athletes perform services under the university's control and return for express or implied compensation or in-kind benefits.[75] But in remanding for the district court to assess the athletes' status under this test, the court also rejected the NCAA's categorical argument that athletes could not be employees because they elect to play sports that are defined by the

67. *See* Letter from Andrew Zimbalist to Susan E. Rice et al., *supra* note 66 (assembling examples).

68. Eli Henderson, *New Georgia Law Allows Direct NIL Payments to Athletes*, SPORTS ILLUSTRATED (Sept. 18, 2024), https://www.si.com/fannation/name-image-likeness/nil-news/new-georgia-law-allows-direct-nil-payments-to-athletes [https://perma.cc/U4G5-6XKB]; Dylan Barbee, *States Are Leading the Way in Athlete Compensation*, THE ATHLETE'S BUREAU (Apr. 30, 2024), https://www.athletesbureau.com/p/states-are-leading-the-way-in-athlete [https://perma.cc/G5Y2-Y4DL].

69. 29 U.S.C. §§ 201–219, 557.

70. *See, e.g.*, Johnson v. Nat'l Collegiate Athletics Ass'n, 556 F. Supp. 3d 491 (E.D. Pa. 2021), *aff'd in part, vacated in part*, 108 F.4th 163 (3d Cir. 2024).

71. *Id.*

72. *Id.*

73. 811 F.3d 528 (2d Cir. 2016).

74. *Johnson*, 556 F. Supp. 3d at 509–10 (citing *Glatt*, 811 F.3d at 536–37).

75. Johnson v. Nat'l Collegiate Athletics Ass'n, 108 F.4th 163, 179–80 (3d Cir. 2024).

NCAA as amateur. In this way, the court removed from play the argument that the NCAA "most heavily relies on"[76] and thus pressured the NCAA to reconsider its ban on direct compensation.

III. TITLE IX ANALYSIS OF ATHLETIC COMPENSATION

In July, head of the OCR Catherine E. Lhamon indicated in a public statement that Title IX will apply "in the new NIL environment."[77] Later, the OCR followed up with a guidance document that supplies additional detail about its expectations for how universities must equitably allocate their NIL revenue disparately based on sex.[78] This part provides context and rationale for the application of Title IX to NIL and other potential new forms of athlete compensation, situating it in the equal treatment requirement provisions of the implementing regulations. As discussed in Part II.B, if a university decided (for example) that only some men's teams and no others should have the opportunity to play in a state-of-the-art facility, or the best coaching money can buy, or luxury travel conditions, the university would violate the regulations' requirement for equal treatment. So, too, if the university favored male athletes in the payment of hourly wages (should the law require or the NCAA eventually agree to allow them) or NIL revenue sharing in the facilitation of NIL payments from third parties. Compensation, like other aspects of the laundry list, is covered by Title IX's equal treatment regulation and the substantive equality framework it employs.

A. Text of the Equal Treatment Regulation

The application of Title IX to athlete compensation is rooted in the text of the regulations, even though such compensation is not expressly enumerated. Section 106.41(c) is the relevant provision. It begins: "A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes."[79] In determining whether equal opportunities are available, the regulations direct the OCR to consider "among other[s]" an enumerated list

76. *Id.* at 181.

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://perma.cc/DRA2-Z6YP].

78. U.S. DEP'T OF EDUC., OFF. FOR C.R., FACT SHEET: ENSURING EQUAL OPPORTUNITY BASED ON SEX IN SCHOOL ATHLETIC PROGRAMS IN THE CONTEXT OF NAME, IMAGE, AND LIKENESS (NIL) ACTIVITIES 7 (2025), https://www.ed.gov/media/document/ocr-factsheet-benefits-student-athletes [https://perma.cc/3GBE-7Q84]. This guidance was withdrawn by the administration of President Donald J. Trump on February 12, 2025, while this Essay was in production. Press Release, U.S. Dep't of Educ., U.S. Department of Education Rescinds Biden 11th Hour Guidance on NIL Comp. (Feb. 12, 2025), https://www.ed.gov/about/news/press-release/us-department-of-education-rescinds-biden-11th-hour-guidance-nil-compensation [https://perma.cc/X8LP-GCB7].

79. 34 C.F.R. § 106.41(c) (2024).

of factors.[80] The first factor, "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes," is the provision that the OCR and courts interpret to require an equitable number of athletic opportunities at each level of competition, as measured by the proportionality test or the absence of unmet interest among the underrepresented sex.[81] Factors two through ten address the quality rather than quantity of athletic opportunities.[82] These factors are sometimes grouped together and colloquially referred to as "the laundry list":[83]

> (2) The provision of equipment and supplies;
>
> (3) Scheduling of games and practice time;
>
> (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;
>
> (10) Publicity.[84]

All of these items on the laundry list refer to benefits a student receives by virtue of their athletic participation. The list is agnostic as to the quality of these benefits or even whether they are offered at all. However, when a university provides students with some benefit because of their athletic participation, whether it be meals, academic tutors, medical training (to use some of the enumerated items above as examples) these benefits must be equitably distributed.[85]

To be sure, the laundry list does not expressly include anything about athlete compensation. But this is understandable, as the regulators who drafted the list did so at a time when the NCAA's amateurism rules were strongly in place.[86] The omission of compensation issues from the regulation in no way indicates that Congress or the OCR intended to exclude them.[87]

---

80. *Id.*

81. *Id.* § 106.41(c)(1); Cohen v. Brown Univ., 101 F.3d 155, 166 (1st Cir. 1996).

82. Portz v. St. Cloud State Univ., 401 F. Supp. 3d 834, 855 (D. Minn. 2019), *aff'd in part, vacated in part, rev'd in part*, 16 F.4th 577 (8th Cir. 2021), *motion for relief from judgment granted*, No. CV 16-1115, 2024 WL 3823106 (D. Minn. Aug. 14, 2024).

83. *Portz*, 401 F. Supp. 3d at 855; Judge & O'Brien, *supra* note 43, at 25.

84. *Portz*, 401 F. Supp. 3d at 855–56; 34 C.F.R. § 106.41(2)–(10).

85. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86) ("The Department will assess compliance with both the recruitment and the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect . . . .").

86. *See supra* note 45 and accompanying text.

87. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415 ("This list is not exhaustive.").

Moreover, the laundry list's prefatory "among other factors" indicates that the enumerated factors are a nonexhaustive list, and other aspects of the athlete experience should be considered when evaluating an athletic program's gender equity under Title IX.[88] The OCR already includes two as a matter of course in their investigations: recruiting and administrative support.[89]

To be clear, Title IX does not apply to benefits paid to athletes by third-party entities with no university affiliations, as these entities are not federally-funded education institutions to which the law applies.[90] Just as Title IX would not prevent a local restaurant from offering free pizza only to the members of the local high school's football team, it does not prevent that same restaurant from offering NIL deals only to athletes of one sex.[91] In contrast, payments to athletes by booster collectives are subject to Title IX due to universities' involvement in the collectives and reliance on NIL offers to prospective athletes as a recruiting tool.[92] Thus, more fully explained in the rest of this part, when received from the university or through the efforts and arrangement of the university, athlete compensation is part of equal treatment due to the direct application of the enumerated items on the laundry list or because it is sufficiently similar to enumerated items such that it is included as an "other factor." Like other laundry list items, compensation in the form of direct wages, NIL revenue sharing, or NIL payments from third parties coordinated by the university are attributes unique to the student-athlete experience.

B. Recruiting and Publicity Overlap Specifically with Athlete Compensation

Title IX's equal treatment mandate already applies to a university's investment in both recruiting and publicity. Publicity is an enumerated item on the laundry list,[93] and recruiting has long been regarded as an "other

88. *Id.*

89. U.S. DEP'T OF EDUC., OFF. FOR C.R., ED-400-763, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 91, 97 (1990), https://eric.ed.gov/?id=ED400763 [https://perma.cc/H9AB-R8EY].

90. Alicia Jessop & Joe Sabin, *The Sky Is Not Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men's Sport and Women's Sport Athletes*, 31 J. LEGAL ASPECTS OF SPORT 253, 271 (2021).

91. Title IX by its text applies only to educational institutions that receive federal funds. 20 U.S.C. § 1681. OCR has confirmed this application. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71414 ("This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department.").

92. Boston, *supra* note 10, at 1137; Faith Anderson, Note, *One Step Forward, Two Steps Back: Why Title IX Does Apply, and Should Apply, to Student-Athlete NIL Deals*, 128 PENN ST. L. REV. 315, 337 (2021).

93. 34 C.F.R. § 106.41(c)(10) (2024).

factor."[94] Both of these items provide support for the conclusion that the equal treatment mandate applies to athlete compensation that is provided or arranged by the university. Compensation, whether the university pays it directly as wages or NIL, or arranges it to be paid by third parties, is surely a recruiting expense.[95] It is hard to imagine a university that offers wages, direct NIL payments, or the facilitation of NIL payments from third parties not touting that fact to prospective recruits in an effort to distinguish itself from competitors.[96] In fact, it is widely acknowledged that NIL operates as a recruiting inducement.[97] It is also similar to other laundry list items that contribute to the athlete experience. Whether the university touts it during recruiting or not, an athlete will consider compensation as a factor when evaluating the quality of a participation opportunity, just as they would consider the quality of facilities and equipment, the talent of their coaches, the presence of academic support, and other laundry list features that the program offers. Therefore, Title IX's equal treatment mandate applies to athlete compensation by application of, or similarity to, the fact that it already applies to recruiting.

When athletic departments are able to make NIL deals directly with their own athletes, the equal treatment mandate applies for the additional reason that these deals are investments in publicity for the teams those athletes play for, and publicity is an expressly enumerated item on the laundry list.[98] To

94. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71417; U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 89, at 97.

95. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg at 71417 (determining compliance by examining, among other factors, "[w]hether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program"). In a 2025 fact sheet, OCR acknowledged that it is "possible that NIL agreements between student-athletes and third parties will create similar disparities and therefore trigger a school's Title IX obligations." U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 78, at 8.

96. Letter from Andrew Zimbalist to Susan E. Rice et al., *supra* note 66 (collecting and providing examples of NIL payments used as these "incentives for the athlete to matriculate at, transfer to, or stay at a particular university").

97. *Id.* (documenting university involvement in booster collectives and gender disparities in their NIL payments to athletes); Boston, *supra* note 10, at 1135–36.

98. 34 C.F.R. § 106.41(10); Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71417 (evaluating compliance by considering, among other factors, "[a]ccess to other publicity resources for men's and women's programs" and the "quantity and quality of publications and other promotional devices featuring men's and women's programs"). In a 2025 fact sheet, OCR confirmed:

> A school's obligation to provide equivalent publicity based on sex continues to apply in the context of NIL. For example, if a school is not providing equivalent coverage for women's teams and student-athletes on its website, in its social media postings, or in its publicity materials, these student-athletes may be less likely to attract and secure NIL opportunities. In addition, if a school is publicizing student-athletes for the purposes of obtaining NIL opportunities, OCR would examine whether the school is providing equivalent publicity for male and female

borrow hypothetical examples from the media, "Oregon could pay a future quarterback to use his picture on a billboard promoting the team's upcoming season, or Nebraska could pay its volleyball players for social media posts that encourage fans to buy tickets to an upcoming match."[99] If Oregon hypothetically excludes athletes on women's teams from similar billboard arrangements, or Nebraska hypothetically excludes athletes on men's sports from similar social media deals, this would raise questions about whether promotion is equitably handled. Although other forms of promotion besides those that rely on NIL payments to athletes are also factored into the question of whether the university is equitably promoting its men's and women's programs, a large disparity would be difficult to overcome by favoring teams of the other sex when it comes to other forms of promotion.

C. NIL-Related Services Are Clearly "Other Factors"

Services that a university may provide to its athletes to help them secure NIL deals with third parties would also clearly count as "other factors" to which equal treatment applies. Like compensation itself, these services are not enumerated on the laundry list because they did not exist when the regulations were promulgated in 1975.[100] If an athletic department official acts as an agent for athletes or provides them training or other resources in marketing and negotiating NIL, these must be equitably distributed like other services on the laundry list, like tutoring and medical services.[101] Compliance would look different depending on whether such services were being passively or proactively administered. For example, if an athletic department holds an NIL workshop that is open and advertised to all athletes who want to attend, it would not violate Title IX if a greater share of male than female athletes attended or vice versa—just as it would not violate Title IX if one sex or the other takes greater advantage of the academic tutor's open office hour policy.[102] But if the athletic department targets specific teams or athletes with NIL training or services, these efforts must reach athletes of both sexes at a similar rate—in the same way that athletic departments must equitably assign the services of a team doctor or strength and conditioning coach.[103]

> student-athletes (including by examining the quantity and quality of publications and other promotional devices that feature the men's and women's athletic teams).

U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 78, at 6.

99. Dan Murphy, *What to Expect for NIL, Title IX with Proposed NCAA Rule Changes*, ESPN (Dec. 6, 2023, 3:30 PM), https://www.espn.com/college-sports/story/_/id/39056505/ncaa-rule-changes-nil-paying-athletes-title-ix-charlie-baker-faq [https://perma.cc/DSU9-LSRD].

100. *See supra* notes 38, 84 and accompanying text.

101. 34 C.F.R. § 106.41(c)(5) (opportunity to receive coaching and academic tutoring); *id.* § 106.41(c)(6) (assignment and compensation of coaches and tutors); *id.* § 106.41(c)(8) (provision of medical and training facilities and services); *id.* § 106.41(c)(9) (provision of housing and dining facilities and services).

102. *See* Judge & O'Brien, *supra* note 43, at 25.

103. *Id.* at 43.

D. Title IX's Financial Aid Regulation Does Not Change This Analysis

Title IX expressly applies to financial aid that students receive by virtue of their athletic participation.[104] As part of the regulation that applies to financial assistance,[105] athletic scholarships and grants-in-aid resources must be distributed proportionately to the number of students of each sex who participate in the athletics program.[106] The regulations include this provision as an exception to the general approach to applying Title IX to financial assistance, which is to prohibit considerations based on sex.[107] This approach cannot work for athletics, however, since considerations of the athlete's sex come with the athlete's participation on a team that is designated for a particular sex. So, the financial assistance regulation (34 C.F.R. § 106.37) has a special provision governing athletics that uses the same substantive equality model that the athletics regulations (34 C.F.R. § 106.42) do.[108]

Although scholarships and grants that apply toward tuition are the classic example of financial assistance governed by these regulations, the OCR has clarified in the past that nongrant aid is also governed by this provision:

> When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.[109]

Both wages and NIL payments are sufficiently dissimilar from athletic scholarships to be considered grants of "financial assistance" governed by the regulation. But the OCR's interpretation that § 106.37(c) also applies to "work-related" nongrant aid means that if litigation or legislation should one day require the NCAA to allow universities to make wage payments to athletes, this compensation would fairly be considered nongrant aid that the OCR has already contemplated under the athletic financial assistance regulation.[110] The OCR confirmed this interpretation in the 2025 Fact Sheet: "When a school provides athletic financial assistance in forms other than scholarships or grants, including compensation for the use of a student

104. 34 C.F.R. § 106.37(c).
105. *Id.* § 106.37.
106. *Id.* § 106.37(c).
107. *Id.* § 106.37.
108. See *supra* notes 31–35 and accompanying text, describing and applying substantive equality.
109. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86).
110. U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 78, at 7 ("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.").

athlete's NIL, such assistance also must be made proportionately available to male and female athletes."[111]

Notably, the litigation seeking to apply employee status to athletes has used the analogy to work-study students to support their argument, further underscoring this connection.[112] But even if athlete wages are not considered part of § 106.37, and even though NIL payments are even more clearly outside its scope, the nonapplication of § 106.37 does not mean that Title IX does not apply to those forms of compensation. They would still be considered features of the athletic program, benefits of participation, like any other aspect of the laundry list to which the equal treatment mandate applies.

E. The Fact That the Market Favors Men's Athletics Does Not Change This Analysis

Not only are wages, NIL payments, and facilitation of NIL deals subsumed into the equal treatment analysis by virtue of their being covered by publicity, recruiting, or an "other factor" similar to the enumerated items on the laundry list, the purpose and spirit of the regulations and their approach to substantive equality demand their inclusion as well.

As explained in Part II above, when promulgating the athletics regulations under Title IX, the OCR made a conscious choice to select substantive over formal equality. Regulators could have accepted a definition of equality that would have permitted athletic departments to use such factors other than sex—such as interest, talent, popularity—to determine who has access to athletic opportunities and how those opportunities would be supported. Instead, it recognized that this model would not allow women to overcome the social forces that constrain their opportunities.[113] Among these social forces is market-based sexism. Universities can, or believe they can, generate more revenue from men's sports because society is willing to pay more to watch men play.[114] But it is well settled that a sport's ability (or potential) to generate revenue from ticket sales or broadcast rights does not justify unequal treatment.[115] The regulations contain no such exception, and neither courts nor the OCR have allowed for special treatment of sports due to their revenue potential.[116] Even the legislative history described in Part

111. *Id.* at 8.

112. Paul Steinbach, *Class Action Compares Athletes to Work-Study Students*, ATHLETIC BUS. (Nov. 11, 2019), https://www.athleticbusiness.com/operations/programming/article/15158338/class-action-compares-athletes-to-work-study-students [https://perma.cc/6K7W-7N7T].

113. Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 48 (2001) ("Throughout the Policy Interpretation, the agency acknowledged that female sports participation has been and continues to be limited by institutional discrimination.").

114. *Id.* at 124.

115. *Id.* at 125–26 (noting that the sports that produce revenue "do so because educational institutions have chosen to invest substantial resources in them to make them popular").

116. Ollier v. Sweetwater Union High Sch. Dist., 858 F. Supp. 2d 1093, 1112 (S.D. Cal. 2012), *enforced*, 07CV714-L, 2014 WL 1028431 (S.D. Cal. Mar. 17, 2014) ("Title IX requires

II.A above supports this view, as Congress rejected efforts to exempt revenue-producing intercollegiate sports from Title IX.[117] If a university chose to pay a higher wage to male athletes on the grounds that those athletes brought in revenue, or if they chose to pay male athletes more to license their NIL on those grounds, such positions would violate Title IX.

Just as Title IX requires equal treatment despite external market-based sexism that creates more revenue for men's sports, it also requires equal treatment despite external market-based sexism that results in more fundraising and booster support for men's sports.[118] Courts and regulators have consistently addressed disparities that favor male athletes that result when booster clubs donate funds raised to benefit the athletes who participate on a particular team.[119] These disparities may exist because parents and fans work harder to raise money for boys' teams, or because they have an easier time raising funds from the public that donates more generously to men's teams.[120] It may also be the case that athletic departments themselves work harder to cultivate booster clubs for their men's teams. But whatever the reason, courts and regulators have rejected attempts by schools to use the fact that they relied on donated funds as a defense for unequal treatment.[121] In a 1995 opinion letter, OCR explained that "private funds . . . , although neutral in principle, are likely to be subject to the same historical patterns that Title IX was enacted to address."[122] The equal treatment mandate "could be routinely undermined" if third-party sexism provided a defense.[123] A school

---

that revenues from all sources be used to provide equitable treatment and benefits to both girls and boys. A source of revenue may not justify the unequal treatment of female athletes."); Haffer v. Temple Univ., 678 F. Supp. 517, 530 (E.D. Pa. 1987) (applying the Equal Protection Clause and rejecting a defense to unequal treatment based on revenue, noting "it is clear that financial concerns alone cannot justify gender discrimination"); Blair v. Washington State Univ., 740 P.2d 1379, 1383 (Wash. 1987) (applying the state's equal protection clause and expressly rejecting the argument that "[b]ecause football is operated for profit under business principles, [it] should not be included in determining whether sex equity exists"); Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71419 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86) ("[A]n institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity." (quoting the opinion of the general counsel of the OCR dated April 18, 1978, as reprinted in 44 Fed. Reg. 71419)).

117. *See supra* Part II.A; 120 CONG. REC. 15322–23 (daily ed. May 20, 1974).

118. *See* Erin E. Buzuvis & Kristine E. Newhall, *Equality Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX's Equal Treatment Requirement*, 22 MARQ. SPORTS L. REV. 427, 442 (2012).

119. Franklin, *supra* note 42, at 159–60.

120. *Id.*

121. Patricia A. Cervenka, *Free Shoes for Primary and Secondary Schools: Playing by the Rules of Title IX*, 17 MARQ. SPORTS L. REV. 285 (2006).

122. Letter from John E. Palomino, Reg'l C.R. Dir., to Karen Gilyard, Esq., Atkinson, Andelson, Loya, Ruud & Romo (Feb. 7, 1995), https://www.ed.gov/about/offices/list/ocr/letters/jurupa.html [https://perma.cc/2NJP-NPSA]; *see also* U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 89, at 5.

123. Letter from John E. Palomino to Karen Gilyard, *supra* note 122; *see also* Daniels v. Sch. Bd. of Brevard Cnty., 985 F. Supp. 1458, 1462 (M.D. Fla. 1997) ("The Defendant suggests that it cannot be held responsible if the fund-raising activities of one booster club are more successful than those of another. The Court rejects this argument. It is the Defendant's

that accepts donations from individuals or booster clubs that are earmarked for a certain team must ensure that inequitable treatment does not result. This may mean that the school itself must dedicate funds to a comparable project that benefits women's teams, if it is unable to motivate new boosters or donors to match the effort that existing boosters make on behalf of men.

The same rationale explains why Title IX must apply when university-affiliated donors such as booster collectives make NIL payments to individual athletes. Unlike third-party entities that seek to license athletes' NIL without regard to whether and how the deal benefits the university, entities like booster collectives exist to support a school's athletic program. Though they make payments directly to athletes instead of university athletic departments—and in this way are similar to a third-party entity that is not subject to Title IX—these payments are intended to and have the effect of benefiting the university athletic department's efforts to recruit and sustain the talent on their roster.[124] A booster collective's NIL payments to individual athletes displaces a financial burden on the university to otherwise invest in the kinds of program amenities (coaches, facilities, equipment) that impress and win over prospective recruits.[125] NIL payments from the collectives create more favorable conditions for athletic participation for the athletes receiving those payments, just as donations from traditional booster clubs do.[126]

Just as market-based sexism produces disparities in aspects of equal treatment procured with donations, boosters, and revenue from tickets and broadcasts, it will inevitably produce disparities in the aspects of equal treatment related to athlete compensation. But just as market-based sexism has been rejected as an exception in those other cases, it cannot justify universities offering or arranging more athlete compensation for their male athletes. That likely means distributing wages and NIL revenue to ensure that women are treated equitably. And it means addressing the efforts of booster collectives with the same best practices that apply to traditional booster clubs: encourage them to benefit male and female athletes alike; or if that fails, find and encourage new boosters to provide similar support to female athletes; or if that fails, match the investment of booster collectives with institutional funds as needed to close the gender gap.

---

responsibility to ensure equal athletic opportunities, in accordance with Title IX. This funding system is one to which Defendant has acquiesced; Defendant is responsible for the consequences of that approach.").

124. Letter from Andrew Zimbalist to Susan E. Rice et al., *supra* note 66; *see also* Anderson, *supra* note 92, at 336.

125. Anderson, *supra* note 92, at 335.

126. The OCR acknowledged the analogy between NIL collectives and traditional booster clubs in a 2025 fact sheet. U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 78, at 8.

F. Conferring Employee Status on Athletes Does Not Change This Analysis

As litigation seeks recognition of student athletes' status as employees for purposes of federal wage and hour law and labor law,[127] it is important for colleges and universities that may find themselves in an employer-employee relationship with their athletes to understand that although this status may add legal obligations, it does not foreclose existing obligations under Title IX. OCR applies a functional test to identify the opportunities to which Title IX's athletics regulations apply. Specifically, the test considers whether the opportunity's participants receive "the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season," and who practice or compete with the team and are listed on the roster as eligible members of the squad.[128] As long as these factors continue to describe those students who may also be considered employees under federal law, there is no justification for excluding their athletic opportunities from a Title IX analysis.

Put another way, bestowing the legal status of employee on athletes for some purposes—wage and hour law, or labor law—does not change the fact that the athlete is also receiving an opportunity to participate in athletics that is subject to Title IX. A university's obligations to pay employees applies on top of, rather than instead of, its obligations to provide equal treatment to its men's and women's sports. It may seem unusual that Title IX's athletics regulations and labor and employment laws like the NLRA or the FLSA would simultaneously apply to the same enterprise given the respective statutes' distinct scopes and purposes. But considering the hybrid nature of big-time college athletic programs helps to clarify that this is indeed the correct result. The educational aspect of college athletic programs—the fact that they are run by educational institutions and purport to have an educational purpose and mission (not to mention, with the benefit of educational institutions' tax-exempt status)—justifies application of Title IX and its regulations that subordinate the institution's business objectives to higher priorities like equality and nondiscrimination. Simultaneously, the commercial aspect of college athletic programs—the fact that they are utilizing the labor of others in pursuit of profits—justifies applying labor law principles that apply to any other private business.

This "both/and" mentality (i.e., that college athletes may be both employees for purposes of labor law and still partake in athletic opportunities under Title IX) means that it is not enough to apply traditional employment discrimination principles regarding equal pay to the compensation college

127. *See supra* Part II.C.

128. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86). Alternatively, if injury prevents an athlete from meeting these requirements but that individual nevertheless receives athletic financial aid, his opportunity will count for Title IX purposes as well. *Id.*

athletes may obtain through collective bargaining—as tempting as that may be for colleges and universities who would rather not provide compensation to female athletes in nonrevenue sports.

Some have argued that in a world where athletes are considered a university's employees, gender equity cases involving coaches and their compensation provide the best analogy for understanding a university's obligation under Title IX.[129] Such a conclusion would arguably pave a plausible pathway for courts to absolve universities of pay disparities resulting from revenue and market-based sexism. In the most notable case on point, *Stanley v. University of Southern California*,[130] the Ninth Circuit rejected a female basketball coach's pay discrimination case, though she earned less than the men's team's coach. She failed to make a prima facie case of pay discrimination under the Equal Pay Act[131] (EPA) because the men's basketball team's capacity for revenue made the jobs sufficiently dissimilar to warrant comparable pay. The court said, "revenue generation is an important factor that may be considered in justifying greater pay"[132] and that "unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA."[133] If *Stanley* applies to athlete compensation as well, universities could use it to justify paying more to male athletes on revenue-producing teams.

There are two problems with this rationale. One, *Stanley* is not necessarily conclusive about the role that revenue generation should play in pay equity cases. In guidance about the EPA's application to college coaches, the Equal Employment Opportunity Commission (EEOC) clarifies that the fact that a men's team generates more revenue than a women's team is *not* proper justification to pay the men's team's male coach if the difference in revenue production is based on sexism in the marketplace and not the result of discrimination in the allocation of resources between the men's and women's teams.[134] The EEOC guidance also gives leeway for universities to use revenue disparities as a "factor-other-than-sex" defense to EPA claims, but only so long as the university can "demonstrate that it has assessed the marketplace value of the particular individual's job-related characteristics."[135]

---

129. Andrew J. Haile, *Equity Implications of Paying College Athletes: A Title IX Analysis*, 64 B.C. L. REV. 1449, 1498 (2023); Michael S. Straubel, *A Proposal to Save College Athletics from Self-Destruction: How to Use Antitrust Law and Market Forces to Rationalize College Athletics and Protect Student-Athletes*, 13 ARIZ. ST. SPORTS & ENT. L.J. 1, 48–49 (2023).

130. 13 F.3d 1313 (9th Cir. 1994).

131. 29 U.S.C. §§ 201, 206.

132. *Stanley*, 13 F.3d at 1323.

133. *Id.* at 1322.

134. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1998-1, ENFORCEMENT GUIDANCE ON SEX DISCRIMINATION IN THE COMPENSATION OF SPORTS COACHES IN EDUCATIONAL INSTITUTIONS (1997), https://www.eeoc.gov/laws/guidance/enforcement-guidance-sex-discrimination-compensation-sports-coaches-educational [https://perma.cc/47YF-JEVJ].

135. *Id.*

More fundamentally, however, pay discrimination cases involving coaches are outside the scope of Title IX's equal treatment regulations that govern the athletic opportunities available to students. Since coaches' rights are provided for elsewhere in Title IX and not under the "separate but equal" framework that applies to athletic programs, it is not proper to analogize coaches' civil rights regarding compensation to those of athletes. Coaches are not situated similarly to athletes who may have the legal status of employee while *also* engaging in a participation opportunity covered by Title IX. Thus, a coach's right to equal pay is governed by employment discrimination law—Title IX's employee provisions, Title VII, and the Equal Pay Act—whereas an athlete employee's right to equal pay is governed by those employment discrimination laws *and* the Title IX's athletics regulations. For this reason, the employee athlete is unique among employees in that their compensation is an aspect of participation governed by Title IX's substantive equality framework that requires equal treatment for separate men's and women's programs.

What this means for universities who decide or are forced to consider some of their athletes to be employees is that revenue generation cannot be a factor in deciding whether and how much to pay their athletes. To comply with Title IX, universities can decide to pay all athletes the same hourly wage, regardless of whether the athlete competes in a revenue sport. Alternatively, they can treat compensation like other aspects of athletic participation that are subject to tiering.[136] Tiering allows universities to provide a benefit to some athletes and not others. But the tiering structure must comply with Title IX in that athletes of each sex must be proportionately represented in each tier. Agreeing to pay the same hourly wage to only those athletes whose sports are considered top tier will comply with Title IX if the top tier was constructed equitably and includes roughly the same percentage of female athletes as male athletes. And it will comply with wage and hour law, if all the athletes who meet the legal definition of employee (whatever that turns out to be) are included in that tier.

Title IX will apply in a similar fashion to compensation or other benefits that are bargained for by a union of athlete employees. If athletes turn out to be employees for purposes of labor law as well, universities will be obligated to bargain with unions made of those employees. Though only some athletes may have the right to unionize, depending on how the courts define employee for this purpose, the university's entire athletic program must still comply with Title IX. If bargained-for benefits disproportionately benefit male athletes, the university must address that disparity in the same manner as described above: either by making them available to all athletes, regardless of their membership in the union, or by subjecting them to a tiering analysis.

136. Tiering is discussed in Part I.C.

CONCLUSION

As a result of litigation and pressure from state legislatures, the NCAA's traditional opposition to athlete compensation—both in terms of wages and NIL—has shifted, is shifting, or may very well shift in the future, raising questions at the intersection of market economics and civil rights. Nothing in the regulations expressly addresses these forms of compensation, which could not have been imagined by regulators who created the current substantive equality framework in the era of NCAA amateurism. Yet, as was the case during the creation of those regulations in 1970s, men's sports are still favored in the marketplace. Capitalism unrestricted by civil rights law will inevitably result in a world where college sports participation materially benefits men more than women. Title IX provides this constraint. As written, the law already ensures that men's and women's athletics program receive equal treatment, and this extends to wages, NIL payments from a university, NIL payments from a third party that are facilitated by a university, and university resources aimed at helping athletes obtain NIL payments from third parties.