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Higher Education Alert

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Title IX complaint against University of Oregon features NIL arguments

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Women student-athletes bring class action against the University of Oregon, alleging disparate treatment in several respects, including equal opportunity to participate in intercollegiate sports and NIL opportunities.



What's the impact?

- The players attempt to argue that Title IX applies to NIL opportunities.
- Higher education institutions should be aware of the potential risk in relationships between athletic departments and NIL collectives.

On December 1, 2023, thirty-two current and former student-athletes filed a [complaint](#) in federal court in Oregon alleging Title IX violations against the University of Oregon. The students' allegations describe disparate treatment based on sex and direct the suit against the university "for depriving its female student-athletes of equal treatment, equal athletic financial aid, and equal opportunities to participate in varsity athletics in violation of Title IX."

The 115-page complaint alleges numerous discrepancies between the experience at the university by members of men’s athletic teams and women’s athletic teams. These contrasts include differences in equipment, travel allowances, coaching, facilities, academic tutoring, recruiting, and many more. The plaintiffs allege the “most egregious” example of unequal treatment is the treatment and benefits offered to members of the men’s football team as compared to female student-athletes at the university.

Title IX

Title IX broadly prohibits discrimination on the basis of sex in any school or education program that receives federal funding. Title IX regulations have been applied to college sports to prohibit disproportionate treatment and distribution of opportunities and benefits to college athletes based on sex.¹ The three basic areas in which an institution is required to maintain compliance under Title IX with respect to athletics are: (1) equal treatment and benefits; (2) equal athletic financial assistance; and (3) effective accommodation of student’s athletic interest and ability. In 1979, the Department of Education, through the Office for Civil Rights (OCR), developed a three-part test to determine whether an institution is meeting its Title IX obligations of providing equal athletic participation opportunities to meet students’ athletic interests and abilities.² An institution must meet one of the following three requirements:

- / the number of male and female athletes is substantially proportionate to their respective enrollments; or
- / the institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex; or
- / the institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.

Since 1979, OCR has continued to clarify and guide institutions on how Title IX regulations will be interpreted and enforced in the context of intercollegiate athletics. The complaint against the University of Oregon alleges that the institution is not meeting any one of the three possible standards for compliance, because, plaintiffs allege, the university provides unequal benefits, financial assistance, and participation opportunities to student-athletes based on sex. Plaintiffs include pictures of the university men’s football team facilities and the women’s beach volleyball team facilities as an example of disparate treatment with respect to facilities.

¹ 34 C.F.R. § 106.41(c).

² 44 Fed. Reg. 71413, 71423 (1979).

NIL and Title IX

Plaintiffs aim to make a splash by including allegations of disparate treatment in NIL opportunities in their complaint, a novel allegation in the context of a disparate treatment in athletics Title IX lawsuit. Following the Supreme Court's decision in *NCAA v. Alston (2021)*, the NCAA adopted an interim name, image, and likeness (NIL) policy in July 2021. The policy permitted NCAA student-athletes to profit from their own publicity rights, opening the door to earning compensation for NIL activities subject to certain limitations. Since July 2021, student-athletes have been permitted to enter into deals with third parties for the use of their publicity rights. While the patchwork of state laws contains differences in some respects, such as the degree to which schools may be involved in NIL activities and oversight and whether high school students may participate in NIL opportunities, the NCAA still formally prohibits schools from paying student-athletes directly for their services as student-athletes (commonly referred to as "pay-for-play").³ But other than the continuing ban on pay-for-play,³ the precise role of educational institutions in the post-*Alston* NIL world is still in flux and varies state-by-state.

In the two years since the NCAA adopted its interim NIL policy, a patchwork of state laws and university-specific NIL policies have governed the actions of schools and student-athletes with little uniformity. Oregon state law requires student-athletes who are members of athletic teams to disclose their NIL agreements to their educational institutions so their respective institutions can review the agreement and confirm it does not conflict with team rules or school sponsorship agreements.⁴ This requirement provides the University of Oregon with the opportunity to have awareness, if not oversight, of the deals its student-athletes are entering. For example, due to the longstanding relationship between the University of Oregon and Nike, a player may be restricted from signing an NIL deal with a competing apparel brand if the proposed NIL activity takes place within team official activities.

NIL deals are often predicated on a multitude of factors, including a player's marketability, on-field performance, and social media presence. In the complaint, the plaintiffs argue that the University of Oregon is failing to provide the same NIL *opportunities* for female student-athletes as it does for their male counterparts. The complaint alleges the university has a role in developing a student-athlete's brand and image, which in turn leads to NIL opportunities. The plaintiffs argue that when the university fails to provide these publicity opportunities to all student-athletes equally, it violates Title IX.

To further muddy the waters, many high-profile schools, including the University of Oregon, are in some way connected with NIL collectives, which are third-party entities comprised of boosters and fans of a school's athletic program that operate outside the educational institution and

³ A putative class action complaint filed in the Northern District of California on December 7, 2023, directly challenges the NCAA's concept of amateurism and prohibition on "pay-for-play" as a violation of antitrust law. *Carter v. NCAA*, No. 23-cv-6325 (N.D. Cal. Dec. 7, 2023).

⁴ OR SB5 (2021).

facilitate and fund NIL deals for student-athletes. Essentially, these organizations pool funds from incoming donations to create NIL deals for student-athletes at a specific institution. The complaint takes aim at [Division Street](#), an NIL collective with a mission to “help Oregon student-athletes build their own unique brand—while making the most of their name, image and likeness marketing opportunities.” Division Street is largely funded by major University of Oregon boosters, including Nike co-founder Phil Knight.

While Division Street is not a named defendant in the lawsuit and plaintiffs do not allege the precise nature of the relationship, if any, between the university and the collective, the plaintiffs allege without more that the collective is affiliated with the university and that the operating relationship between the school and the entity violates Title IX. Specifically, they allege that the university and Division Street provide unequal “publicity and other treatments and benefits to increase □ NIL-related training, opportunities, and income.”

What’s next?

While the relationship between Title IX and NIL is still very much an open question, the court in [In Re College Athlete NIL Litigation](#),⁵ recently heard arguments on the issue. The case before the Northern District of California centers around alleged antitrust violations committed by the NCAA by denying players the opportunity to earn a portion of broadcast revenue and engage in NIL opportunities before 2021. During oral arguments, attorneys for the players and the NCAA addressed the role Title IX plays if players are entitled to broadcast revenue.

By their terms, the Title IX regulations identify nine *non-exclusive* areas in which equal treatment and benefits must be provided to student-athletes:

- / The provision of equipment and supplies;
- / Scheduling of games and practice time;
- / Travel and per diem allowance;
- / Opportunity to receive coaching and academic tutoring;
- / Assignment and compensation of coaches and tutors;
- / Provision of locker rooms, practice, and competitive facilities;
- / Provision of medical and training services;
- / Provision of housing and dining facilities and services; and
- / Publicity.⁶

⁵ *In Re: College Athlete NIL Litigation*, No. 20-cv-03919 CW (N.D. Cal. 2023).

⁶ 34 C.F.R. § 106.41(c).

Notably, the regulations do not expressly include NIL opportunities among these non-exclusive areas of scrutiny, although, in the complaint, the plaintiffs attempt to connect publicity opportunities to NIL opportunities. An exhaustive search revealed no case in which a court has ruled on whether NIL opportunities properly fall within the meaning of “Publicity,” as defined under the regulations. However, as schools generally are not permitted to provide NIL opportunities to student-athletes directly, and the regulations have not been amended in this respect since the NCAA instituted its interim NIL policy, universities will likely argue NIL does not fit within the types of publicity regulated by Title IX. Additionally, Title IX has been ruled to apply to certain activities not listed specifically in regulations such as recruiting.⁷

This complaint filed by the women’s beach volleyball players and club rowers shines a spotlight on the relationship between schools and NIL collectives generally, and specifically at the University of Oregon. The plaintiffs will likely argue that the school is effectively skirting Title IX requirements by operating through an NIL collective. The university will likely respond that the collective is not connected to or under the control of the university, and, in any event, that NIL deals are inherently *individualized* and occur between a player and a third-party with no actions required from the school to initiate such an opportunity for any student-athlete. Title IX prohibits sex-based discrimination committed by schools, and the University of Oregon is not a party to any NIL agreement. Further, Oregon state law and NCAA rules place constraints on the role a school can have in NIL.

If the complaint survives a likely motion to dismiss, expect the scope of discovery to be a hot-button issue. The university will likely argue that under the NCAA interim policy and Oregon law, NIL opportunities provided by third parties, including collectives not directly connected to or under the authority of the university, are not governed by Title IX, and any claims involving NIL opportunities not facilitated by the school directly fall beyond the scope of what’s required by Title IX. However, if the court accepts the plaintiffs’ argument that NIL falls within the scope of “publicity” as defined in Title IX, plaintiffs would likely seek communications between university officials and boosters funding Division Street, seeking to expose coordination between the University of Oregon and the Division Street collective. Higher education institutions should keep a close eye on this case, as the court’s decision on this issue and others raised in the complaint could have far-reaching implications for higher education institutions and Title IX compliance, collectives, and their relationships, if any, regarding NIL.

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⁷ See *Oliver v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d, 1093, 1110-11 (S.D. Cal. 2012).