

NIL Speeds Ahead While Title IX Trails Behind: Finding Room for Title IX in the Evolving NIL Landscape

ABSTRACT

Title IX was enacted to eliminate sex-based discrimination in educational programs receiving federal funding, including intercollegiate athletics. While the law has successfully increased female participation in sports, disparities in the treatment of male and female athletes persist, particularly in the context of publicity and promotional resources. The rise of name, image, and likeness (NIL) opportunities has further widened this gap, as universities and their affiliated collectives disproportionately promote male athletes, enhancing their marketability and NIL earning potential. Schroeder et al. v. University of Oregon presents a novel legal issue—whether Title IX applies to NIL deals when universities provide unequal publicity resources to male and female student athletes. This Note examines how Title IX’s equal treatment mandate extends to NIL promotional efforts, arguing that when institutions directly or indirectly facilitate NIL opportunities in a manner that disproportionately benefits male athletes, they risk violating federal law. Furthermore, the entanglement between universities and NIL collectives raises critical questions of agency law, suggesting that collectives function as promotional arms of institutions rather than independent third parties. Without regulatory intervention, these inequities will continue to undermine Title IX’s purpose.

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The National Collegiate Athletic Association (NCAA) rescinded its regulations that prohibited college athletes from profiting from their name, image and likeness (NIL) on July 1, 2021.¹ Since then, intercollegiate student athletes have entered into contractual agreements with third-parties and capitalized on their right of publicity for multi-million dollar endorsements and brand deals.² In just its first year, the NIL market was worth \$917 million, and it is projected to be worth \$1.67 billion in 2025, with no intention of slowing down.³ From July 1, 2022 to December 31, 2022, male student athletes reported more NIL deals than female student athletes—67.4 percent of total compensation as reported from data of fifty-five thousand athletes across more than 575 schools.⁴ While Title IX of the Education Amendments of 1972 (Title IX) requires that federally funded

1. See Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/3AAY-QGJ7>].

2. See *id.*

3. *NIL at 3: The Annual Opendorse Report, Name, Image, and Likeness 2024-2025*, OPENDORSE, <https://biz.opendorse.com/wp-content/uploads/2024/07/NIL-AT-3-The-Annual-Opendorse-Report-1.pdf> [<https://perma.cc/ZS98-ZY98>] (last visited Mar. 2, 2025).

4. Associated Press, *Male Athletes Lead Way in NIL Money, According to Third-Party Data*, ESPN (Jan. 27, 2022, 3:45 PM), https://www.espn.com/college-sports/story/_/id/33160929/male-athletes-lead-way-nil-money-per-data [<https://perma.cc/AW5C-YCKX>].

educational institutions provide equivalent opportunities to men and women in athletics, NIL deals have yet to be subject to Title IX scrutiny because they are facilitated by third parties such as collectives.⁵ Collectives are private ventures formed by boosters and fans of particular educational institutions that develop, fund, or otherwise facilitate NIL deals for student athletes they support.⁶ Even though collectives are not subject to Title IX on their own, collectives often work closely with schools or athletic departments to facilitate NIL opportunities for student athletes, creating speculation as to whether and to what extent such entanglement could impute any liability onto institutions subject to Title IX.⁷

The first-ever lawsuit implicating NIL deals subject to Title IX compliance is currently proceeding in federal court.⁸ On December 1, 2023, a class of female student athletes at the University of Oregon (UO) filed a Title IX complaint against the university, alleging the university provides members of the football team “unbelievably better treatment than it gives to any of its female student athletes.”⁹ The

5. See 20 U.S.C. § 1681(a). Title IX is codified at 20 U.S.C. §§ 1681–1688, and OCR’s regulations are available at 34 C.F.R. pt. 106. Title IX applies to education programs or activities that receive federal financial assistance, with some exceptions. 20 U.S.C. §§ 1681–1688. 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 (2025), <https://primarynewssource.org/wp-content/uploads/ocr-factsheet-benefits-student-athletes.pdf> [<https://perma.cc/CF78-KZBK>] (“[The] OCR has long recognized that a school has Title IX obligations when funding from private sources, including private donations and funds raised by booster clubs, creates disparities based on sex in a school’s athletic program or a program component. . . . 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.”); see Press Release, U.S. Dep’t of Educ., U.S. Department of Education Rescinds Biden 11th Hour Guidance on NIL Compensation (Feb. 12, 2025) [hereinafter OCR Fact Sheet Rescindment], <https://www.ed.gov/about/news/press-release/us-department-of-education-rescinds-biden-11th-hour-guidance-nil-compensation> [<https://perma.cc/5L8Q-XYL2>].

6. Pete Nakos, *What Are NIL Collectives and How Do They Operate*, ON3 (July 6, 2022), <https://www.on3.com/nl/news/what-are-nil-collectives-and-how-do-they-operate/> [<https://perma.cc/WL7E-ZQNC>].

7. See generally Memorandum from Donna A. Lopiano, President, The Drake Grp., to Hannah Zack, Alice Yao, & Suzanne Goldberg, Dep’t of Educ., Off. for C.R. (Aug. 1, 2023) [hereinafter Drake Group Letter August 2023], <https://www.thedrakegroup.org/wp-content/uploads/2023/08/Aug.-5-The-Drake-Group-to-OCR-Letter-RE-NILs-2023.pdf> [<https://perma.cc/X7TD-UEZZ>].

8. See Daniel Libit, *Oregon Denies ‘Any Control’ over NIL Collective in Title IX Defense*, SPORTICO (Mar. 5, 2024, 9 AM), <https://www.sportico.com/leagues/college-sports/2024/oregon-title-ix-defense-division-street-nil-phil-knight-1234769273/> [<https://perma.cc/2DAN-KNZE>] (“[*Schroeder et al. v. University of Oregon*] is the first ever [lawsuit] to invoke alleged discrepancies in NIL opportunities as the basis of a Title IX noncompliance.”); Class Action Complaint, *Schroeder v. Univ. of Or.*, No. 6:23-cv-01806 (D. Or. Dec. 1, 2023), ECF No. 1 [hereinafter *Schroeder Complaint*].

9. *Schroeder Complaint*, *supra* note 8, at 4 (emphasis omitted).

plaintiffs allege that the lesser publicity they receive, compared to men, unfairly hinders their teams and reduces their visibility, thereby decreasing their opportunities for NIL deals.¹⁰ Because publicity has never been the aim of any major Title IX lawsuit, few secondary legislative materials or judicial interpretations exist regarding publicity.¹¹ In the absence of federal law guiding the “Wild West of NILs,” universities and colleges ultimately have free rein to work with third parties to make student athletes the most attractive deals, thereby both securing the best athletes for their programs and funneling most NIL deals to the biggest revenue-generating sports: football and men’s basketball.¹² *Schroeder et al. v. University of Oregon*, which alleges unequal treatment under Title IX, serves as a unique lens into the potential Title IX issues within the NIL landscape, presenting the first opportunity for judicial review to determine whether and to what extent NIL deals come under the purview of Title IX.¹³

Part II of this Note describes the background and current nature of NIL deals in college athletics as well as the Title IX standard. Part III addresses the *Schroeder* plaintiffs’ Title IX claims and analyzes them within the greater landscape of NIL issues. Finally, Part IV proposes that collectives be evaluated under agency law in order to ensure the compliance of NIL opportunities with Title IX and the protection of gender equity in NIL deals.

I. BACKGROUND

Understanding Title IX’s role in intercollegiate athletics requires an examination of the statute’s legislative history, the framework of the statute’s implementing regulation, and evolving interpretations of Title IX and the 1975 Regulation in the NIL era.¹⁴ This discussion begins with Title IX’s broad mandate against sex-based discrimination and its application to athletics. It then explores the statute’s equal treatment requirement, focusing on publicity and its

10. *Id.* at 5.

11. See Libit, *supra* note 8; 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, 428–29 (2012) (recognizing equal treatment claims focus more on inequitable facilities and inequalities in scheduling).

12. See Dennis Dodd, *Inside the World of ‘Collectives’ Using Name, Image and Likeness to Pay College Athletes, Influence Programs*, CBS SPORTS (Jan. 26, 2022, 1:03 PM), <https://www.cbssports.com/college-football/news/inside-the-world-of-collectives-using-name-image-and-likeness-to-pay-college-athletes-influence-programs/> [https://perma.cc/7RWW-VSUV].

13. See generally *Schroeder* Complaint, *supra* note 8; see Libit, *supra* note 8.

14. See 45 C.F.R. § 86.4 (2025) (original publication of 1975 Regulations by Department of Health, Human Services, and Welfare).

impact on NIL opportunities. Finally, it examines the rise of collectives, their influence on athlete compensation, and the legal questions they raise under Title IX, particularly given the lack of comprehensive regulation in the NIL space.

A. Title IX and Intercollegiate Athletics

Title IX has played a major role in shaping gender equity in college sports, but its impact goes beyond increasing participation opportunities for women. Understanding how Title IX applies to intercollegiate athletics begins with an overview of the statute's origins and how it came to include sports, even though that was not its original focus. The rise of NIL deals and collectives has dramatically changed the landscape of college athletics, raising new questions about whether educational institutions in this new landscape treat male and female student athletes equally in compliance with Title IX.

1. Legislative History of Title IX

Title IX of the Education Amendments of 1972 prohibits sex-based discrimination in “any education program or activity receiving [f]ederal financial assistance.”¹⁵ Prior to its enactment, many colleges and universities explicitly barred women's enrollment, while those that admitted them imposed strict enrollment quotas, severely limiting women's access to higher education.¹⁶ In 1970, testimony before a House Special Subcommittee on Education revealed “widespread and massive pattern[s] of discrimination against women at every level [of academia]” that not only denied women equal access to educational opportunities, but also systematically discouraged them from pursuing those opportunities in the first place.¹⁷ Congress enacted Title IX as a result, intending the statute to be a “strong, comprehensive” measure to combat discriminatory stereotypes in order to ensure all students were afforded an equal opportunity to realize the benefits of

15. 20 U.S.C. § 1681(a).

16. 118 Cong. Rec. 5811 (1972) (paper by Dr. Bernice Sandler, entered into the record by Sen. Bayh) (“Essentially, many institutions place a ceiling on the number of qualified women they will admit, while permitting admittance of men with lower qualifications.”).

17. *Id.* at 5810 (noting women are discouraged from considering academic or professional endeavors because of “erroneous stereotyped notions” that women should get married and have children; evidenced by the hearings that “documented that women are discriminated against when they first apply for admission; when they apply for scholarship and financial aid; when they apply for positions on the faculty”).

education.¹⁸ Signed into law by President Richard Nixon in July 1972, Title IX provides: “[n]o 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.”¹⁹

Today, Title IX is most celebrated for its role in increasing opportunities for women in sports,²⁰ despite neither its text nor its legislative history explicitly connecting Title IX to athletics.²¹ While sports may not have been the focus of the debates leading to Title IX’s enactment, both courts and the Department of Education’s Office for Civil Rights (OCR) interpret Title IX’s antidiscrimination mandate broadly to include athletics.²² Congress enacted Title IX to “remedy discrimination that results from stereotyped notions of women’s interests and abilities” and eliminate societal barriers that discouraged women from achieving their full potential before and after graduation.²³ Courts also underscore the importance of athletics to the overall educational experience, indicating that athletics provide opportunities to build self-confidence, gain leadership skills, and learn teamwork—all opportunities that carry significant value both on and

18. *Id.* at 5804 (statement of Sen. Bayh) (intending Title IX as “a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women”).

19. 20 U.S.C. § 1681.

20. See DEBORAH L. BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION* 67 (Richard Delgado & Jean Stefancic eds., 2010) (“The biggest Title IX success story in the past three and a half decades is the law’s role in revolutionizing female sports participation at high schools and colleges throughout the country.”); see also *Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996) (“Title IX has changed the face of women’s sports as well as our society’s interest in and attitude toward women athletes and women’s sports.”).

21. Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 327 (2012) (“None of this language provides a direct connection to the application of Title IX to athletics. Instead, this legislative history demonstrates that Title IX was specifically enacted to prohibit discrimination within the educational setting.”).

22. See, e.g., *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993) (noting that despite Title IX not explicitly treating athletics, “the statute’s heart is a broad prohibition of gender-based discrimination in all programmatic aspects of educational institutions”).

23. *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996) (“Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women’s interests and abilities.”); 118 Cong. Rec. S5813 (daily ed. Feb. 28, 1972) (statement of Sen. Evan Bayh) (“Sex discrimination in education is particularly damaging because it places limits, often at a very early age, upon women which restrict them from achieving their full potential and from making important contributions to our society.” (quoting letter from Osta Underwood, National President, National Federation of Business and Professional Women’s Clubs, to Sen. Evan Bayh, (Feb. 28, 1972))).

off the field.²⁴ Title IX's legislative history reflects an understanding that sports are a vital part of education and that excluding women from athletic opportunities perpetuates their treatment as "second-class citizens."²⁵

2. The 1975 Regulation: Title IX's Regulatory Framework

Published in 1975, Title IX's implementing regulation ("1975 Regulation")²⁶ solidified Title IX's application to athletics, clarifying that educational institutions must treat both sexes equally with regard to three distinct aspects of athletics: participation opportunities,²⁷ athletic scholarships,²⁸ and equitable treatment of male and female athletes.²⁹ Today, the OCR oversees Title IX compliance and has issued several interpretations and guidance directives to further clarify institutional obligations when it comes to Title IX compliance in athletics.³⁰

Since its enactment, Title IX advocates and litigants have prioritized securing access to participation opportunities for female student athletes over securing them equal treatment.³¹ The lack of attention equal treatment claims have received as compared to

24. *Cohen*, 991 F.2d at 891 ("For college students, athletics offers an opportunity to execute leadership skills, learn teamwork, build self-confidence, and perfect self-discipline . . . [t]he lessons learned on the playing fields, are invaluable in attaining career and life successes in and out of professional sports.").

25. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 836–37 (W.D. Mich. 2001); *see, e.g., Brenden v. Indep. Sch. Dist.*, 742, 477 F.2d 1292, 1298 (8th Cir. 1973) (noting the significance of interscholastic athletics for females as part of the total educational experience).

26. *See* 45 C.F.R. § 86.4 (2025) (original publication of 1975 Regulations by Department of Health, Human Services, and Welfare, 40 Fed. Reg. 24137, 24137 (June 4, 1975)); 34 C.F.R. § 106.41(a) (2025) ("No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.").

27. 34 C.F.R. § 106.41(c)(1); *see Cohen*, 991 F.2d at 897 ("Equal opportunity to participate lies at the core of Title IX's purpose.").

28. *See* 34 C.F.R. § 106.37(c).

29. 34 C.F.R. § 106.41(c)(2)–(10); *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 291 (2d Cir. 2004) (citing *Boucher v. Syracuse Univ.*, 164, F.3d 113, 115 n.2 (2d Cir. 1999)) ("Title IX claims alleging that a school provides unequal benefits and opportunities to its male and female athletes are generally referred to as 'equal treatment' claims and derive from factors two through ten of the regulations.").

30. Dep't of Educ. Organization Act, Pub. L. No. 96–98, 93 Stat. 669 (1979) (codified at 20 U.S.C. §§ 3401–3510) (noting the 1975 Regulations were originally adopted by the US Department of Health, Education, and Welfare (HEW)—the U.S. Department of Education's predecessor—at 45 C.F.R. § 86; the 1975 Regulations were recodified at 34 C.F.R. § 106 by the U.S. Department of Education in 1980).

31. *See Buzuvis & Newhall, supra* note 11; *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 916 (7th Cir. 2012) (noting participation claims are the focus of most Title IX cases).

participation claims does not mean male and female student athletes are, in fact, treated equally; instead, it reflects the priority of advocates to “get women in the game” in the first place.³² This lack of attention also does not diminish the importance of equal treatment for female students who are already participating in school athletics; ensuring equitable treatment in areas such as funding, facilities, coaching, and publicity is the critical next step toward achieving full gender equity in sports.³³ Of the three aspects of athletics identified by the 1975 Regulation, this Note focuses solely on the third aspect, equitable treatment of male and female student athletes, and contemplates NIL benefits as a component of the equitable treatment requirement that educational institutions must comply with under Title IX.

3. Equitable Treatment of Male and Female Student Athletes

Title IX requires that male and female student athletes receive equitable treatment in the benefits and services provided to their respective athletic programs. As a result of participation litigation dominating the Title IX discourse, the OCR, courts, and legal scholars have given comparatively less attention to Title IX equal treatment claims; therefore, equal treatment claims have largely developed from agency regulations and interpretations.³⁴ The 1975 Regulation provides a non-exhaustive list of factors to consider when evaluating whether equal athletic opportunities exist between male and female student athletes:

[. . .] (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

32. BRAKE, *supra* note 20, at 144.

Fewer court decisions have applied Title IX’s equal-treatment standards to the athletes who are already playing varsity sports. This is not because there is less discrimination in this area. Instead, it reflects the priority of women’s sports advocates and Title IX litigants to first get women into the game and the greater immediate stakes where sports are cut or not offered at all.

Id.; see also Rosa Leon, *Title IX Reinterpreted: Obligation of Publicity*, 10 MISS. SPORTS L. REV. 261, 261–63 (2021) (arguing that the reason benefits an athlete receives from participation in college athletics has likely not been on the radar of most Title IX advocates is because the fight has been focused on “just getting a seat at the table”).

33. BRAKE, *supra* note 20, at 144 (“Once women have access to sports, ensuring equal treatment for female athletes is the necessary next step toward gender equality.”).

34. See Buzuvis & Newhall, *supra* note 11; see also 44 Fed. Reg. 71413, 71413 (Dec. 11, 1979) (adding recruitment and support services to the list of factors); *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 291–92 (2d Cir. 2004) (noting most circuit court opinions in Title IX cases address claims regarding opportunities to participate, rather than equal treatment claims, and highlighting several district court cases that considered equal treatment claims).

and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.³⁵

These factors, along with further guidance on equal treatment in the OCR's later 1979 Policy Interpretation, form the basis of Title IX's equal treatment framework.³⁶ The 1979 Policy Interpretation specifies that the OCR's evaluation of an educational institution's equal treatment compliance involves consideration and comparison of several athletic program components provided by the institution: the availability, quality, and kinds of benefits, opportunities, and services across men's and women's athletic teams.³⁷ Compliance with Title IX is assessed in terms of an overall program comparison, meaning the OCR compares men's and women's programs overall, rather than comparing whether one sport is treated worse than another sport.³⁸ Under this standard, *identical* benefits, opportunities, or treatment are not required to show that program components are equivalent, as long as the overall effect of any differences is *negligible*.³⁹ Additionally, even if the benefits, opportunities, and services of a school's athletic program are not equivalent in availability, quality, or kind, the school may nevertheless be in compliance with Title IX if the differences are the result of nondiscriminatory factors.⁴⁰ However, while the comparison is a totality assessment of all program components, a substantial disparity in just one program component is sufficient to violate Title IX on its own.⁴¹

In assessing equal treatment, courts often look “beyond tangible differences in treatment” and have displayed “sensitivity to the harms of discrimination from the perspective of the students who experience it.”⁴² Title IX's equal treatment mandate fits squarely with the public policy behind Title IX, which is to encourage women to enter

35. 34 C.F.R. §106.41(c)(2)–(10) (2025); *see also* 44 Fed. Reg. at 71413.

36. 34 C.F.R. §106.41(c)(2)–(10) (2025); *see also* 44 Fed. Reg. at 71413.

37. 44 Fed. Reg. at 71413.

38. *See* BRAKE, *supra* note 20, at 145; *see* Parker v. Franklin Cnty. Cmty. Sch. Corp., 667 F.3d 910, 919–20 (7th Cir. 2012) (“[T]he regulation frames the general compliance obligations of recipients in terms of program-wide benefits and opportunities[.] ‘Title IX protects the individual as a student-athlete, not as a basketball player, or swimmer.’” (quoting 44 Fed. Reg. at 71422)).

39. 44 Fed. Reg. at 71413.

40. *Id.*

41. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 294 (2d Cir. 2004); 44 Fed. Reg. at 71413.

42. *See, e.g.,* Parker, 667 F.3d at 916 (finding disparity in scheduling of games substantial enough to violate Title IX); McCormick, 370 F.3d at 275 (finding a school's scheduling choices regarding soccer seasons improperly deprived girls', but not boys', opportunities to participate in championships, substantial enough to violate Title IX).

43. BRAKE, *supra* note 20, at 154; *see, e.g.,* Geldwert Affidavit ¶ 6, McCormick, 370 F.3d 275 (“If the schools think that [playing in primetime] is not important, . . . try to move the boys' [games to weeknights] and see what they do.”).

educational pursuits.⁴³ If male athletic teams receive better treatment and benefits than female athletic teams, then female student athletes “receive the psychological message that they are ‘second-class’ or that their athletic role is of less value than that of boys.”⁴⁴ This “second-class” treatment may have the effect of discouraging female student athletes from participating in athletics “in contravention of the purposes of Title IX.”⁴⁵ Therefore, because the purpose of Title IX is to encourage female participation by eradicating stereotypical notions of women’s interests and abilities, courts often look to the message that a disparity between athletic programs sends to female student athletes.⁴⁶

While equal treatment involves consideration of all benefits offered to student athletes, this Note focuses on a school’s obligation to provide equitable *publicity* in the context of NIL. To the extent that educational institutions provide greater publicity resources to men’s teams than women’s teams, they thereby provide male athletes greater visibility to build their brands and increase their NIL opportunities. Therefore, this Note argues that inequitable university-driven publicity or access to a collective’s publicity resources as provided to male athletes over female athletes serves to amplify the visibility of male students beyond the field, court, or pool, creating a substantial disparity in one sex’s ability to receive NIL opportunities over another.⁴⁷

4. Publicity

Title IX’s equal treatment mandate requires that male and female student athletes receive equivalent benefits, services, and

43. See *infra* Section II.A.1.

44. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 178 F. Supp. 2d 805, 836–37 (W.D. Mich. 2001) (describing psychological effects of disparate treatment in scheduling, that can “cause girls to have” lesser “perceptions of self-worth” and “lower expectations for themselves”); see also *Parker*, 667 F.3d at 916 (citing *Cmtys. for Equity*, 178 F. Supp. 2d at 836–37) (“The practice of scheduling almost twice as many boys’ basketball games on primetime nights sends a message that female athletes are subordinate to their male counterparts and are ‘second-class.’”).

45. See *Parker*, 667 F.3d at 916 (taking into account the harmful effect the scheduling disparity had on the female plaintiffs’ perceptions of themselves and whether such harm had the effect of discouraging girls from participating in sports, in contravention of Title IX).

46. See generally BRAKE, *supra* note 20; *Cmtys. for Equity*, 178 F. Supp. 2d at 836–37 (describing psychological effects of disparate treatment in scheduling, sending “clear message that female athletes are subordinate to their male counterparts”); *Parker*, 667 F.3d at 916; *McCormick*, 370 F.3d at 298.

47. Scholars have argued that NIL should come under the purview of other benefits listed under Title IX. *E.g.*, Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1106, 1106 (2023) (recruitment); Abigail Oliphant, *NIL Collectives and Title IX: A Proactive Consideration of Title IX’s Application to Donor-Driven NIL Collectives*, 57 IND. L. REV. 531, 548 (2024) (addressing “assignment and compensation of coaches and tutors”).

opportunities, including publicity.⁴⁸ The 1975 Regulation explicitly lists “publicity” as one of the program components to be considered in determining whether an educational institution provides equal opportunities for male and female student athletes.⁴⁹ Publicity is any mechanism that promotes or amplifies a team or athlete, as well as any communication that indicates athletes “deserve visibility and promotion.”⁵⁰ Specifically, the OCR’s 1979 Policy Interpretation of Title IX requires that an institution’s publicity efforts for its male and female athletes be equivalent in “availability, quality and kind” in terms of the sports information personnel, sports program-related publications, and other promotional resources it offers.⁵¹ If an educational institution provides its female athletes with a lesser quantity or quality of publicity resources, it thus denies those athletes the benefits of school athletic programs that they would otherwise enjoy if they were male and therefore violates Title IX.⁵² When assessing whether educational institutions offer equivalent benefits, opportunities, and treatment to their men’s and women’s teams overall in terms of publicity, the OCR advises institutions to evaluate whether they provide “equivalent coverage for men’s and women’s teams and athletes on [their] website, social media, or other publicity.”⁵³ Inequities arise when promotional efforts disproportionately favor men’s teams, such as more frequent and prominent social media posts, paid advertisements like billboards, or

48. 34 C.F.R. § 106.41(c)(2)–(10) (2025); see *Soule v. Conn. Ass’n of Schs.*, No. 3:20-CV-00201(RNC) 2024 WL 4680533, at *7 (D. Conn. Nov. 5, 2024) (citing 44 Fed. Reg. 71413, 71413 (Dec. 11, 1979) (“The ‘governing principle’ for equal treatment claims is that ‘male and female athletes should receive equivalent treatment, benefits, and opportunities.’”)).

49. See Faith Anderson, *One Step Forward, Two Steps Back: Why Title IX Does Apply, and Should Apply, to Student-Athlete NIL Deals*, 128 PENN STATE L. REV. 315, 339–40 (2024) (arguing the importance of equity in publicity can be inferred from the fact that Congress specifically included “publicity” as a factor in the 1975 Regulations because it felt it was an area in which women would face discrimination).

50. See Katie Lever, *How Title IX Publicity Requirements Impact Sports Media Coverage*, AWFUL ANNOUNCING (July 1, 2024), <https://awfulannouncing.com/naaa/title-ix-impact-sports-media-nil-coverage.html> [<https://perma.cc/EY9G-FAM6>] (“While publicity is a broad term, it’s also a powerful force that subtly communicates which athletes deserve visibility and promotion.”).

51. See 44 Fed. Reg. at 71413 (“Compliance will be assessed by examining, among other factors, the equivalence for men and women of: (1) Availability and quality of sports information personnel; (2) Access to other publicity resources for men’s and women’s programs; and (3) Quantity and quality of publications and other promotional devices featuring men’s and women’s programs.”); see also *Ollier v. Sweetwater Union High Sch. Dist.*, 58 F. Supp. 2d 1093, 1112 (S.D. Cal. 2012) (noting a violation of Title IX, where band and cheerleaders performed more at boys’ sports than girls’ sports, and girls’ sports were provided with less coverage and promotion in yearbooks, fewer announcements in school’s daily bulletin, less signage, and inferior signage).

52. See 34 C.F.R. § 106.41(c) (2025); 44 Fed. Reg. at 71413.

53. DEPT OF EDUC. OFF. FOR C.R., TITLE IX AND ATHLETIC OPPORTUNITIES IN COLLEGES AND UNIVERSITIES: A RESOURCE FOR STUDENTS, COACHES, ATHLETIC DIRECTORS, AND SCHOOL COMMUNITIES 5 (2023).

enhanced game-day experiences, including the presence of cheerleaders, pep bands, and halftime performances.⁵⁴ Additionally, the OCR considers whether spirit groups like cheerleaders, pep bands, and drill teams are equally provided for men's and women's teams, as disparities in these areas can significantly impact athlete visibility and marketability.⁵⁵

B. The Evolution of NIL Dealmaking

1. Brief Overview of the NCAA's Rules: Students First, Athletes Second⁵⁶

Prior to July 1, 2021, the NCAA barred student athletes from both commercializing their NILs and earning compensation tied to their athletic performance, thereby limiting student athlete compensation to education-related benefits.⁵⁷ Such restrictions reflected the NCAA's commitment to amateurism, the NCAA's long-held stance that student athletes should be students competing for scholarships, rather than professionals competing for profit.⁵⁸ Emphasizing education as an integral part of the student athlete experience, the NCAA made student athlete eligibility contingent on one's amateur status to ensure student

54. See Letter from Timothy C.J. Blanchard, U.S. Dep't of Educ. Off. for C.R. Region II, to Robert Barchi, President, Rutgers Univ. 43 (July 28, 2015) (on file with author); 34 C.F.R. § 106.41(c); 44 Fed. Reg. at 71413; Lee Green, *Title IX Compliance—Part II: The Eleven Areas of Other Athletics Benefits*, NFHS (Mar. 14, 2022), <https://www.nfhs.org/articles/title-ix-compliance-part-ii-the-eleven-areas-of-other-athletics-benefits/> [<https://perma.cc/KHM7-4YLS>] (noting that “[t]ypical red flags are greater efforts to publicize boys sports to media outlets, more elaborate game programs for boys teams, or more extensive publicity activities at boys games (e.g., cheerleaders, bands and halftime entertainment”).

55. See *id.*

56. See Press Release, U.S. S. Comm. on Com. Sci. & Transp., Thune Statement on NCAA Sports and Success of College Athletics Hearing (July 9, 2014), <https://www.commerce.senate.gov/2014/7/thune-statement-on-ncaa-sports-and-success-of-college-athletes-hearing#:~:text=However%2C%20the%20college%20student%2Dathlete%20is%20and%20should,of%20college%20football%20and%20men's%20and%20women's> [<https://perma.cc/FH36-UWQ2>].

57. See generally *NCAA v. Alston*, 594 U.S. 69, 78 (2021) (holding that the NCAA's restrictions on education-related benefits for student athletes violates the Sherman Act).

58. See Alan Blinder, *N.C.A.A. Chief, Pressured by State Laws, Pushes to Let Athletes Cash In*, N.Y. TIMES (Sept. 17, 2021), <https://www.nytimes.com/2021/05/08/sports/ncaabasketball/ncaa-endorsements-mark-emmert.html> [<https://perma.cc/K52J-BJA9>] (stating that “[t]he changes together promise to reshape a multibillion-dollar industry and to test the N.C.A.A.'s generations-long assertions that student-athletes should be amateurs who play mainly for scholarships and that college sports appeal to fans partly because the players are not professionals”); NCAA CONST., art. I, §1.3.1 (stating that “[a] basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports”).

athletes were motivated by education, rather than remuneration.⁵⁹ Facing mounting pressure from state laws challenging NILs and a unanimous US Supreme Court decision in *NCAA v. Alston*, which held the NCAA could not unduly restrain financial benefits to student athletes under antitrust law, the NCAA repealed its 115-year prohibition on NIL commercialization, thereby allowing student athletes to exercise their right of publicity while retaining their eligibility as student athletes.⁶⁰

2. Landscape of Amateurism with NIL

After repealing its NIL prohibition, the NCAA instituted an Interim NIL Policy (“Interim Policy”) that took effect on July 1, 2021.⁶¹ The Interim Policy gives student athletes in Division I, Division II, and Division III schools the right to engage in NIL activities while retaining their amateur status, to the extent their NIL activities comply with state law and their respective schools’ policies.⁶² The NCAA defines NIL as “an activity that involves the use of an individual’s name, image and likeness for commercial or promotional purposes.”⁶³ The NCAA sets only two broad parameters for school compliance with the Interim Policy: (1) schools cannot engage in “pay-for-play” (compensation in exchange for athletic performance), and (2) NIL payments to an athlete must not exceed the athlete’s individual market value.⁶⁴ Instead, third parties can engage in quid-pro-quo agreements, compensating athletes for services unrelated to athletic performance, team membership, or school enrollment.⁶⁵ By maintaining this restriction that distinguishes

59. See W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 232 (2006) (“[T]he mere acceptance of money in any form made it impossible for a professional to enjoy the game for its own sake or to aspire to lofty principles such as sportsmanship.”); see also NCAA CONST., art. 12 § 5.2.1 (repealed in 2022) (explaining that if an athlete benefited from their name, image, or likeness monetarily while involved with collegiate sports, they would be disqualified).

60. See *Name, Image and Likeness Interim Policy*, NCAA (July 1, 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [https://perma.cc/36LF-9B8P].

61. See *id.*

62. See *id.*; *Name, Image, and Likeness Policy—Question and Answer*, NCAA (Feb. 2023), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf [https://perma.cc/769L-NUHY].

63. *Id.*

64. See *Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement*, NCAA [hereinafter *NCAA May Guidance*], https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf [https://perma.cc/A836-DD5R] (last visited Feb. 17, 2025) (“*NIL Agreements must be based on an independent case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions . . .*”).

65. See *id.*

between schools and third parties, the NCAA ensures a clear boundary between amateur collegiate athletes and professional athletes while simultaneously allowing student athletes to capitalize on their individual market value through third-party deals. This framework therefore functionally upholds amateurism by prohibiting payment to student athletes based solely off the students' participation in sports, while still allowing states and institutions broad latitude to create unique opportunities within these parameters.⁶⁶

3. The Rise of Collectives

Because NIL deals must comply with the Interim Policy's pay-for-play proscription, third parties serve as the source of funding for student athletes monetizing their NILs and are therefore integral to any NIL opportunity.⁶⁷ The NCAA likely envisioned NIL deals to resemble traditional brand endorsements, where a student athlete would endorse certain products or services in exchange for compensation based on the unique value the athlete brings to the deal beyond the student's athletic performance.⁶⁸ While brand endorsements do account for about 20 percent of the NIL landscape, a new, rapidly-emerged business model is responsible for the remaining 80 percent of NIL deals: the collective.⁶⁹ Collectives are constructed and incorporated independently from a university and are often backed by

66. See Ana A. Rivera, *The Image and Likeness of Women: The Implications of Title IX in the NIL Era*, 34 MARQ. SPORTS L. REV. 399, 419 (2024) (arguing that “Alston preserved the status quo in terms of NCAA policy in barring direct payments to athletes for participation in sports—they did not touch that question at all—but completely upended the idea that the NCAA could place unlimited restraints on athlete compensation, as they had been doing up until that point”).

67. See *id.* at 419–20.

68. See Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create ‘Chaotic’ NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting> [<https://perma.cc/KH2G-CAVV>] (stating that “NIL has quickly evolved from its original intent of star athletes sponsoring a local business to crowdfunding models doling out four- and five-figure payments for appearances”); Meg Penrose, *The NCAA’s Challenge in Determining NIL Market Value*, 76 OKLA. L. REV. 203, 209 (2024) (“The NCAA likely envisioned that student-athletes would garner NIL deals as individuals.”).

69. See Johny Hart, *Is NIL a Good Thing or a Bad Thing? Sports Industry Expert Weighs In*, TEMPLE NOW (June 25, 2024), <https://news.temple.edu/news/2024-06-10/nil-good-thing-or-bad-thing-sports-industry-expert-weighs#:~:text=Another%20key%20driver%20of%20NIL,success%20through%20their%20NIL%20deals> [<https://perma.cc/3GYF-WGFB>]; see also Eric Prisbell, *What Donor Fatigue Means as NIL Enters its Third Year of Impacting College Sports*, ON3 (June 27, 2023), <https://www.on3.com/nil/news/what-donor-fatigue-means-as-nil-enters-its-third-year-of-impacting-college-sports-ncaa-collectives/> [<https://perma.cc/UYM5-RPC2>] (explaining that brand deals are how college athletes are paid under NIL).

prominent alumni or a conglomeration of boosters.⁷⁰ Collectives essentially act as “shell corporation[s] to funnel money from boosters to student-athletes” by pooling funds to distribute directly to athletes.⁷¹ Over 250 collectives exist, with models varying based on their corporate structure, general objectives, and relationship with a particular educational institution.⁷² While most collectives are donor-driven, soliciting contributions from boosters via single payments or subscription models, some function as marketplaces, facilitating deals between athletes and businesses (and some collectives even function as a combination of both).⁷³ The financial scale of collectives is substantial, with the most ambitious Southeastern Conference (SEC) football collectives amassing anywhere from \$3 to \$14 million annually.⁷⁴

The NCAA responded to the rapid rise of NIL collectives by issuing supplemental guidance to clarify the role of third parties in the NIL space, classifying collectives as “boosters.”⁷⁵ While the NCAA classifies collectives as a type of booster,⁷⁶ there is one major difference between traditional booster clubs and collectives. Unlike traditional booster clubs, whose fundraising money goes directly to athletic departments that in turn distribute the money among sports teams, collectives operate independently, working directly with student athletes without the institution as a de facto middleman (and thus without institutional oversight).⁷⁷ This distinction carries important legal consequences, particularly under Title IX, which mandates gender equity in educational institutions receiving federal funding.⁷⁸ Courts and the OCR have held educational institutions liable for violating Title IX if they distribute benefits or resources raised by booster clubs unequally among male and female student athletes, prohibiting this

70. See Nicoleas Mayne & S. Amy Spencer, *Deal Structure Options for NIL Collectives*, NIXON PEABODY (Sept. 13, 2024), <https://www.nixonpeabody.com/insights/articles/2024/09/13/deal-structure-options-for-nil-collectives> [<https://perma.cc/RAH4-UMXA>].

71. See *id.*; Noah Henderson, *A Pragmatic Argument Against Title IX's Reach to NIL Collectives*, NIL DAILY (Nov. 2, 2023), <https://www.si.com/fannation/name-image-likeness/news/a-pragmatic-argument-against-title-ix-reach-nil-collectives-noah9> [<https://perma.cc/F68Y-L5S4>] (arguing that collectives are essentially acting as “a shell corporation to funnel money from boosters to student-athletes”).

72. See Memorandum from the Off. of Chief Couns., Internal Revenue Serv., AM 2023-004 (May 23, 2023) [hereinafter IRS Memo].

73. See *A Changing Game: The Rise of NIL Collectives*, TEAMWORKS (Sept. 6, 2023), <https://teamworks.com/blog/a-changing-game-the-rise-of-nil-collectives/> [<https://perma.cc/9QYR-5QVJ>].

74. Patrick O'Rourke, *NIL Collectives*, NCAA REVENUE SHARING & NIL ESTIMATES 2025, <https://nil-ncaa.com/collectives/> [<https://perma.cc/2MMY-LGYA>] (last visited Feb. 20, 2025).

75. See NCAA *May Guidance*, *supra* note 64.

76. See *id.*

77. See Boston, *supra* note 47, at 1129; Oliphant, *supra* note 47, at 538.

78. See Boston, *supra* note 47, at 1132–33.

practice for being a “guise of ‘outside funding.’”⁷⁹ However, because collectives are a legally separate entity from educational institutions, and because educational institutions are absent, in theory, from the deals process between collectives and student athletes, in theory, collectives do not come under Title IX scrutiny.⁸⁰ Unlike educational institutions, collectives do not receive federal funds, nor do they receive “significant assistance” from Title IX-applicable educational institutions.⁸¹

Because the NCAA could not reasonably predict the strength and pervasiveness of the new business model of collectives, it could not proactively prescribe effective rules for monitoring collectives in the newly emerged NIL landscape.⁸² Additionally, the absence of uniform federal NIL legislation, combined with sporadic state laws that continue to loosen restrictions on collectives’ NIL involvement, has left collectives “[m]ostly unshackled by NCAA regulations.”⁸³ The onset of NIL and the subsequent engagement of collectives has greatly diminished the NCAA’s power; conversely, the power of collectives—which are currently outside the reach of Title IX—has expanded. Deeply changed is the landscape of NIL, which as one legal scholar has put it, is “[twelve] highway exits past the Wild, Wild West.”⁸⁴

II. ANALYSIS

Schroeder et al. v. University of Oregon presents a groundbreaking issue of first impression, offering the first judicial opportunity to determine whether and to what extent Title IX applies

79. See Oliphant, *supra* note 47, at 542; Chalenor v. Univ. of N.D., 291 F.3d 1042, 1048 (8th Cir. 2002).

80. 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 SPORT 253, 271 (2021).

81. 34 C.F.R. § 106.31(b)(6) (2025) (stating that a school may not “aid or perpetuate discrimination by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees”).

82. See Dodd, *supra* note 12; see also Meg Penrose, *The NCAA’s Challenge in Determining NIL Market Value*, 76 OKLA. L. REV. 203 (2024); Albert Samaha, Emily Giambalvo, Jesse Dougherty & Artur Galocha, *The Hidden NIL Economy of College Sports*, WASH. POST (Oct. 21, 2024, 6:00 AM), <https://www.washingtonpost.com/sports/interactive/2024/nil-money-deals-college-sports-athlete-pay/> [<https://perma.cc/CG7J-NZVU>] (“While the NCAA technically doesn’t allow players to get paid for their play, collectives can offer players as much money as they want for low-lift tasks, such as public appearances, charity work or posting advertisements on social media, effectively establishing de facto salaries or signing bonuses.”).

83. Dodd, *supra* note 12. See generally Drake Group Letter August 2023, *supra* note 7, at 3.

84. Dodd, *supra* note 12.

to NIL deals between student athletes and third-party entities.⁸⁵ In their complaint, members on the University of Oregon's women's beach volleyball team ("*Schroeder* plaintiffs") allege that UO allocates significantly more publicity resources to its (male) football team, thus promoting male athletes in ways that enhance their marketability for NIL deals, while failing to provide "any" female student athletes with comparable benefits.⁸⁶ The *Schroeder* plaintiffs allege that this disparity violates Title IX's equal treatment mandate for gender equity.⁸⁷ Although publicity has not been the focus of major Title IX lawsuits in the past, the rise of NIL brings universities' potentially discriminatory publicity practices to the forefront, as publicity rights directly impact female student athletes' NIL earning potential.⁸⁸ If universities promote male athletes more than female athletes, they provide male athletes with more opportunities to be recognized and awarded NIL deals, leaving female athletes—not promoted and therefore less likely to be recognized—to "work harder" than their male counterparts to market themselves for NIL deals.⁸⁹ Under this theory, *Schroeder* plaintiffs argue that UO's discriminatory publicity practices provide its male athletes more opportunities for recognition than their female counterparts, resulting in inequitable NIL opportunities.⁹⁰ Inequitable NIL opportunities, the plaintiffs claim, constitute a

85. See, e.g., Libit, *supra* note 8; Mayne & Spencer, *supra* note 72; S. Amy Spencer, *Title IX Complaint Against University of Oregon Features NIL Arguments*, NIXON PEABODY (Dec. 12, 2024), <https://www.nixonpeabody.com/insights/alerts/2023/12/12/title-ix-complaint-against-university-of-oregon-features-nil-arguments> [https://perma.cc/EMT7-RHE7] ("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."); Leeden Rukstalis, *Changing the Game: The Emergence of NIL Contracts in Collegiate Athletics and the Continued Efficacy of Title IX*, 29 WASH. & LEE J. CIV. RTS. & SOC. JUST. 275, 321 (2023) ("Currently, no legislative or judicial precedent exists on whether Title IX will apply in the context of collegiate NIL arrangements.").

86. *Schroeder* Complaint, *supra* note 8, at 5 (alleging that "[the University of] Oregon gives more than a third of its male student-athletes—the men on its football team—unbelievably better treatment than it gives to any of its female student-athletes: . . . nearly-unlimited publicity, including to advance their name, image, and likeness (NIL) opportunities and income").

87. *Id.* at 110–11.

88. Kristi Dosh, *Name, Image and Likeness Legislation May Cause Significant Title IX Turmoil*, FORBES (Jan. 21, 2020, 1:22 PM), <https://www.forbes.com/sites/kristi-dosh/2020/01/21/name-image-and-likeness-legislation-may-cause-significant-title-ix-turmoil/?sh=484f88487625> [https://perma.cc/RC2E-XSPN] (discussing Title IX compliance in terms of "promotion and marketing" with Dr. Lindsey Darwin, an assistant professor and gender equity researcher within the Sport Management Department at the State University of New York College at Cortland, and quoting Dr. Darwin's statement that "women could argue that their [NIL] earning potential is in jeopardy. . . . Women student athletes would be required to work harder than their men student athlete counterparts to promote themselves in an effort to benefit from their NIL, if the institution will not do this for their programs").

89. *Id.*

90. See *Schroeder* Complaint, *supra* note 8, at 95.

violation of Title IX.⁹¹ Title IX's equal treatment mandate explicitly includes publicity, requiring institutions to provide equitable promotional support and resources for male and female student athletes.⁹² The *Schroeder et al. v. University of Oregon* lawsuit illustrates how inequitable publicity practices can disproportionately benefit male athletes' potential to secure NIL opportunities, depriving female athletes of the equal treatment they are guaranteed under Title IX.⁹³

In line with Title IX's equal treatment mandate, the OCR requires that educational institutions must equitably distribute publicity between male and female student athletes.⁹⁴ The *Schroeder* plaintiffs allege that the University of Oregon, "both directly and by working with and through" its partnership with its associated NIL collective, Division Street, violate this mandate by prioritizing male athletes in ways that enhance their NIL-related training, opportunities, and income, while depriving female athletes of comparable publicity and NIL support.⁹⁵ To analyze the *Schroeder* plaintiffs' arguments, this discussion first turns to UO's provision of publicity, and then turns to UO's entanglement with its collective, Division Street.

A. The University of Oregon Denies Females Equitable Access to Publicity Resources

Under Title IX, federally funded institutions must provide equitable treatment to male and female student athletes, which extends to providing equitable publicity and promotional resources.⁹⁶ Publicity is critical for NIL opportunities because it enhances a student athlete's visibility and marketability.⁹⁷ When schools allocate more resources to

91. *See id.*; 34 C.F.R. § 106.41(c)(10) (2025).

92. 34 C.F.R. § 106.41(c)(10).

93. *Schroeder* Complaint, *supra* note 8, at 95–96.

94. 34 C.F.R. § 106.41(c).

95. *Schroeder* Complaint, *supra* note 8 at 95 (“[The University of] Oregon provides its male and female student-athletes with a wide array of publicity and other treatments and benefits to increase their NIL-related training, opportunities, and income, both directly and by working with and through its NIL collective, Division Street.”); *Id.* at 96 (“[N]o female student-athlete receives anywhere near the amounts mentioned on that list.”).

96. 34 C.F.R. § 106.41(c); 44 Fed. Reg. 71413, 71413 (Dec. 11, 1979).

97. *See also* Shannon Terry, *About On3 NIL Valuation and Roster Value*, ON3 (July 29, 2022), <https://www.on3.com/nil/news/about-on3-nil-valuation-per-post-value> [https://perma.cc/Y83W-428W] (“[I]f the NIL activities of a booster organization or collective (i) promotes a school’s athletic program or assists in providing benefits to enrolled student athletes, and (ii) such activities are known to the school, then the school could potentially be responsible for any activity of the booster organization or collective that violates NCAA rules.”); Boston, *supra* note 47, at 1139 (“Publicity is a reciprocal benefit with respect to NIL in that it provides market exposure for athletes that can be used to generate even more NIL opportunities.”).

publicizing male athletes—such as through social media posts, marketing campaigns, or team branding—this not only can create disparities in NIL opportunities between male and female athletes, but may also send a message to female student athletes that their teams are less valued by the school community.⁹⁸ The *Schroeder* plaintiffs allege that UO provides greater access to publicity resources and promotional materials to members of the football team than it does any female athlete, causing inequities in the values of the NIL-related contracts, treatment, and benefits that male and female athletes receive.⁹⁹ The *Schroeder* plaintiffs provide several examples to illustrate their claim: UO posts more regularly about men’s teams than women’s teams on its official website and social media accounts, provides customized media space to some men’s teams but none to women’s teams, fails to offer social media accounts to some women’s teams, and offers unequal photographic coverage.¹⁰⁰ Such disparities in publicity directly transpires to increased NIL opportunities for male athletes, as demonstrated by three UO football players’ NILs ranking among the top hundred ranked NIL values in the nation (at the time of the complaint), while not a single UO female athlete made the list.¹⁰¹ Disparities in institutional promotion, branding, and marketing, such as the disparities alleged by the *Schroeder* plaintiffs, strongly suggests that UO’s conduct constitutes a violation of Title IX’s equal treatment mandate.¹⁰²

The OCR has expressly recognized that a critical component of publicity is how universities promote their teams through team branding, which involves crafting a story, personality, and image of a

98. See *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004) (noting unequal publicity offered by an institution reflects which athletic programs it prioritizes and signals to the school community which teams it views as most important).

99. Plaintiffs’ Opposition to Defendant’s Motion for Judgment on the Pleadings for Count I at 18, *Schroeder v. Univ. of Oregon*, No. 6:23-cv-01806 (D. Or. Nov. 7, 2024), ECF No. 44; *Schroeder* Complaint, *supra* note 8, at 95–96.

100. *Schroeder* Complaint, *supra* note 8, at 94.

101. *See id.*

While the men’s football team members are given so much publicity and NIL support that Oregon’s quarterback, running back, and wide receiver are listed in On3’s NIL 100 list as, respectively, the 8th, 28th, and 76th highest NIL recipients in the country, the women’s beach volleyball players receive so little publicity and NIL support that none of them—or any other Oregon female student-athlete—receives anywhere near the amounts mentioned on the list.

See id. at 6.

102. *Id.*

team, as well as presenting its identity to the community.¹⁰³ Team-branding is also “an important aspect of publicity because the messaging communicates how the University perceives the value of the student-athletes [sic].”¹⁰⁴ While there are various factors that influence an individual’s NIL brand value, such as social media following, athletic performance, team ranking, or perceived attractiveness, there is a difference between the “valuation of . . . NIL agreements that are dictated by the marketplace and not controlled by the institution and the institution’s effort to provide equal publicity, promotion, requiring, and exposure.”¹⁰⁵ To the extent that a university directly affects an athlete’s marketability through use of its own resources to promote the visibility of the athlete or by directly assisting athletes in procuring endorsement deals, then the university should be held accountable pursuant to its Title IX obligation to do so equally for both male and female athletes.¹⁰⁶ A university that devotes better quality or a higher quantity of resources to elevate the brand of men’s sports teams over women’s sports teams fails to adhere to Title IX’s equal treatment mandate.¹⁰⁷

The quantity of social media posts is another way a school directly promotes its student athletes.¹⁰⁸ The *Schroeder* plaintiffs allege

103. Letter from Zachary Pelchat, Team Leader, U.S. Dep’t of Educ. Off. for C.R., to Nicholas B. Dirks, C., Univ. of Cal., Berkeley 8 (Mar. 6, 2017) (on file with author) [hereinafter Letter to Chancellor Dirks] (“Team branding is the process of telling the story, personality and image of the team and how the team’s identity and messaging are presented to the community.”).

104. *Id.* (“Team branding is an important aspect of publicity because the messaging communicates how the University perceives the value of the student-athletes [sic], and the branding also serves as a recruiting tool.”); see Susan M. Shaw, *Why Women Student Athletes Allege Title IX Violations at U of Oregon*, FORBES (Jan. 15, 2024, 7:10 PM), <https://www.forbes.com/sites/susanmshaw/2024/01/15/why-women-student-athletes-allege-title-ix-violations-at-u-of-oregon/> [<https://perma.cc/YC8J-J2ES>].

105. THE DRAKE GROUP, NILS AND TITLE IX: EDUCATIONAL INSTITUTIONS MUST FIX THEIR PROMOTION, PUBLICITY, AND RECRUITING INEQUITIES CRITICAL TO THE NIL MONETIZATION SUCCESS OF COLLEGE FEMALE ATHLETES AND MUST NOT USE THIRD PARTIES TO EVADE THEIR TITLE IX OBLIGATIONS 3 (2021), <https://www.thedrakegroup.org/wp-content/uploads/2021/10/10-12-21-Position-Statement-Title-IX-and-NILs-1.pdf> [<https://perma.cc/M2RE-MS6N>].

106. See Emily Riley, *Title IX Requires Girls’ Sports Get Equal Publicity. They Often Don’t*, CAP. NEWS SERV. (Apr. 11, 2022), <https://cnsmaryland.org/2022/04/11/title-ix-publicity-pentucket-massachusetts/> [<https://perma.cc/7JJB-MGBW>]; 34 C.F.R. §106.41(c)(10) (2025); 44 Fed. Reg. 71413, 71413 (Dec. 11, 1979).

107. See Letter to Chancellor Dirks, *supra* note 103, at 8–9 (finding disparity in publicity where University of California, Berkeley distributed resources with different quantity and quality of “branding” in men’s and women’s locker rooms and facilities, resulting in less female exposure).

108. See, e.g., Letter from Meena Morey Chandra, Acting Regional Director, U.S. Dep’t of Educ. Off. for C.R., to Jeffrey Mulquieen, Superintendent, Pentucket Reg’l Sch. Dist. (Nov. 14, 2017), <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/investigations/more/01161298-a.pdf> [<https://perma.cc/R3EZ-BB69>] (assessing number of tweets, posts on Facebook page and school website and finding disparities in posting about girls and boys teams amounted to unequal publicity under Title IX).

that UO directly assists male athletes more than female athletes in procuring NIL opportunities through its own promotion of athletes.¹⁰⁹ Specifically, the plaintiffs allege that UO posts more on its official website and social media accounts about male athletes than female athletes, resulting in unequal athlete visibility and resultant NIL opportunities.¹¹⁰ Follower count and social media engagement are key factors that impact a student athlete's ability to secure NIL opportunities through social media platforms.¹¹¹ When the official social media account of a university promotes an athlete or team, it gives that athlete or team even greater visibility than an individual's personal account could, because most official university social media accounts have more followers than do individual athletes or teams, especially in regard to women's teams.¹¹² Universities play a pivotal role in shaping athletes' public profiles through media coverage, promotional materials, and social media engagement, providing student athletes additional opportunities to be recognized and directly impacting NIL earnings.¹¹³

Unequal institutional promotion directly influences NIL opportunities by enhancing the visibility and marketability of male athletes over female athletes, reinforcing gender-based disparities in branding and sponsorship potential.¹¹⁴ Given that universities play a critical role in shaping student athletes' public profiles, Title IX requires universities to ensure equitable student athlete access to publicity resources, including media coverage, social media promotion, and branding opportunities.¹¹⁵

109. *Schroeder Complaint*, *supra* note 8, at 94.

110. *Id.* at 94.

111. Hart, *supra* note 69 (noting the audience an athlete can reach is a "key driver of NIL value").

112. Shwetha Surendran & Paula Lavigne, *Inequity in College Sports Tweets An Investigative Data Analysis*, ESPN, https://www.espn.com/espn/feature/story/_/id/38632774/notre-dame-power-five-schools-gender-bias-tweets-analysis [<https://perma.cc/3GYE-BPB2>] (last visited Feb. 17, 2025) (synthesizing social media accounts of then-65 Power 5 universities, finding athletic departments official accounts had more followers than any one women's team, with one exception, and 84% of posts by athletic departments favored men over women).

113. *See Shaw*, *supra* note 104 (noting lead plaintiff Ashley Schroeder allegation that UO's disparate treatment makes her feel undervalued and has cost the volleyball team NIL opportunities, and stating "[w]ithout the university's publicity machine behind them, these student athletes are not able to generate the kinds of followings that ensure lucrative NIL opportunities").

114. *See id.*

115. *See id.*; THE DRAKE GROUP, *supra* note 105.

B. UO Works by and Through Its Collective to Provide Inequitable NIL Opportunities

Although collectives are legally distinct entities from educational institutions, their legal separateness may be muddled when schools help student athletes develop, identify, or arrange NIL-related opportunities or income, both of which necessarily occur between students and third-party collectives.¹¹⁶ The *Schroeder* plaintiffs allege that UO “work[s] with and through” its NIL collective, Division Street, to predominantly support NIL opportunities for male student athletes, while failing to provide comparable benefits to female student athletes.¹¹⁷ Division Street, founded and operated by UO alum and Nike founder Phil Knight, is a separate legal entity distinct from UO.¹¹⁸ Because Division Street does not receive federal funds, in theory, it does not have to comply with Title IX in doling out benefits and services to student athletes.¹¹⁹ However, to the extent UO influences, encourages, or facilitates activity by Division Street that results in unequal provisions of benefits and services to one sex over another, then UO, through its collaboration with Division Street, may be vulnerable to liability under Title IX.¹²⁰

In assessing whether collectives like Division Street impute Title IX liability on their affiliated universities, this Section first establishes that collectives are publicity resources; therefore, they should be evaluated as a benefit or service, provided by a university, under Title IX. Then, this Section looks to the various ways that educational institutions like UO facilitate, direct, or benefit from a collective’s activities that may trigger Title IX scrutiny.

116. See Jonathan L. Israel, *Giving Title IX Its Props in the NIL Era of College Sports*, FOLEY & LARDNER LLP (Jan. 27, 2023), <https://www.foley.com/insights/publications/2023/01/giving-title-ix-props-nil-era-college-sports/> [<https://perma.cc/G376-87KV>].

117. *Schroeder* Complaint, *supra* note 8, at 95.

118. See, e.g., Daniel Libit, *Oregon, Division Street Play for Kicks Amid Title IX NIL Litigation*, SPORTICO (Mar. 29, 2024, 8:00 AM) [hereinafter *Oregon, Division Street Play for Kicks*], <https://www.sportico.com/leagues/college-sports/2024/oregon-division-street-shoe-partnership-title-ix-nil-litigation-1234772918/> [<https://perma.cc/4EUJ-YSTF>].

119. Anderson, *supra* note 49, at 334 (“The primary argument to why Title IX is inapplicable to NIL deals is that third-party donors are not federally funded and, therefore, not subject to Title IX.”); Defendant’s Motion for Judgment on the Pleadings at 10, *Schroeder v. Univ. of Oregon*, No. 6:23-cv-01806 (D. Or. July 3, 2024), ECF No. 26 (“The outside entities offering those NIL opportunities are private companies that are not subject to Title IX. No law or facts support grafting an outside entities’ activities onto the University, and then making the University responsible for those entities’ actions.”).

120. See Jessop & Sabin, *supra* note 80 (noting in terms of third-party payments made by corporations to athletes, “a Title IX claim would only emerge if an athletics department provided one gender of athletes with an NIL-related benefit that it did not provide the other gender, or provided the NIL benefit to one gender over the other gender at a non-equitable level”).

1. Collectives Function as a Publicity Resource for Student Athletes

Collectives are a promotional resource that provide marketing and branding support to student athletes to enhance their marketability and NIL potential.¹²¹ Collectives like Division Street are more than just financial intermediaries funneling money from boosters to student athletes.¹²² Instead, they actively facilitate publicity to enhance student athletes' marketability through social media promotion, media appearances and branding support, and the provision of access to networking and sponsorship opportunities that increase student athletes' visibility and NIL value.¹²³ For example, in choosing to commit to UO, cornerback Na'eem Offord chose UO over other schools not because of the NIL compensation UO offered (which was comparable to that offered at other schools), but because of the opportunity to receive assistance from Division Street's Phil Knight on endorsements and marketing.¹²⁴ Division Street also provides professional and educational opportunities through "micro-internship[s]," providing student athletes opportunities to learn "skills in financial literacy, NIL deal literacy, and marketing skills establishing professional relationships through collaborations with brands and business partners."¹²⁵ Because publicity is a recognized

121. See 34 C.F.R. § 106.41(c)(10) (2025); Crystal Waddell, *NIL Collectives: How They Work and Benefit Student Athletes*, COLLAGE & WOOD (Aug. 19, 2024), <https://collageandwood.com/blogs/sports-senior-night/nil-collectives#:~:text=In%20conclusion%2C%20NIL%20collectives%20have,and%20protect%20athletes%20from%20exploitation> [https://perma.cc/4ENS-N4AU].

122. See Russell Steinberg, *Division Street: Helping Oregon Athletes Take Flight in the NIL Era*, BOARDROOM (Sept. 30, 2021) [hereinafter *Helping Oregon Athletes Take Flight*], <https://boardroom.tv/division-street-oregon-ducks/> [https://perma.cc/82HE-87VC] (noting Division Street aims to provide additional benefits to participating student-athletes such as: education UO athletes on building their brands, navigating partnerships, expanding their digital presences, offering creative counsel, and more).

123. See *Helping Oregon Athletes Win on a New Playing Field*, DIVISION STREET, <https://www.divisionst.com/about> [https://perma.cc/9JGQ-7JK5] (last visited Feb. 16, 2025) ("Division Street's mission is to empower Oregon student-athletes to be successful in the brand and marketing landscape, as well as maximize revenue opportunities."); Meerah Powell, *Nike Co-Founder Announces New Company Focused on Helping UO Athletes Market Themselves*, OPB (Sept. 30, 2021, 7:09 PM), <https://www.opb.org/article/2021/09/30/nike-co-founder-announces-new-company-focused-on-helping-uo-athletes-market-themselves/> [https://perma.cc/MJ5U-8Y9A].

124. John Talty, *Phil Knight Spares No NIL Deal in Thirst for Oregon National Title: 'He's Gonna Help Me Make My Shoe'*, CBS SPORTS (Dec. 5, 2024), <https://www.cbssports.com/college-football/news/phil-knight-spares-no-nil-deal-in-thirst-for-oregon-national-title-hes-gonna-help-me-make-my-shoe/> [https://perma.cc/C7DB-XXVU] (noting Knight would also help him make his shoe, contributing to his personal brand).

125. Solly Fulp, *7 Ways Learfield Is Unlocking NIL Opportunities*, LEARFIELD, <https://www.learfield.com/2024/05/7-ways-learfield-is-unlocking-nil-opportunities/>

component of Title IX's equal treatment mandate, collectives that provide greater promotional support to male athletes than female athletes create inequitable NIL landscapes—reinforcing discrimination that Title IX is designed to remedy.

2. Institutional Entanglements with NIL Collectives

If a school influences how a collective distributes NIL opportunities or promotes student athletes, the “collective basically becomes an arm of the school” and is subject to Title IX's guarantee of equitable treatment and benefits.¹²⁶ A school's collaboration or engagement with a collective raises Title IX concerns if NIL opportunities, benefits, and treatment are not equitably distributed between the school's male and female student athletes. Many schools have official partnerships with collectives; by publicly acknowledging a collective as a partner, the institution is essentially communicating to its donors that when considering where to donate their money, they should direct their money to that specific collective.¹²⁷ OU, for example, has publicly recognized Division Street its official collective, thereby significantly increasing the likelihood that a donor interested in supporting OU athletes is more likely to direct money to Division Street

[<https://perma.cc/X9HP-K4FQ>] (last visited Feb. 16, 2025); *see also* Calvin Sonalia, *NIL Connects Seminoles with Business World*, FSUNews (Nov. 14, 2022), <https://www.fsunews.com/story/sports/2022/11/14/rising-spear-nil-collectives-help-bridge-gap-between-sports-business-and-community/10688938002> [<https://perma.cc/8RRH-RC28>] (collectives and NIL “encourage[] entrepreneurship among young adults looking to enter the professional world”).

126. Colleen Murphy, *College Athletics Programs Face Likely ‘Collision’ Between NIL Deals and Title IX*, ALM (Oct. 17, 2023, 2:16 PM), <https://www.law.com/2023/10/17/college-athletics-programs-face-likely-collision-between-nil-deals-and-title-ix/?slreturn=20250201-40539> [<https://perma.cc/3SXP-ZUU9>]; *see* Bethany S. Wagner & Zachary V. Zagger, *Department of Education Warns NCAA Schools that NIL Deals May Implicate Title IX Obligations*, OGLETREE DEAKINS (Jan. 17, 2025), [https://ogletree.com/insights-resources/blog-posts/departments-of-education-warns-ncaa-schools-that-nil-deals-may-implicate-title-ix-obligations/#:~:text=The%20department%20noted%20the%20variety,landscape%20around%20that%20is-sue%20change.&text=The%20fact%20sheet%20comes%20just,as%20additional%20information%20becomes%20available](https://ogletree.com/insights-resources/blog-posts/departments-of-education-warns-ncaa-schools-that-nil-deals-may-implicate-title-ix-obligations/#:~:text=The%20department%20noted%20the%20variety,landscape%20around%20that%20is-sue%20change.&text=The%20fact%20sheet%20comes%20just,as%20additional%20information%20becomes%20available.). [<https://perma.cc/BVP6-LPXU>] (“The department noted the variety and evolving nature of NIL agreements in college athletics and specified that the application of Title IX ‘is a fact-specific inquiry.’”).

127. Drake Group Letter August 2023, *supra* note 7, at 5–6 (noting schools have “official” collectives partially so that “unauthorized” collectives do not usurp the school's preferred need); Jeremy Crabtree, *Athletic Officials Realize It's Time to Support NIL Collectives or Get Left Behind*, ON3 (Nov. 14, 2022), <https://www.on3.com/nil/news/more-and-more-athletic-officials-throwing-support-behind-nil-collectives-tennessee-kansas-state-colorado-oregon-state-kentucky-wisconsin-oklahoma/> [<https://perma.cc/88UA-SFSY>].

than another, non-OU-affiliated collective.¹²⁸ Schools work with their partner collectives in various ways, from fundraising on behalf of collectives,¹²⁹ to facilitating meetings between collectives and boosters by providing inside donor information directly to collectives,¹³⁰ to merely communicating with their partner collectives on a regular basis.¹³¹ Division Street is recognized as a “top 15 most ambitious NIL collective[]” by On3 (a prominent college sports publication), in part due to the collective’s “strong communication with [football coach Dan] Lanning.”¹³² Educational institutions with official partner collectives often memorialize their partnerships through contracts like data sharing agreements¹³³ or licensing agreements for university branding, trademarks, and platforms to promote athletes.¹³⁴ Incorporating college

128. See Kyra Buckley, *University of Oregon Athletics Expected to Thrive with Changes Coming to NIL*, OPB (Feb. 7, 2025, 8:00 AM), <https://www.opb.org/article/2025/02/07/university-of-oregon-athletics-changes-nil/#:~:text=Division%20Street%20was%20created%20by,athletes%20to%20do%20endorsement%20activity.%E2%80%9D> [https://perma.cc/2PY9-L9KP] (“‘Division Street was created by major Oregon donors ‘It’s an independent entity that’s the collective for the university,’ [adjunct professor in sports business law and former Rutgers football player Jason] Belzer explains. ‘Its job is to contract with student-athletes to do endorsement activity.’”); see also John Rustik, *Oregon Alumni Launching New Company “Division Street” to Aid in NIL Ventures*, SPORTS ILLUSTRATED (Sept. 30, 2021), <https://www.si.com/college/oregon/history/oregon-alumni-launch-new-nil-company> [https://perma.cc/3K7K-65KD].

129. See Claire Boyer, *LSU Tigers Coach Brian Kelly Leads NIL Fundraiser, Raises Millions*, NIL DAILY (Feb. 7, 2025) (demonstrating that events featuring coaches have become popular across the country).

130. See Richard Silva, *What Is New Auburn Athletics Director John Cohen Looking for in Search for a New Football Coach?*, MONTGOMERY ADVERTISER (Nov. 8, 2022, 12:17 PM), <https://www.montgomeryadvertiser.com/story/sports/college/auburn/2022/11/08/auburn-football-john-cohen-athletics-director-coaching-search/69623127007/> [https://perma.cc/CK8N-XQT9].

131. See Dellenger, *supra* note 68 (“Collectives and their schools are, for the most part, in constant communication, some even operating as a separate fundraising arm.”).

132. Pete Nakos, *On3’s Top 15 NIL Collectives in College Sports*, ON3 (Aug. 29, 2024), <https://www.on3.com/nl/news/on3s-top-15-nil-collectives-in-college-sports/> [https://perma.cc/DMV5-WY3M] (ranking Division Street part of top 15 NIL collectives, “operat[ing] on a high level, working closely with an athletic department while boasting one of the top budgets” and estimated to spend over \$200 million in 2024); Pete Nakos, *Dan Lanning, Dillon Gabriel Back Oregon’s NIL Operation: ‘You Either Got it or You Don’t’*, ON3 (July 25, 2024), <https://www.on3.com/nl/news/dan-lanning-oregon-ducks-football-respond-kirby-smart-nil-phil-knight-nike-dillon-gabriel-division-street/> [https://perma.cc/6HUB-MPM7].

133. See, e.g., Daniel Libit, *Nebraska-NIL Collective Data Deal Models New Form of Engagement*, SPORTICO (July 15, 2024, 5:55 AM) [hereinafter *Nebraska-NIL Collective Data Deal*], <https://www.sportico.com/leagues/college-sports/2024/nebraska-1890-nil-collective-data-deal-1234789331/> [https://perma.cc/NDZ6-MCCW].

134. See, e.g., *Oregon, Division Street Play for Kicks*, *supra* note 118 (“As an external organization, Division Street has licensed the UO marks and logos via the official process.”); Arden Cravalho, *Oregon Ducks’ Name, Image, and Likeness Collective Releases Nike Shoe Collaboration*, ON SI (Oct. 6, 2024), <https://www.si.com/college/oregon/football/oregon-ducks-name-image-and-likeness-collective-releases-nike-shoe-collaboration-phil-knight-dan-lanning-division-street> [https://perma.cc/VD69-N25H].

logos and intellectual property (IP) significantly impacts the effectiveness of ad campaigns, resulting in an average 22 percent increase in engagement for digital campaigns.¹³⁵ Such a deep institutional entanglement suggests that collectives function less as independent market actors and more as promotional arms of the university. When schools that receive federal funding encourage or facilitate collective activity that results in unequal promotional benefits for male and female student athletes, Title IX concerns arise.¹³⁶

If a university athletic department acts as an agent for student athletes in NIL deals, disproportionately steering NIL deals to male athletes or investing disproportionate resources in marketing male athletes, a Title IX violation may be triggered.¹³⁷ For example, in 2023, the University of Utah helped its official collective partner, Crimson Collective—an independent collective focused on NIL opportunities for University of Utah student athletes—plan an event during which the collective would give each Utah football player a free lease on a new 2024 Dodge Ram truck, valued at approximately \$61,000 each.¹³⁸ The university not only helped coordinate the event, but hosted it in its own football stadium, generating significant media coverage and enhancing the visibility of its football team.¹³⁹ When institutions allocate or provide their own resources to enhance NIL opportunities for men's teams without offering comparable support for women's teams, they deprive female student athletes of equal access to the same benefits and services of athletic participation. Additionally, institutions may

135. See Fulp, *supra* note 125.

136. See Boston, *supra* note 47, at 1151–52 (“[I]f a school allows athletes to use its tangible or intellectual property, provides complimentary access to NIL exchanges or talent agencies, arranges athlete meetings with third parties, refers athletes to third parties, or negotiates athletes’ NIL transactions, those sorts of activities would trigger Title IX.”).

137. See Jessop & Sabin, *supra* note 80, at 271–72 (“[I]f an intercollegiate athlete could point to an athletics department as being a conduit to the booster-intercollegiate athlete relationship and funneling boosters in the direction of one gender of intercollegiate athletes over another, Title IX scrutiny could emerge.”).

138. Joe Coles, *Every Utah Football Scholarship Player Receives Free Ram Truck Lease in NIL Deal*, DESERET NEWS (Oct. 4, 2023, 2:41 PM), <https://www.deseret.com/2023/10/4/23902662/utah-utes-football-scholarship-players-receive-free-ram-truck-lease-nil-deal-crimson-collective> [https://perma.cc/R5S5-XRQV]; see also Drake Group Letter August 2023, *supra* note 7, at 3–4 (noting examples of NIL collectives providing money solely based on roster value or team value); Darren Rovell, *New Texas Booster Fund Highlights Major Flaws in NIL System*, ACTION NETWORK (Dec. 8, 2021, 5:03 PM), <https://www.actionnetwork.com/ncaaf/new-texas-booster-fund-highlights-major-flaws-in-nil-system> [https://perma.cc/KE7Z-NSLV] (noting that boosters donating to University of Texas collective Horns with Heart “blindly give” \$50,000 to each offensive lineman on the football team for future charity work).

139. See Coles, *supra* note 138; Eric Prisbell, *Prominent Title IX Lawyer: Utah Collective's NIL Truck Deal 'Huge' Concern for University*, ON3 (Nov. 15, 2023), <https://www.on3.com/nl/news/utah-utes-nil-title-ix-crimson-collective-truck-deal-arthur-bryant-julie-sommer/> [https://perma.cc/EY2U-WTSQ].

influence how a collective distributes NIL income among student athletes by helping establish financial incentives offered to potential high school recruits, such as setting a guaranteed minimum NIL compensation for student athletes on specific teams.¹⁴⁰ If a university ensures that a collective provides at least \$50,000 to each football player, for example, the university gains a competitive edge in recruiting by effectively pre-promising NIL earnings to prospective athletes in order to attract top talent.¹⁴¹ This institutional involvement in steering NIL benefits disproportionately toward male athletes raises Title IX concerns, as it conflicts with an institution's obligation to provide for equitable treatment and opportunities for female student athletes.

If universities provide greater marketing support, branding opportunities, and exposure to male athletes, they are effectively increasing male athletes' NIL value without doing so for female athletes, placing their female athletes at a disadvantage. While collectives may be legally separate entities from universities, their significant entanglement with universities—through branding agreements, donor coordination, and promotional activities—raises serious Title IX concerns. If universities actively facilitate collective conduct that disproportionately benefit male athletes, those universities cannot hide behind legal technicalities to evade responsibility for facilitating gender inequity.

III. SOLUTION

Schroeder et al. v. University of Oregon presents an issue of first impression, offering an opportunity for judicial determination as to whether and to what extent Title IX applies to NIL deals between student athletes and third-party entities.¹⁴² The *Schroeder* class action, which implicates the University of Oregon as promoting men's sports more than women's sports, thereby providing male student athletes disproportionate access to NIL opportunities, illustrates how important it is for Title IX to ensure that both male and female athletes receive

140. See Dellenger, *supra* note 68.

141. *Id.* (discussing attracting players to schools and quoting Jason Belzer, a founder of SANIL ("an agency that helps manage several collectives"), as saying "[t]he goal is to create a baseline . . . [OU coach] Brent Venables can now go out and recruit and say 'Each one of our student-athletes earns \$50,000!'").

142. *Schroeder* Complaint, *supra* note 8; see Stephen Best, *NIL: Never-Ending Intercollegiate Litigation*, BUCHALTER (Feb. 7, 2024), <https://www.buchalter.com/publication/2337853/> [<https://perma.cc/CQ45-JAMF>] ("*Schroeder* is a landmark case in that it represents the first major intersection between NIL regulation and a university's obligation to comply with Title XI.").

equal publicity benefits from their participation in athletics.¹⁴³ Accordingly, this Note argues collectives are a “new business model” and should be evaluated under agency law.¹⁴⁴

A. Collectives and Agency Law

Collectives like Division Street are “fundraising arms of schools . . . that are legally separate from the schools on paper but not in function.”¹⁴⁵ Unlike traditional boosters, collectives do not funnel money through athletic departments to distribute to student athletes, but instead distribute money directly to student athletes themselves.¹⁴⁶ Technically, as third-party entities, they are neither subject to Title IX nor to NCAA disclosure rules; therefore, they do not have to disclose student athlete deals or how they distribute money to student athletes.¹⁴⁷ Because NCAA guidance and many state laws now directly allow athletic departments to facilitate NIL deals,¹⁴⁸ athletic departments are no longer mere bystanders in NIL transactions; instead, athletic departments now often directly benefit from NIL deals that favor male student athletes, inducing top-level recruits to choose the departments’ own schools by offering competitively high bids.¹⁴⁹ Educational institutions’ partnerships with collectives has allowed institutions to exert significant control over collectives’ distribution of

143. See Schroeder Complaint, *supra* note 8, at 5, 94–96.

144. See Paula Lavigne, *Education Secretary Miguel Cardona on Title IX Compliance: ‘It Shouldn’t Be that the Federal Government Has to Watch – It’s Everyone’s Job’*, ESPN (June 15, 2022, 6:45 AM), https://www.espn.com/college-sports/story/_/id/34084273/education-secretary-miguel-cardona-title-ix-compliance-the-federal-government-watch-everyone-job [https://perma.cc/MKC2-S3LR]; Drake Group Letter August 2023, *supra* note 7, at 2 (“[F]undraising 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.”).

145. Drake Group Letter August 2023, *supra* note 7, at 2.

146. Boston, *supra* note 47, at 1150.

147. See Jennifer Lee, *Liability Redefined: The Application of Agency Law to an Athletic Booster’s Relationship with an NCAA Member Institution*, 13 J. BUS. ENTREPRENEURSHIP & L. 153, 154 (2020) (“A major problem with third-party boosters is that the NCAA lacks subpoena power and does not have jurisdiction to charge boosters. The NCAA’s only right to recourse is through the institution itself.”); Ray Yasser & Carter Fox, *Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes*, 12 HARV. J. SPORTS & ENT. L. 174, 199 (2021) (noting third party payments would not trigger Title IX scrutiny because they are not educational institutions).

148. See Boston, *supra* note 47, at 1151 (“School involvement with Collectives is likely unavoidable. According to NCAA regulations, schools cannot outsource recruiting functions to third parties. This means that if a school has Collective-funded athletes on its roster, it is likely involved with the Collective’s activities in some way.”).

149. See *id.* (“Given the large amount of [collective] funding involved, it is highly unlikely that Collectives are making such high value NIL offers to high school teenagers without any input from the target school.”).

NIL opportunities while avoiding Title IX accountability. Without federal legislation or OCR guidance specifying how to evaluate at what point a collective becomes so involved with an educational institution that their partnership opens the institution to Title IX liability,¹⁵⁰ a liability loophole exists that allows collectives and universities to skirt Title IX legal obligations. To address this loophole, the relationship between collectives and institutions should be evaluated under agency law.

Agency law governs relationships where one party, the principal, exerts control over another, the agent, either explicitly or implicitly.¹⁵¹ Courts should apply agency principles to the activities of collectives to determine whether a university controls a NIL collective to such an extent that the collective's actions should be attributed to the institution.¹⁵² If a collective acts as an agent of a university—rather than an independent entity—then Title IX obligations should apply to the collective's distribution of NIL opportunities to male and female student athletes, even if the collective is, on paper, an entity distinct from the institution. Plaintiffs who bring a suit against an educational institution for a Title IX violation via disproportionate collective funding of athletes must establish a principal-agent relationship between the collective and institution by proving the degree of control the educational institution has over the collective.¹⁵³ The more an educational institution directs, influences, or benefits from a collective's activities, the stronger the argument that the collective is an agent of the school rather than an independent third party.¹⁵⁴ In the case of UO, the *Schroeder* plaintiffs would need to establish that UO exerts significant control over Division Street's operations, such that the collective functions as an extension of the university rather than an independent entity.¹⁵⁵ The *Schroeder* plaintiffs would need to meet the following three elements to establish a principal-agent relationship

150. See OCR Fact Sheet Rescindment, *supra* note 5.

151. RESTATEMENT (SECOND) OF AGENCY § 1 cmt. b (AM. L. INST. 1958); see RESTATEMENT (THIRD) OF AGENCY § 1.02 (AM. L. INST. 2006).

152. See RESTATEMENT (SECOND) OF AGENCY, *supra* note 151, § 1 cmt. b; RESTATEMENT (THIRD) OF AGENCY, *supra* note 151, § 1.02.

153. See RESTATEMENT (SECOND) OF AGENCY, *supra* note 151, § 1 cmt. b (“Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking.”); see, e.g., *Nebraska-NIL Collective Data Deal*, *supra* note 133 (“The further and deeper of a contractual relationship you have with a third-party entity, the closer you get to making the argument that the third party is working directly under the university.”).

154. See, e.g., *A. Gay Jensen Farms Co. v. Cargill Inc.*, 309 N.W.2d 285, 290, 293–294 (Minn. 1981).

155. See *id.*

between UO and Division Street: (1) mutual consent to the relationship between UO and Division Street; (2) action by Division Street on behalf of UO; and (3) retainment of the right of control by UO.¹⁵⁶ This Section will examine each of these elements in turn to assess when a collective may be considered an agent of an educational institution for purposes of Title IX liability.

1. Consent by the Collective and the Institution

An agency relationship requires mutual consent, which can be established through express contracts or implied conduct.¹⁵⁷ In the NIL context, express agreements arises when universities designate specific collectives as official partners, grant them exclusive rights to use trademarks, or share donor data to facilitate fundraising.¹⁵⁸ For example, the University of Oregon contracts with Division Street, granting it the right to use UO's branding and trademarks to sell Oregon-branded merchandise, with proceeds directly funding NIL opportunities for UO student athletes.¹⁵⁹ This contractual agreement demonstrates explicit institutional consent to an agency relationship because UO willingly authorizes Division Street to act on its behalf in commercial activities that generate NIL funds for student athletes.¹⁶⁰ Even without a formal agreement, a university's ongoing collaboration with a collective can demonstrate its implicit consent for the collective to act as an agent on its behalf. An educational institution can impliedly consent to the agency relationship through actions such as publicly endorsing a collective, directing donors to donate to the collective rather than to the athletic department, or encouraging collectives to recruit specific athletes.¹⁶¹ Routine university staff communication with a

156. See RESTATEMENT (SECOND) OF AGENCY, *supra* note 151, § 1 cmt. b; RESTATEMENT (THIRD) OF AGENCY, *supra* note 151, § 1.01 cmt. c.

157. *Gorton v. Doty*, 69 P.2d 136 at 144 (Idaho 1937) ("It is not essential to the existence of authority that there be a contract between principal and agent or that the agent promise to act as such, nor is it essential to the relationship of principal and agent that they, or either, receive compensation.").

158. See, e.g., *Nebraska-NIL Collective Data Deal*, *supra* note 133 (discussing a 10-page "data sharing agreement" between the University of Nebraska and its official NIL collective, 1890 Nebraska, as an "extensively memorialized school-collective compact[]").

159. *Oregon, Division Street Play for Kicks*, *supra* note 118 ("As an external organization, Division Street has licensed the UO marks and logos via the official process.").

160. RESTATEMENT (THIRD) OF AGENCY, *supra* note 151, § 1.01; see, e.g., *Nebraska-NIL Collective Data Deal*, *supra* note 133 ("The further and deeper of a contractual relationship you have with a third-party entity, the closer you get to making the argument that the third party is working directly under the university.").

161. See, e.g., *A. Gay Jensen Farms Co. v. Cargill Inc.*, 309 N.W.2d 285, 290–291 (Minn. 1981) (finding principal manifested consent to agency relationship when principal directed agent

collective to coordinate NIL deals tied to the university's recruiting objectives¹⁶² suggests that the university is impliedly consenting to the collective acting as its agent to accomplish its recruiting goals.¹⁶³ Through both express agreements and ongoing collaboration, the University of Oregon demonstrates that Division Street functions as an authorized agent in procuring and facilitating NIL opportunities, reinforcing the argument that Division Street's activities should subject UO to Title IX liability.

2. Action by the Collective on Behalf of the Institution

If a collective exists exclusively to promote and facilitate NIL opportunities for athletes at a single institution, this arrangement suggests that the collective operates primarily on behalf of the university rather than as a standalone business entity.¹⁶⁴ Many NIL collectives work only with athletes at a particular institution—like how Division Street only works with student athletes at UO—rather than with a variety of athletes at different schools.¹⁶⁵ This suggests that Division Street lacks market independence, which is a strong factor that the collective exists for the primary benefit of UO.¹⁶⁶ Unlike commercial NIL agencies that work across various schools and sports, Division Street exists to promote and facilitate NIL opportunities

to implement its recommendations); Nebraska Huskers (@Huskers), X (July 8, 2024, 10:01 AM), <https://x.com/Huskers/status/1810328344531288251> [<https://perma.cc/5VXR-Z3GV>] (noting partnership between Nebraska and its collective “make[s] it convenient for . . . donors”).

162. Jeremy Crabtree, *How Are Recruiters Working with NIL Collectives in States Where It's Allowed?*, ON3 (June 20, 2022), <https://www.on3.com/nl/news/how-are-recruiters-working-with-nl-collectives-in-states-where-its-allowed/> [<https://perma.cc/V3KD-W4UQ>] (noting that coaches or directors of educational institutions often communicate about recruiting goals to collectives).

163. See RESTATEMENT (THIRD) OF AGENCY, *supra* note 151 § 1.02 cmt. d (“Mutual consent may be inferred from conduct.”).

164. See RESTATEMENT (SECOND) OF AGENCY, *supra* note 151, § 1 cmt. b; RESTATEMENT (THIRD) OF AGENCY, *supra* note 151, § 1.01 cmt. c; see also, e.g., Tim Shaw, *NIL Collectives Blocked by IRS From Claiming Tax-Exempt Status*, Thomson Reuters Tax & Accounting, THOMSON REUTERS (July 17, 2024), <https://tax.thomsonreuters.com/news/nl-collectives-blocked-by-irs-from-claiming-tax-exempt-status/> [<https://perma.cc/J9YQ-SBQ2>].

165. See DIVISION STREET, *supra* note 123 (noting “Division Street’s mission is to empower Oregon student-athletes to be successful in the brand and marketing landscape, as well as maximize revenue opportunities”).

166. See IRS Memo, *supra* note 72, at 10–11 (inferring that because collectives are organized by fans or boosters of particular athletic program, it is reasonable to assume they have “an interest in limiting a collective’s NIL opportunities to the student-athletes at that school rather than making these opportunities available to any student-athlete willing to participate in the collective’s activities”).

exclusively for student athletes at UO, suggesting it cannot operate without UO, rather than as a standalone business entity.¹⁶⁷

Further evidence that Division Street primarily acts on behalf of UO arises from the way Division Street raises and distributes NIL funds.¹⁶⁸ Agency action on behalf of a principal includes not only express direction from a principal to an agent, but also actions by the agent from which principal control can be inferred.¹⁶⁹ University-specific licensing agreements between an institution and collective, in which the collective partners exclusively with that institution and leverages the institution's IP to promote its athletes for NIL opportunities, suggest that the collective operates as a marketing arm of the institution, working on behalf of the institution. For example, Division Street utilizes UO's IP to sell exclusive UO-branded merchandise to fans in order to fund its NIL operations—Division Street does not sell merchandise branded with any other school's IP.¹⁷⁰ This dependency on university branding and IP strongly suggests that Division Street's operational viability hinges on institutional cooperation. When a collective relies on access to school-owned assets to generate NIL revenue, this suggests the collective is not operating independently, but on behalf of the university.¹⁷¹

Finally, a collective's alignment of its operations with an institution's competitive interests suggests that the collective primarily acts on behalf of its affiliated institution.¹⁷² Collectives align their operations with a university's interests by crafting NIL deals to attract and retain recruits for the university.¹⁷³ When a university establishes

167. See DIVISION STREET, *supra* note 123; Boston, *supra* note 47, at 1129 ("In essence, a Collective is a booster organization whose main purpose is to fund NIL opportunities.").

168. See DIVISION STREET, *supra* note 123.

169. See RESTATEMENT (THIRD) OF AGENCY, *supra* note 151, § 2.03.

170. See Olivia Cleary, *How Is Phil Knight's Revolutionary 'Division Street' Changing NIL for Oregon Duck Athletes?*, SPORTS ILLUSTRATED (May 10, 2024), <https://www.si.com/college/oregon/news/oregon-ducks-phil-knight-revolutionary-division-street-changing-name-image-likeness-nil-duck-athletes-dillon-gabriel-evan-stewart-nfaly-dante-sabrina-ionescu> [<https://perma.cc/EEB5-CHRJ>].

171. See, e.g., *A. Gay Jensen Farms Co. v. Cargill Inc.*, 309 N.W.2d 285, 291 (Minn. 1981) (establishing agency relationship by principal's interference with internal affairs of agent, constituting "de facto control").

172. See generally *id.* at 291.

173. See Jeremy Crabtree, *Rules or Not, You Have to Be Naïve to Think NIL Isn't Impacting Recruiting*, ON3 (Aug. 27, 2021), <https://www.on3.com/nil/news/ncaa-rules-nil-impacting-recruiting/> [<https://perma.cc/KJM8-6XVN>] ("Schools are not only saying they can help, but they're also making specific promises of how much," a SEC football recruiting coordinator told On3. "It doesn't ever seem to have a specific dollar amount. But I'm seeing it with a good 40 percent of kids."); Christopher Kamrani, Justin Williams, Antonio Morales, Bruce Feldman, Scott Dochterman, Manny Navarro, Chris Vannini, Stewart Mandel & David Ubben, *Inside How College Football's*

a baseline NIL compensation—such as promising that all members of a particular team will receive a set amount in NIL deals—it obligates the collective to allocate funds accordingly, mirroring the control of a principal’s directive.¹⁷⁴

3. The Right of Control

Institutions’ athletic departments often work in tandem with collectives by providing access to athletes or guiding compliance with NCAA rules.¹⁷⁵ When an institution controls access to a collective’s key product—the student athletes—the relationship moves closer to that of a principal and agent. An institution’s control of a collective’s access to student athletes or influence over the collective’s adherence to NCAA regulations and institutional policies suggests the institution’s right to control the collective, a critical factor in determining an agency relationship.¹⁷⁶ UO requires student athletes to disclose their NIL activities to UO seven days before the activities occur and restricts students athletes from “us[ing]” NIL deals during official team activities that “conflict[] with the University’s Code of Conduct, team rules, or a contract entered into between the University of Oregon and a third party.”¹⁷⁷ UO’s NIL notice requirement suggests that UO ultimately controls student athlete participation in NIL activities and likely has the ability to veto NIL contracts that conflict with institutional objectives. Because NIL agreements with Division Street require an athlete’s enrollment at UO (as Division Street operates exclusively with UO athletes), UO’s authority to demand athlete compliance with its policies, such as its Code of Conduct, strongly suggests that the school has authority to regulate the extent to which Division Street can engage with its athletes. Such authority reinforces the argument that Division Street operates under UO’s control.¹⁷⁸

Even if schools do not directly fund collectives, their financial entanglement and shared assets, through shared donor bases, coordinated fundraising, and access to university resources, also

Transfer Portal Works: Coaches, Players and Agents Dish on NIL, THE ATHLETIC (May 13, 2024), <https://www.nytimes.com/athletic/5484900/2024/05/13/college-football-transfer-portal-nil-deals/> [<https://perma.cc/ML6P-75XX>] (quoting one NIL collective CEO, “You have to know what the coaches want, and the collective, somehow, has to be operating consistently with how the coaches want their program run”).

174. See Dellenger, *supra* note 68; Kamrani et al., *supra* note 173.

175. See Dellenger, *supra* note 68.

176. See *Alfaro-Huitron v. Cervantes Agribusiness*, 982 F.3d 1242, 1252 (10th Cir. 2020).

177. *NIL Information for University of Oregon Donors*, UNIV. OF OR. ATHLETICS, <https://goducks.com/sports/2021/8/11/nil-faqs-for-donors> [<https://perma.cc/462G-UN7ZNEED>] (last visited May 22, 2025).

178. See *id.*; *Helping Oregon Athletes Take Flight*, *supra* note 122.

suggest a level of control that should implicate institutions under Title IX. The more financially dependent a collective is on its institution, the more likely the institution exerts control over the collective.¹⁷⁹ Many institutions offer exclusive rewards to fans to support their collectives, which they could only otherwise get by donating directly to the university, suggesting the institution itself is offering financial support to collectives.¹⁸⁰ For example, some universities, like the University of Texas, offer loyalty points or donor benefits for contributions to their affiliated NIL collectives, which ties collective donations to institutional fundraising strategies.¹⁸¹ By offering exclusive donor benefits to those who contribute to a collective rather than an institution's own athletic department, that institution provides its own resources to finance the collective. When an institution redirects its own resources in the form of donor perks or loyalty points to help a collective fundraise, this arguably increases the collective's financial dependence on the institution, suggesting the institution has de facto control over the collective's operations through its ability to fund NIL opportunities.¹⁸²

Athletic departments' influence over how donor dollars are allocated further demonstrates a collective's financial dependence on its affiliated institution and the institution's ultimate control over the success of the collective's ability to fundraise.¹⁸³ The collective and the institution likely share the same donor pool and therefore likely sharing

179. See RESTATEMENT (THIRD) OF AGENCY, *supra* note 151, § 1.01 cmt. f(1) ("An essential element of agency is the principal's right to control the agent's actions.").

180. See, e.g., Pete Nakos, *Huskers Name 1890 Nebraska Official NIL Collective*, ON3 (July 8, 2024) [hereinafter *Huskers Name*], <https://www.on3.com/nil/news/nebraska-cornhuskers-names-1890-official-nil-collective-troy-dannen-matt-rhule/> [https://perma.cc/3WMS-ZPHX].

181. Joe Cook, *Texas One Fund Announces Collective Donors Can Earn Longhorn Foundation Loyalty Points*, ON3 (Aug. 26, 2024), <https://www.on3.com/teams/texas-longhorns/news/texas-one-fund-announces-collective-donors-can-earn-longhorn-foundation-loyalty-points/> [https://perma.cc/8DET-N4T3]; Pete Nakos, *Texas One Fund Donors to Earn Longhorn Foundation Loyalty Points Is 'Game Changer'*, ON3 (June 20, 2023), <https://www.on3.com/nil/news/texas-one-fund-nil-collective-longhorn-foundation-loyalty-points-football-ncaa/> [https://perma.cc/4GLN-BHSW] ("The Longhorn Foundation's loyalty points system help[s] determine priority for season ticket seat selection and upgrades for all sports, including the Red River Showdown, football road games, postseason events and football parking.").

182. See *A. Gay Jensen Farms Co. v. Cargill Inc.*, 309 N.W.2d 285, 291 (Minn. 1981) (establishing agency relationship by principal's interference with internal affairs of agent, constituting "de facto control").

183. See Eric Prisbell, *What Donor Fatigue Means as NIL Enters Its Third Year of Impacting College Sports*, ON3 (June 27, 2023), <https://www.on3.com/nil/news/what-donor-fatigue-means-as-nil-enters-its-third-year-of-impacting-college-sports-ncaa-collectives/> [https://perma.cc/BEP9-7X4D] ("The athletic department is competing with the collective over the same donor dollar.").

a key financing source.¹⁸⁴ Therefore, athletic departments may maintain influence over the flow of funding to collectives through the ability to redirect donors who traditionally contribute to the athletic department's capital campaigns for new facilities or equipment to instead donate to collectives to help with recruiting and retention efforts of athletes.¹⁸⁵ If an institution can exert control over donor flow, it can exert control over the availability of funds supporting NIL opportunities. Some institutions may share donor lists, sponsors, or databases with NIL collectives.¹⁸⁶ By directly connecting boosters to collectives or coordinating fundraising efforts, institutions are effectively controlling how NIL money is distributed, even if the payments technically come from an outside entity.¹⁸⁷

An institution's control over an NIL collective can range from direct contractual agreements to implied control through influence over fundraising, recruiting, and resource distribution. When a school endorses, facilitates, or materially benefits from a collective's operations, the collective effectively acts as an agent of the institution. If a collective is an agent of the institution, then the agent collective's actions may subject the university to Title IX liability as the principal, therefore also obligating the collective's actions to comply with Title IX's equal treatment mandate. If a university-affiliated collective unequally promotes male over female athletes, the university cannot evade liability by claiming NIL deals are independent third-party transactions—instead, it must ensure NIL-related publicity and promotional opportunities are equitably distributed.

184. See, e.g., *id.* (“Universities in small college towns and [with] less wealthy alumni bases are having to fish the same pond – which inevitably leads to donors either having to split the pot or having to choose based on which entity – the university or the collective – that the donor values most.”).

185. See Prisbell, *supra* note 183 (“[T]here’s an increasing realization among schools and athletic directors . . . that they may need to pause come capital campaigns or locker-room and stadium renovations. The capital is of greater value being redirected into a collective.”).

186. See, e.g., *Huskers Name*, *supra* note 180.

187. See Brad McElhinny, *As Former AD Lyons Underscored, Colleges Face Balancing Act on NIL and Title IX*, WVMETRONews (Jan. 15, 2023, 7:41 AM), <https://wvmetronews.com/2023/01/15/as-former-ad-lyons-underscored-colleges-face-balancing-act-on-nil-and-title-ix/> [<https://perma.cc/NA6L-2V6T>] (reporting the University of Iowa’s Athletic Director chose not to share donor information and quoting him as stating: “[i]f we start making the deals ourselves or identifying actual sponsors or people to give to the trust then that starts getting closer that you as an athletic department are involved, and it could run Title IX implications. If it’s all done by them then it’s not an issue”).

IV. CONCLUSION

Title IX's equal treatment mandate is clear: educational institutions must provide equitable benefits and opportunities to male and female student athletes, including publicity and promotional support.¹⁸⁸ The *Schroeder et al. v. University of Oregon* lawsuit highlights how inequitable publicity practices—whether directly through an institution's own publicity resources or through institutional entanglements with NIL collectives—can violate Title IX by creating systemic disadvantages for female athletes. Without intervention, these disparities threaten to undo decades of progress in gender equity in collegiate athletics. Evaluating the relationship between universities and collectives under agency law offers a necessary framework for closing this loophole. When collectives operate as de facto marketing and fundraising arms of the institution—relying on institutional branding, donor networks, and access to enrolled student-athletes—they function as publicity resources subject to Title IX's equal treatment requirements. Treating collectives as agents of institutions ensures that institutions cannot evade Title IX liability by outsourcing promotional efforts or NIL facilitation to legally separate entities, and requires institutions to ensure they keep arms distance from collectives so as not to incur Title IX liability and ensure athletes have fair market value.

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188. See 34 C.F.R. § 106.41(c)(10) (2025).

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