

Insights

OCR CONFIRMS TITLE IX APPLIES TO INSTITUTIONS' DIRECT NIL AND REVENUE-SHARING

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On January 16, 2025, the Office of Civil Rights of the Department of Education – the agency responsible for enforcing Title IX at institutions of higher education – issued a Fact Sheet confirming that OCR will apply established gender equity principles governing collegiate athletics when evaluating institutions' NIL-related compensation and activities. The Fact Sheet formalized the July 2024 statement by OCR assistant secretary Catherine Lhamon that “Schools must provide equal athletic opportunities based on sex, including with respect to benefits, opportunities, publicity, and recruitment, and must not discriminate in the provision of financial aid.” Understanding OCR's clarified Title IX enforcement framework is essential for Division I institutions as they continue to develop strategies to implement the pending settlement in *In re College Athlete NIL Litigation*, Case No. 4:20-cv-03919-CW (N.D. Cal.) (the “*House Settlement*” or “settlement”), and, in particular, how they will allocate the revenue-sharing dollars permitted under the terms of the proposed settlement.

WHY WAS THIS GUIDANCE ISSUED NOW?

In the *House Settlement*, the NCAA and Power Five conferences have agreed with plaintiffs' counsel in three class actions to the terms of a settlement that would permit Division I institutions to pay their student athletes directly up to a cap determined based on an average of certain revenues across the Power Five Conferences and the University of Notre Dame. In the first year, the 22% revenue cap will allow for approximately \$21 million in payments from institutions to their athletes, with the amount to be adjusted periodically based on changes in average revenues. Additional scholarships will be permitted, with up to \$2.5 million of new scholarships counting against the cap, as well as up to \$2.5 million in additional Academic Achievement (*Alston*) payments counting against the cap. Institutions have not historically been permitted to make direct payments to student athletes above and beyond the cost of attendance at the institution, but the *House Settlement* will permit institutions to pay their student athletes directly and to serve as marketing agents for their student athletes. Payments that will count towards the cap will include payments from any “associated entity or individual,” which includes collectives, individuals who have donated at least \$50,000 lifetime to a particular member institution or associated entity, and individuals who are asked to or in fact assist with recruiting *except* when those payments are legitimate NIL deals “for a valid business purpose related to the promotion or endorsement of goods or services

provided to the general public for profit, with compensation at rates and terms commensurate with compensation paid to similarly situated individuals with comparable NIL value who are not current or prospective student-athletes at the Member Institutions.” Additionally, the *House* Settlement would have the NCAA abandon its historical scholarship limits in favor of adopting roster caps for each team with scholarships permitted for each student athlete.

Since the *House* Settlement was initially submitted to the court in May 2024, institutions have been working hard to develop plans for how they will implement the settlement should it be approved after the April 7, 2025, final approval hearing. Most major Division I sports programs have been strategizing on how to adjust their rosters, what additional scholarships they can afford to offer, and how they will allocate their permissible revenue-sharing dollars across their athletics programs. The back-damages aspect of the settlement reflects an allocation of approximately 75% to football, 20% to men’s and women’s basketball, and the remaining 5% to all other sports. With many institutions having women make up more than 50% of their undergraduate enrollment, the damages allocation model is not proportional to the breakdown of undergraduate enrollment.

OCR CLARIFIED HOW TITLE IX WILL APPLY TO THE VARIOUS ASPECTS OF THE HOUSE SETTLEMENT SHOULD IT BE APPROVED

In no uncertain terms, OCR made clear that the changes to rosters, payments to athletes, and support provided to students for NIL and marketing pursuant to the terms of the *House* Settlement will be subject to the gender-equitable principles that have been applied to collegiate athletics for the past 50 years. The key notable clarifications for institutions to understand are:

- **Participation Opportunities:** Institutions may adjust their rosters in response to the new roster caps proposed under the settlement, but OCR will still enforce the equal athletic opportunity mandate of Title IX.
- **Treatment and Benefits:** OCR considers an institution to be in compliance with Title IX if an institution offers *equivalent* benefits, opportunities and treatment to male and female student athletes in the major components of the institution’s athletic program (e.g., the traditional laundry list of treatment and benefits, including, most relevantly, publicity and recruitment). Differences in treatment and benefits may exist only if they are the result of non-discriminatory factors. “Market factors” are not amongst the factors listed by OCR as justifying unequal treatment.
- **NIL:** If an institution offers assistance to student athletes in obtaining and managing NIL agreements with third parties, this will be treated as a benefit akin to publicity, subject to the equivalency requirements of Title IX. As OCR stated, “A school’s obligation to provide equivalent publicity based on sex continues to apply in the context of NIL.” This includes providing equivalent publicity for the purpose of attracting NIL opportunities. If the institution

provides support services to help its student athletes in obtaining, negotiating, or managing NIL opportunities, the equivalence requirement will apply to those offerings as well.

- **Direct NIL Agreements Between Institutions and Student Athletes:** OCR explained that any compensation provided by an institution other than scholarships or grants, including payments for use of the student athlete's NIL, will be considered "athletic financial assistance" under Title IX. Athletic financial assistance has always been subject to a requirement of providing reasonable opportunities for each sex in proportion to their participation in intercollegiate athletics (i.e., to participation numbers). OCR looks to the aggregate amount of financial assistance made available to men and women and whether it is substantially proportionate to the number of students of each sex participating. Substantial proportionality in athletic financial assistance typically looks to a maximum 1% variance from perfect proportionality, but institutions have flexibility in any given year if a disparity in assistance can be explained by legitimate non-discriminatory factors, such as unexpected fluctuations in participation rates of one gender.
- **Third-Party NIL Compensation:** OCR does not consider compensation provided by a third party (i.e., **not** the institution) to be financial assistance from the institution that must comply with Title IX. OCR did not provide guidance in its Fact Sheet on how it will treat compensation from NIL collectives that are closely connected to institutions, but prior guidance makes clear that a collective's payments to student athletes may be subject to Title IX if the institution for whose student athletes the collective is providing support appears to be actively supporting or facilitating the deals. For many institutions, the lines between the athletic departments and collectives already have been muddied, and active support and coordination has become commonplace. OCR's Fact Sheet does not address when active support will be sufficient to render NIL collective compensation subject to Title IX, but institutions should increase their efforts to keep collectives distinct and independent. Moreover, OCR warned that it will scrutinize funding from private sources like booster clubs (and collectives) that create disparities based on sex in an institution's athletic program or a program component, and that "NIL agreements between student-athletes and third parties [possibly] will create [] disparities and therefore trigger a school's Title IX obligations." Institutions therefore should not take the lack of express discussion of when OCR will consider a collective sufficiently interconnected with an institution to justify applying Title IX to its deals as *carte blanche* to facilitate gender-inequitable deal flow through an associated collective.

WHAT SHOULD INSTITUTIONS BE DOING IN LIGHT OF OCR'S GUIDANCE?

Many institutions have dedicated significant time and resources attempting to garner support for an increased athletic budget to implement the *House Settlement*, planning how they will modify team rosters, determining whether they need to cut or add sports, and how, if at all, they will increase

scholarships or make revenue-sharing payments. In light of OCR's guidance, now these institutions need to apply a clarified Title IX lens to their strategic planning. What particular steps should your institution take now in response to the OCR position statement?

1. Evaluate your participation opportunities under Title IX, and develop a strategy to maintain or achieve the proportionality of opportunities offered to women and men in light of the *House Settlement's* anticipated roster caps.
2. If your institution was contemplating making revenue-sharing or direct NIL payments under the *House Settlement*, or providing support services relating to NIL, revisit the approach your athletic department and administration plan to take. Gender-inequitable distributions of revenue-sharing payments, direct NIL payments, or support services relating to NIL will expose your institution to regulatory enforcement risk based on OCR's unambiguous enforcement position. Moreover, the clarity of OCR's position means following the back-damages allocation from the *House Settlement* (which allocates significantly more funding to men than women) for future revenue-sharing payments, will expose the institution to real Title IX litigation risk on top of heightened regulatory enforcement risk. Your institution must weigh the benefit of a *hopefully* more competitive football, basketball, insert-your-highest-revenue-generating-men's-program-here based on knowingly inequitable direct compensation against the institution's commitment to (and legal obligation of) gender equity and Title IX compliance, alongside the very real litigation and regulatory risk of such an approach.
3. If your institution already has committed to inequitable revenue-sharing or direct NIL payments upon implementation of an approved *House Settlement*, revisit your agreements to determine appropriate next steps to unwind deals that will, in the aggregate, subject your institution to real Title IX risk.

Our team continues to monitor the developments around Title IX and collegiate athletics, and will provide further updates as the landscape changes. Institutions with questions about how the Fact Sheet impacts your institution, looking for assistance in conducting an audit of Title IX compliance, or seeking assistance in reconfiguring your plans for rosters, revenue-sharing, or other *House Settlement*-related issues, can contact sarah.hartley@bclplaw.com or the BCLP Higher Education Team for guidance.

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