



Spring 2025 CLE Workshop · March 26 – 28, 2025

# Higher Education Discrimination Law

**Getting Your House in Order and Other Emerging  
Discrimination Topics in Athletics**

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# Overview

- *House* and Gender Equity
- Title IX Litigation
- Athletes as Employees
- Transgender Athletes

# House Settlement

- Resolves consolidated anti-trust litigation against NCAA and Power 5 Conferences:

**House:** Seeks back pay for lost Name Image Likeness (NIL) compensation.

**Hubbard:** Seeks damages for previously denied academic awards.

**Carter:** Seeks damages for denied compensation for athletics services.

- Terms of settlement apply to all DI institutions but will have impact beyond DI.
- Two main components of settlement:
  - **Back Damages:** Applies to all DI institutions to compensate former and current student-athletes for impact of NCAA rules that have limited compensation for athletic performance, including NIL prohibited prior to July 1, 2021.
  - **Future Benefits/Revenue Sharing:** Institutions may opt-in to model permitting annual sharing of revenue with student-athletes up to 22% of Power 5 conferences annual revenue from media rights, ticket sales, sponsorships, etc..., including direct NIL payments to student-athletes.

# Back Damages

## Applies to all Division I Institutions

NIL (*House*)  
\$1.976B

- 1) BNIL:
  - \$1,815,000
- 2) Videogame NIL:
  - \$71,500,000
- 3) Lost NIL Opportunities:
  - \$89,500,000

Athletic Services (*Carter*)  
\$600M

- 1) 95% - Power Five Football and Basketball
  - 75/15/5 ratio across fb/mbb/wbb
- 2) 5% - General Portion
  - Share determined by school and sport revenue generation

Alston (*Hubbard*)  
\$300M

- Qualified claimants will receive the maximum annual value of the Alston Award : \$5,980.
- If number of claimants is too large, settlement amount will be allocated pro rata.

# Future Benefits/Revenue Sharing

## **Applies to Defendant DI Institutions and Optional for Non-Defendant DI Institutions**

- **Opting-In:** Any payment by institution to even one student-athlete in excess of payment previously permissible under NCAA rules has effect of opting-in and making institution subject to Revenue Sharing portion of settlement.
- **Benefits Pool:** Institutions opting-in may share revenue with student-athletes up to 22% of Power 5 conferences annual revenue from media rights, ticket sales, sponsorships, etc..., including direct NIL payments to student-athletes, with periodic adjustments to benefits pool.
- **Roster Caps:** For institutions that opt-in to revenue sharing, scholarship limits are eliminated in favor of roster limits for all sports at that institution.
- **Third Party NIL:** payments to student athletes in excess of \$600 must be reported to NCAA established clearinghouse for assessment of fair market value.
- **Enforcement and Arbitration:** Disputes about enforcement of settlement go to arbitration.

# ATHLETICS AID, PAYMENTS, AND BENEFITS **INSIDE** “THE POOL”



# ATHLETICS AID, PAYMENTS, AND BENEFITS **OUTSIDE** “THE POOL”



## **ATHLETICS AID**

GIA/COA Within Current NCAA Limits

Existing Payments (SAF, Awards)

Existing Benefits (Health Insurance)

Existing NCAA Benefits & Payments



## **INSTITUTIONAL NIL**

School/MMR contracts w/ SA as marketing agent

School/MMR sublicenses SA rights to 3P



## **THIRD PARTY NIL**

Payments made by 3Ps

Funds don't originate from school

Booster NIL for FMV/valid business purpose



# Roster Limits

- For institutions that opt-in to revenue sharing, scholarship limits are eliminated in favor of roster limits for all sports at that institution.
- Roster limits may result in elimination of up to 25K Division I roster spots
- Expectation that elimination of roster spots disproportionately impact non-revenue sports such as Track & Field, Swimming, Gymnastics

# Objections and Opt-Outs

- Approximately 350 student-athletes have opted out of settlement class.
- Over 70 objections to settlement filed. Objections argue:
  - Settlement is new anti-trust scenario - "salary caps" and roster limits determined by competitors
  - Settlement adopts economic assumptions favorable to NCAA
  - Settlement disproportionately negatively impacts non-revenue sports and women

# Non-Released Claims

- Are student-athletes employees under National Labor Relations Act?
- Are student-athletes employees under Fair Labor Standards Act?
- How does Title IX fit in the framework of the settlement?

# Important Dates and Next Steps

- April 7, 2025: Hearing on final court approval of settlement
- June 15, 2025: Deadline for non-defendant institutions to opt-in
- July 1, 2025: Effective date of settlement terms

# What If There Isn't Approval?

- State laws
  - Virginia
  - Georgia
- Potential executive orders
  - Ohio

# Title IX

“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.”

# Refresher: Title IX in Collegiate Athletics

## Financial Assistance

- Includes any financial assistance offered to SAs
  - EX: Grant-in-aid/COA/*A/ston*, Other Personal Benefits
- “Substantially proportionate” to participation rates
- Non-discriminatory distribution

## Benefits + Opportunities + Treatment

- Equitable treatment across ALL athletics programs
- 11 “treatment” areas
- NIL Treatment Areas: Publicity, Support Services, Recruiting
- Source of funding irrelevant

## Participation - Meet Interests + Needs (1 of 3)

- (1) Proportionality
- (2) History of Expansion
- (3) Effective Accommodation

**For Title IX compliance, must meet #1, 2, and 3**

# Title IX – NIL and *House*



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

## **Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities**

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Title IX of the Education Amendments of 1972<sup>1</sup> (Title IX) prohibits discrimination on the basis of sex by schools that receive Federal financial assistance, including K-12 schools, colleges, and universities.<sup>2</sup> If a school receives Federal financial assistance, Title IX's prohibition on sex discrimination extends to all of the school's programs and activities, including its athletic program.

# Title IX – NIL and *House*

- Non-grant Financial Assistance
- Treatment Areas
  - Publicity
  - Support Services

# Title IX – NIL and *House*



The screenshot shows the official website of the U.S. Department of Education. At the top, there is a dark teal header with the department's seal and name on the left, and links for 'Español', 'Data', 'Research', and 'Contact Us' on the right. A search bar is also present. Below the header is a navigation bar with dropdown menus for 'Higher Ed', 'Adult Programs', 'Birth to Grade 12 Education', 'Teaching & Admin', 'Grants & Programs', and 'Laws & Policy'. The main content area features a breadcrumb trail: 'HOME / ABOUT US / NEWSROOM / PRESS RELEASES'. Below this, the text 'PRESS RELEASE' is displayed. The title of the release is 'U.S. Department of Education Rescinds Biden 11th Hour Guidance on NIL Compensation'. The body of the release begins with a quote: 'The NIL guidance, rammed through by the Biden Administration in its final days, is overly burdensome, profoundly unfair, and it goes well beyond what agency guidance is intended to achieve'. The date 'FEBRUARY 12, 2025' is listed at the bottom of the release text.

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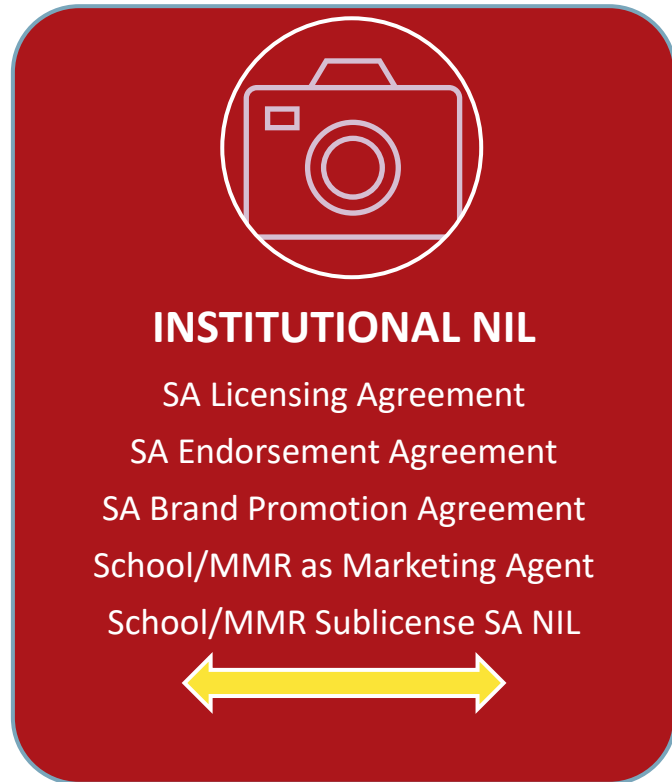
PRESS RELEASE

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FEBRUARY 12, 2025

# Title IX Impacts: Institutional NIL



- Risk Assessment: Are NIL payments considered “Financial Assistance” within Title IX?
- Equal or equal in effect, or nondiscriminatory reason
- Implicated “Treatment Areas”:
  - Publicity
  - Recruiting
  - Support Services
- Example: Institution can now act as marketing agent for SAs. If offer services to some but not all SAs, could implicate "treatment areas."

# Title IX Impacts: Third Party NIL



- 3P activities subject to Title IX if institution provides “significant assistance” to 3P
- It’s where the money goes, not where it’s coming from
- Implicated “Treatment Areas”:
  - Publicity
  - Recruiting
  - Support Services
- Example: Institution provides facilities and suite use to NIL Collective for free. Collective only supports Football. Could be considered “significant assistance” and NIL Collective would fall under Title IX.

# Roster Limits

Sport	Current Aid Limit	Future Roster Cap	New Scholarship Opportunities
Basketball (M)	13	15	2
Basketball (W)	15	15	0
Football	85	105	20
Baseball	11.7	34	22.3
Soccer (M)	9.9	28	18.1
Soccer (W)	14	28	14
Swim & Dive (M)	9.9	30	20.1
Swim & Dive (W)	14	30	16
Volleyball (M)	4.5	18	13.5
Volleyball (W)	12	18	6
Tennis (M)	4.5	10	5.5
Tennis (W)	8	10	2

# What Should Schools Be Doing Now?

- Determining priorities
- Determining budget
- Modeling scenarios
- Role of MMRs
- International SAs
- Title IX approach
- Who/what will be paying the SAs?
- NIL Licensing Template

# ***Niblock v. University of Kentucky***

- Class action suit alleging UK failed to provide equal participation opportunities to female student-athletes.
- Plaintiffs argued women's lacrosse, field hockey, and equestrian were viable women's sports at UK.

# ***Niblock v. University of Kentucky***

- UK failed Prong One and Prong Two of the three-part participation test.
- Court found UK compliant with Title IX under Prong Three.
- Court held plaintiffs failed to prove UK failed to accommodate the interests and abilities of UK's female students.

# *Niblock v. University of Kentucky*

- "The question under Prong Three is whether UK is meeting 'the *actual* interests and abilities of its students and admitted students.' 2010 Letter at 6, n. 15. Plaintiffs must prove that there are female students actually able to compete at a varsity level in a sport and that there are enough of them to form a team. Plaintiffs confine their argument to field hockey, lacrosse, and equestrian. For the reasons stated, Plaintiffs have failed to meet their burden in any of these particular sports at this time.

*Niblock v. Univ. of Kentucky*, No. CV 5:19-394-KKC, 2024 WL 4891025, at \*16 (E.D. Ky. Oct. 28, 2024)

# ***Fisk v. Bd. of Tr. of California State University***

- Class action suit alleging San Diego State University (SDSU) failed to provide female student-athletes equal financial aid.
- Court found female student-athletes who filed the discrimination case could now sue for retaliation for the institution's acts related to the plaintiffs asserting their rights.

# ***Fisk v. Bd. of Tr. of California State University***

- Standing issue
- Motion to Voluntarily Dismiss Without Prejudice
- Final Pretrial Conference scheduled for September 11, 2025

# ***Schroeder v. University of Oregon***

- Class action suit alleging disproportionate treatment and disproportionate granting of financial aid to women varsity student-athletes.
- Plaintiffs also suing Division Street and Opendorse, the collectives used to handle NIL at Oregon.
- Alleges male varsity student-athletes are offered much greater NIL opportunities than female student-athletes.

# ***Schroeder v. University of Oregon***

- Three motions filed by Oregon are pending and discovery is stayed until these motions are ruled on.
- First athletics Title IX case relating to Name, Image, and Likeness.

# Student-Athletes as Employees | Regulatory Updates

- NLRB Memorandum GC 21-08 withdrawn
- Dartmouth men's basketball student-athletes' petition to unionize withdrawn
- NCPA v. USC, Pac-12, NCAA withdrawn

# Athlete Unionization Efforts

- Athletes.org
- National College Players Association

# Student-Athletes as Employees | Legislative Updates

- State laws / proposed legislation that declares student-athletes are not employees even as the result of direct NIL payments
  - See e.g. Ohio
- Congressional hearings and activities
- Federal legislation?

# Student-Athletes as Employees | Judicial Updates

*Johnson v. NCAA* (E.D. Penn, Third Circuit)

- Four-part test for determining whether particular athletes should be considered employees under FLSA
  - (a) perform services for another party
  - (b) necessarily and primarily for the other party's benefit
  - (c) under that party's control or right of control
  - (d) in return for "express" or "implied" compensation or "in-kind benefits"
- Plaintiffs filed third amended complaint
- March 24, 2025 deadline for defendants to file motions to dismiss third amended complaint

# Student-Athletes as Employees | Judicial Updates

*Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016)

- Economic realities test
  - Nature of the relationship
  - Control and compensation
  - Comparison to other student activities
  - Historical precedent
- College athletes are not employees
- Concurring opinion considers treating DI basketball and FBS differently

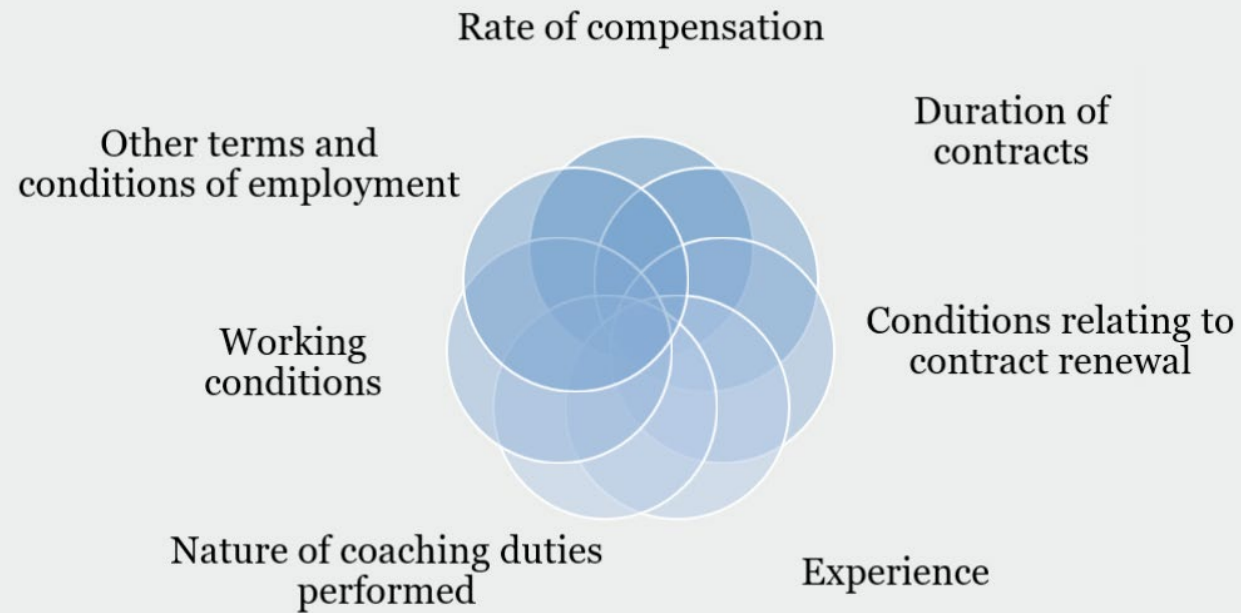
# Title VII

- Recruitment and scholarships
- Playing time
- Promotions (team captain)
- Disciplinary actions (team rules; less coach autonomy)
- Sexual harassment
- Religious accommodations
- Hiring and firing – roster management

# Title IX

## Treatment

### Compensation of Coaches



# Equal Pay Act

## Disparate Treatment Between Men's and Women's Sports

- Equal work means equal pay
- One sex generating more revenue than the other is not a legitimate nondiscriminatory justification.
- The EEOC has cautioned schools against using market analysis as defense to inequality in claims.
- Pay disparities would need justified if male and female athletes are performing similar duties

# Other Impacts

- Different statuses for different athletes
- Worker's compensation
- Unemployment
- Payroll taxes
- Unionization/strikes + work stoppages
- Pregnant Workers Fairness Act
- Benefits
- ADA
- FMLA
- Leave policies
- Immigration
- Title IX

# What Can You Do to Prepare Now?

- Tabletop exercise
  - Application of Johnson test to current athlete pool
  - Staffing an HR department within athletics
  - Review student-athlete handbooks
  - Review grant-in-aid agreements
  - Review NIL licensing and/or revenue share agreements
  - Review university policies and procedures
- Educate administrators and coaches
  - Prepare for likely scenarios
- Prepare athletics administrators and coaches for likely scenarios
  - Questions from team members about being approached by a union
  - Complaints by team members about conditions
- Educate government relations staff

# Transgender Athletes



# Transgender Athletes

PRESS RELEASE

## U.S. Department of Education to Investigate Title IX Violations in Athletics

The Department Will Review Athletics Policies at Additional Schools

FEBRUARY 6, 2025

Related Content

The Department's Office for Civil Rights (OCR) is launching directed investigations into the following entities for apparent Title IX violations:

- San Jose State University
- University of Pennsylvania
- Massachusetts Interscholastic Athletic Association

Additionally, OCR is actively reviewing athletic participation policies at a number of schools to evaluate their alignment with Title IX protections for female athletes.

# Transgender Athletes

## NCAA Policy

- Men's Teams:
  - "regardless of sex assigned at birth or gender identity"
- Women's Teams
  - Student assigned male at birth or female at birth and has begun hormone therapy may practice but not compete

# Transgender Athletes

## State Law and Circuit Courts

- State law that conflicts with NCAA policy or executive order regarding transgender participation?
  - California Code Regs. Title 4 §831
- How do the courts in your circuit apply Title IX to allegations of discrimination on the basis of gender identity?

# Transgender Athletes

## *Slusser v. Mountain West Conference*

- Title IX, Equal Protection, First Amendment, Fraud, Negligent Misrepresentation
- Discovery stayed pending 12(b) motion to dismiss



# Questions?

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