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Emerging Legal Issues Under Title IX: Transgender Athletes and Name, Image, and Likeness Compensation for College Athletes

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Emerging Legal Issues Under Title IX: Transgender Athletes and Name, Image, and Likeness Compensation for College Athletes

Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex in education programs and activities that receive federal financial assistance. All K–12 public school districts and all public colleges and universities, as well as most private colleges, receive federal funding, meaning that these schools must comply with Title IX’s statutory requirements and regulations. Title IX regulations in part address a history of higher participation rates for males over females in school athletics programs, where boys’ athletics programs received more emphasis than girls’. Since the law’s passage, the participation rates for girls and women in athletics at the high school and college levels have increased substantially.

Long-standing Title IX regulations prohibit sex discrimination in school athletics programs. In particular, the Department of Education’s (ED’s) Title IX regulations prohibit recipient institutions from discriminating based on sex in “interscholastic, intercollegiate, club, or intramural athletics.” The regulations provide that if a recipient awards athletic scholarships, an institution must “provide reasonable opportunities for such awards for members of each sex in proportion to the numbers of students of each sex participating in interscholastic or intercollegiate athletics.” In addition, ED’s Title IX regulations require that recipient institutions must provide equal opportunities in athletics programs for both sexes. A variety of factors can be relevant to this requirement, including an institution’s level of support for things like equipment, scheduling, facilities, and publicity. The regulations also provide that athletics options for students must “effectively accommodate the interests and abilities of members of both sexes.” A 1979 Policy Interpretation released by the predecessor of ED, the Department of Health, Education, and Welfare (HEW), still in force today, explains how the Department (now ED) assesses compliance with the various requirements in the Title IX regulations. Among other things, it articulates how ED assesses compliance with the requirement in Title IX regulations that a recipient “effectively accommodate” the abilities and interests of both sexes, providing a three-part test used to weigh compliance with this requirement.

One developing legal issue surrounding athletics and Title IX’s requirements concerns the participation of transgender students in athletics programs. Some have argued that permitting certain transgender students, particularly transgender girls and women, to participate in athletics consistent with their gender identity violates the rights of women under Title IX. Others take the opposite view—that prohibiting transgender students from participating in athletics consistent with their gender identity violates the statute. Students have brought Title IX challenges both to policies that include and exclude transgender women from covered athletics programs, and litigation on these questions is currently ongoing in the lower federal courts. ED has issued a Notice of Proposed Rulemaking (NPRM) that, if adopted, would amend the agency’s Title IX regulations with specific provisions regarding the participation of transgender students in athletics programs. The proposal would prohibit categorical bans on transgender students participating in sports consistent with their gender identity but would allow some restrictions that—for each grade level, sport, and level of competition—are substantially related to an important educational objective and are aimed to minimize harm to those students whose participation consistent with gender identity is limited.

Another emerging issue under Title IX concerns compensation and benefits for collegiate athletes through entities such as Name, Image, and Likeness (NIL) collectives. In July 2021, the National Collegiate Athletic Association (NCAA), the primary body that regulates intercollegiate athletics, issued an Interim Policy authorizing college athletes to benefit from their NIL. Since the adoption of the NCAA’s Interim Policy, college athletes have made millions of dollars by entering into third-party contracts for the use of their NIL. One major source of compensation has developed through the formation of entities, known as “collectives,” that raise funds and help facilitate NIL deals for a particular university’s athletes. In most cases collectives are not legally affiliated with a university, although how closely aligned they are with a school might vary. Some commentators have criticized the structure and implementation of NIL deals by collectives as benefiting male athletes more than female athletes, including through money and promotion opportunities. Given this alleged disparity, some have argued that schools are evading their responsibilities under Title IX by essentially coordinating with NIL collectives in a manner that benefits men’s sports more than women’s. Given the large number of universities and NIL collectives, the potentially wide variety of formal and informal relationships that may arise between a school and a third-party NIL collective, and the lack of case law or guidance from a federal agency, the application of Title IX in this context is uncertain.

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Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex in education programs and activities that receive federal financial assistance.¹ All K–12 public school districts and all public colleges and universities, as well as most private colleges, receive federal funding, meaning that these schools must comply with Title IX’s statutory requirements and regulations.² While Title IX’s sex discrimination ban has a number of legal applications for schools, such as in cases of sexual harassment,³ one important area the law affects is schools’ sports programs.⁴

Long-standing Title IX regulations prohibit sex discrimination in athletics programs run by covered educational institutions.⁵ The Title IX regulations in part address a history of higher participation rates for males over females in school athletics programs, where boys’ athletics programs received more emphasis than girls’.⁶ Since the law’s passage, the participation rates for girls and women in athletics at the high school and college levels have increased substantially.⁷

In recent years, at least two emerging legal issues under Title IX concerning sports have generated widespread discussion and ongoing litigation. First, the participation of transgender athletes in school sports has prompted substantial debate as to Title IX’s requirements. Some have argued that permitting certain transgender students, particularly transgender girls and women, to participate in athletics consistent with their gender identity can violate Title IX. Others take the opposite view—that prohibiting transgender students from participating in athletics consistent with their gender identity violates the statute.⁸ In addition, the National Collegiate Athletic Association (NCAA) recently altered its policy regarding compensation for collegiate athletes through profits from the use of their name, image, and likeness. This shift has allowed some college athletes to obtain deals worth millions of dollars, often reached through third-party entities known as “collectives.” Some commentators have asserted that universities may be evading their Title IX obligations through their relationships with such collectives.⁹

This report provides an overview of the Title IX athletics requirements that covered schools face, including through agency regulations and guidance, as well as judicial enforcement of the law. The report continues by examining the two emerging legal issues under the statute identified

¹ 20 U.S.C. § 1681.

² Office for Civil Rights, *Sex Discrimination: Frequently Asked Questions*, DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html> (last visited Jan 29, 2024).

³ See CRS Legal Sidebar LSB10726, *Sexual Harassment and Assault at School: Divergence Among Federal Courts Regarding Liability*, by Jared P. Cole (2022).

⁴ 34 C.F.R. §§ 106.41, 106.37 (2023).

⁵ *Id.* §§ 106.41, 106.37.

⁶ See *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993) (“It would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys’ athletic programs to the exclusion of girls’ athletic programs in high schools as well as colleges.”); Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71413, 71419 (Dec. 11, 1979) (“Participation in intercollegiate sports has historically been emphasized for men but not women.”).

⁷ See *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 915 (7th Cir. 2012) (“Since the enactment of Title IX, there has been a huge increase in the number of females participating in high school athletic programs.”); McCormick *ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004) (“The participation of girls and women in high school and college sports has increased dramatically since Title IX was enacted.”); *Title IX at 50: Where We’ve Been, Where We’re Headed, and Why It Matters*, NAT’L EDUC. ASS’N (July 7, 2022), <https://www.nea.org/nea-today/all-news-articles/title-ix-50-where-weve-been-where-were-headed-and-why-it-still-matters>.

⁸ See *infra* “Participation of Transgender Students in Athletics and Title IX.”

⁹ See *infra* “Name, Image, and Likeness Collectives and Compensation for College Athletes.”

above concerning sports: (1) the participation of transgender students on athletics teams, and (2) Name, Image, and Likeness (NIL) compensation for college athletes.

Background on Title IX and Athletics

Title IX generally provides, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁰ Title IX’s statutory and regulatory requirements are primarily enforced in two ways: through private rights of action in federal court directly against recipient schools, and by federal agencies that distribute funding to education programs.¹¹ The Department of Education (ED) distributes substantial funding to elementary, secondary, and postsecondary institutions, and its Office for Civil Rights (OCR) plays a lead role in enforcing Title IX in schools throughout the country that receive funding from the agency.¹²

The statutory text of Title IX does not mention athletics.¹³ Two years after the enactment of Title IX, however, Congress passed legislation specifically directing for the promulgation of regulations implementing the statute “which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.”¹⁴ The regulations were published in 1975, and Congress had 45 days to disapprove them; during that time, Congress held hearings on the regulations.¹⁵ The regulations went into force after Congress declined to disapprove them.¹⁶ The Title IX athletics regulations in place today are largely

¹⁰ 20 U.S.C. § 1681(a).

¹¹ CRS Report R45685, *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations*, by Jared P. Cole and Christine J. Back (2019). If compliance with the statute cannot be achieved by an agency informally, a referral may be made to the Department of Justice. 20 U.S.C. § 1682 (“Compliance with any requirement adopted pursuant to this section may be effected . . . by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.”); 34 C.F.R. § 106.81 (incorporating the procedural provisions of Title VI); *id.* § 100.8(a)(1).

¹² The Attorney General, under Executive Order 12,250, coordinates implementation and enforcement of Title IX across executive agencies. Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 3 C.F.R. § 298 (1980). Subject to the coordinating function of the Attorney General, the Department of Justice’s Civil Rights Division and OCR collaborate in enforcing Title IX consistent with a memorandum of understanding reached between the agencies, which indicates that OCR has primary responsibility for enforcing the statute directly against recipients of financial assistance from ED through complaint investigations and compliance reviews. Memorandum of Understanding Between the United States Department of Education, Office for Civil Rights, and the United States Department of Justice, Civil Rights Division (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf. ED’s Title IX regulations served as the model for the comprehensive “common rule” implementing Title IX by 21 other executive branch agencies, including DOJ. This common rule recognizes ED’s lead role in enforcing Title IX through guidance and investigations. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Final Common Rule, 65 Fed. Reg. 52858 (Aug. 30, 2000) (incorporated throughout the Code of Federal Regulations).

¹³ See 20 U.S.C. § 1681.

¹⁴ Education Amendments Act of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484 (1974) (codified at 20 U.S.C. § 1681 note). Known as the Javits Amendment, this requirement was directed to the Secretary of Health, Education, and Welfare (HEW). In 1979, Congress divided HEW into ED and the Department of Health and Human Services. ED then duplicated the Title IX regulations. *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 287 (2d Cir. 2004)

¹⁵ See *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor*, 94th Cong. (1975).

¹⁶ For a detailed history of the process, see *McCormick*, 370 F.3d at 286–87.

unchanged, although a pending rulemaking proposal from ED would, if adopted, amend them with respect to athletics participation by transgender students.¹⁷

ED’s Title IX regulations prohibit recipient institutions from discriminating based on sex in “interscholastic, intercollegiate, club, or intramural athletics.”¹⁸ The regulations provide that if a recipient institution awards athletic scholarships, it must “provide reasonable opportunities for such awards for members of each sex in proportion to the numbers of students of each sex participating in interscholastic or intercollegiate athletics.”¹⁹ In addition, ED’s Title IX regulations require that recipient institutions must provide equal opportunities in athletics programs for both sexes.²⁰ In deciding whether institutions have provided equal opportunities, ED may consider a list of factors outlined in the regulations that pertain to an institution’s level of support for athletics, including things like equipment, scheduling, facilities, and publicity.²¹ The regulations also provide that athletics options for students must “effectively accommodate the interests and abilities of members of both sexes.”²²

In sum, and as articulated by ED, the Title IX regulations prohibit discrimination in athletics based on sex with respect to (1) student interests and abilities; (2) athletic benefits and opportunities; and (3) financial assistance and scholarships.²³

Administrative Enforcement of Title IX: Guidance Documents from the Department of Education

A substantial portion of the obligations for recipients under Title IX is outlined in a series of documents issued by ED that articulate how the agency interprets the statute and regulations. These documents have significantly shaped the application of Title IX to athletics. As explained below, guidance from ED has generally interpreted the Title IX athletics regulations as imposing three types of requirements on recipient institutions, which concern

- effective accommodation of student interests and abilities;
- equal athletic benefits and opportunities; and

¹⁷ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (April 13, 2023). *See infra* “Participation of Transgender Students in Athletics and Title IX.”

¹⁸ 34 C.F.R. § 106.41(a). The regulations provide that “where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.” *Id.* § 106.41(b).

¹⁹ *Id.* § 106.37(c).

²⁰ *Id.* § 106.41(c).

²¹ *Id.* § 106.41(c)(2)-(10).

²² *Id.* § 106.41(c)(1).

²³ *See* DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX AND ATHLETIC OPPORTUNITIES IN COLLEGES AND UNIVERSITIES (Feb. 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf>. Requirements concerning financial assistance and scholarships may have more relevance in the postsecondary context than for elementary and secondary schools. *See* DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX AND ATHLETIC OPPORTUNITIES IN K-12 SCHOOLS (Feb. 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-k12-athletic-resource-202302.pdf>.

- proportional financial assistance (i.e., scholarships).²⁴

Pursuant to its role in enforcing Title IX, ED’s OCR may conduct compliance reviews of institutions, as well as directed investigations, to ensure that recipients of federal funds are complying with applicable requirements.²⁵ OCR also receives complaints from individuals alleging violations of Title IX by educational institutions and can conduct investigations.²⁶ When violations of the statute are found through these means, the office can seek informal resolution with a school through a resolution agreement.²⁷ According to OCR, if negotiations do not reach a resolution agreement, it may then take more formal enforcement measures, including seeking to suspend or terminate an institution’s funding.²⁸

The oldest guidance document from ED still in effect is a 1979 Policy Interpretation that was actually released by the predecessor of ED, the Department of Health, Education, and Welfare (HEW).²⁹ That document, released after a comment period, explains how the Department (now ED) will assess compliance with the athletics requirements in Title IX regulations. The Policy Interpretation states that it is designed for intercollegiate athletics but that its general principles will often apply to club, intramural, and interscholastic athletics programs, which are also covered by Title IX.³⁰

Effective Accommodation and the “Three-Part Test”

Perhaps most prominently, the 1979 Policy Interpretation articulates how ED will assess compliance with the requirement in Title IX regulations that the levels of competition and selection of sports by a recipient “effectively accommodate” the abilities and interests of both sexes.³¹ Among a number of considerations, the Policy Interpretation provides a three-part test used to weigh compliance with this requirement:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

²⁴ See DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX AND ATHLETIC OPPORTUNITIES IN COLLEGES AND UNIVERSITIES (Feb. 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf>.

²⁵ 34 C.F.R. § 106.71 (incorporating by reference the procedures applicable under 34 C.F.R. § 100.7(a)); OFFICE FOR CIVIL RIGHTS, DEP’T OF EDUC., CASE PROCESSING MANUAL 21–22 (2022) [hereinafter OCR MANUAL], <https://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.pdf>.

²⁶ Dep’t. of Educ., Office for Civil Rights, *About OCR*, <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last visited Feb. 6, 2024).

²⁷ OCR MANUAL, *supra* note 25, at 16–17.

²⁸ *Id.* at 23–34. OCR may instead refer the case to the Department of Justice. *Id.*

²⁹ Congress transferred HEW’s Title IX responsibilities to ED in the Department of Education Organization Act of 1979. 20 U.S.C. § 3441. *See also id.* § 3505 (providing that “orders, determinations, [and] rules” made by a federal agency “in the performance of functions which are transferred” to the Secretary of Education “shall continue in effect” until revoked in accordance with law).

³⁰ Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71413, 71413 (Dec. 11, 1979). Federal courts have applied the Policy Interpretation to high school sports programs. *See Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 855 (9th Cir. 2014); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 290–91 (2d Cir. 2004); *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265 (6th Cir. 1994); *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 171 (3d Cir. 1993).

³¹ A Policy Interpretation, 44 Fed. Reg. at 71417. *See* 34 C.F.R. § 106.41(c)(1).

- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.³²

In 1996, OCR issued another document (following a request for comments) clarifying the role and nature of the three-part test mentioned above for determining compliance with the “effective accommodation” requirement of Title IX athletics regulations.³³ The Clarification indicated that the three-part test provides recipients with options “when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate” in athletics.³⁴ As long as an institution meets one of the three prongs of the test, OCR will consider the institution to be in compliance with this requirement.³⁵

The 1996 Clarification also explained in more detail how an institution can comply with each prong of the test. The first part of the test, which looks to whether “participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments,” begins by determining the number of participation opportunities offered to females and males.³⁶ This analysis centers on counting the number of athletes that participate in an athletics program.³⁷ The analysis under the first prong then asks whether opportunities are substantially proportionate for men and women. Under the 1996 Clarification, OCR considers opportunities substantially proportionate if the additional number of participants “required to achieve proportionality would not be sufficient to sustain a viable team.”³⁸ Schools have substantial flexibility in choosing how to meet this standard: they may eliminate or cap certain teams (usually men’s), or add teams (usually women’s).³⁹ The first-prong inquiry is conducted on a case-by-case basis, with consideration for the specific circumstances and size of a program.⁴⁰

As mentioned above, the second part of the test for measuring “effective accommodation” asks whether a school “can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities” of members of an underrepresented sex in athletics participation.⁴¹ The 1996 Clarification states that this prong essentially examines previous and current efforts to provide participation opportunities through

³² A Policy Interpretation, 44 Fed. Reg. at 71418. The three-part test also applies to high school athletics. See LETTER FROM DEP’T OF EDUC. TO PACIFIC LEGAL FOUNDATION 2 (March 27, 2008), <https://www2.ed.gov/about/offices/list/ocr/letters/title-ix-2008-0327.pdf>.

³³ Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, DEP’T OF EDUC. (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* ED has also emphasized that Title IX does not require eliminating teams in order to comply with the statute, but doing so is a “disfavored practice. Accordingly, when OCR negotiates compliance agreements with institutions, it will seek alternative remedies to eliminating sports teams. Dear Colleague Letter from Gerald Reynolds, Assistant Sec’y for Civil Rights, U.S. DEP’T OF EDUC. 2 (July 11, 2003), <https://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.pdf>. Cf. *infra* “Judicial Examination of Title IX and Athletics.”

³⁷ See Dear Colleague Letter from Norma V. Cantu, Assistant Sec’y for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP’T OF EDUC. (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

program expansion.⁴² The inquiry looks at the entire history of an athletics program and requires a continuing practice of program expansion to satisfy this prong.⁴³ The requirement will not be satisfied, the Clarification indicates, when an institution simply increases the proportional opportunities for an underrepresented sex “by reducing opportunities for the overrepresented sex alone,” or by doing so “to a proportionately greater degree than for the underrepresented sex.”⁴⁴

Finally, a recipient can satisfy the test for “effective accommodation” under the third prong by showing that the interests and abilities of the underrepresented sex have been “fully and effectively accommodated” by the current athletics program.⁴⁵ The 1996 Clarification explains that under this prong, OCR will consider whether there is an unmet interest in a particular sport; the ability to sustain an intercollegiate team in that sport; and “a reasonable expectation of competition for the team.”⁴⁶ If each of these conditions is present, and a school nonetheless does not offer that sport for the underrepresented sex, then a recipient has not fully and effectively accommodated the interests and abilities of its students.⁴⁷

In 2010, OCR released additional guidance in the form of a Dear Colleague Letter focused specifically on part three of the three-part test for complying with Title IX’s “effective accommodation” requirement.⁴⁸ The Letter explained that in examining whether there is (1) unmet interest and (2) sufficient ability to sustain a team, OCR evaluates a range of factors, including if an institution uses nondiscriminatory methods of assessment; whether a viable sports team for the underrepresented sex was eliminated recently; and the frequency of assessments made by the institution of the interests and abilities of the underrepresented sex.⁴⁹ In addition, OCR considers a range of indicators to assess the interest level⁵⁰ and ability to sustain a team⁵¹ among the underrepresented sex.

⁴² *Id.*

⁴³ *Id.* The analysis of the history of program expansion might examine such factors as a recipient’s record of adding teams or increasing the number of athletes of the underrepresented sex. Analysis of a continuing practice of program expansion might examine the current implementation of a policy for requesting the addition of sports or a recipient’s current implementation of a plan or program expansion. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* In circumstances in which an institution has recently eliminated a viable team, OCR assumes that there “is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.” *Id.*

⁴⁸ See Dear Colleague Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, *Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three*, U.S. DEP’T OF EDUC. 3 (April 20, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

⁴⁹ *Id.* at 4–7.

⁵⁰ The non-exhaustive list of factors for evaluating interests includes “requests by students and admitted students that a particular sport be added; requests for the elevation of an existing club sport to intercollegiate status; participation in club or intramural sports; interviews with students, admitted students, coaches, administrators and others regarding interests in particular sports; results of surveys or questionnaires of students and admitted students regarding interests in particular sports; participation in interscholastic sports by admitted students; and participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students.” *Id.* at 6.

⁵¹ OCR will examine factors such as “the athletic experience and accomplishments—in interscholastic, club or intramural competition—of underrepresented students and admitted students interested in playing the sport; opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain an intercollegiate team; and if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team. . . . (continued...) ”

With respect to the last question at issue—(3) whether there is a reasonable expectation of competition for the team—the Dear Colleague Letter indicates that OCR examines “available competitive opportunities in the geographic area in which the institution’s athletes primarily compete.”⁵²

The three-part test is widely cited as a significant aspect of Title IX athletics compliance for schools.⁵³

Equal Athletic Benefits and Opportunities

While the effective accommodation requirement and its three-part test have attracted significant attention, Title IX also requires schools to offer equal athletic benefits and opportunities.⁵⁴ The 1979 Policy Interpretation articulates how ED will examine compliance with the Title IX regulatory requirement that recipients operating athletics programs provide athletic benefits and opportunities for both sexes on an equal basis, including consideration of a number of factors like scheduling and facilities.⁵⁵ Compliance will be assessed “by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Recipients will be in compliance if the compared program components are equivalent, that is, equal or equal in effect.”⁵⁶

Proportional Scholarships

Title IX also requires that athletic scholarships are allocated proportionally. OCR’s 1979 Policy Interpretation indicates that the total amount of scholarship aid for men and women should be proportional to their participation rates.⁵⁷ Institutions comply with this requirement if the comparison shows substantially equal amounts of aid or if a disparity can be explained by legitimate nondiscriminatory factors. Building on this description, a subsequent 1998 letter

participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered; and tryouts or other direct observations of participation in the particular sport in which there is interest.” *Id.* at 6–7.

⁵² *Id.* at 13.

⁵³ See Brian L. Porto, *Unfinished Business: The Continuing Struggle for Equal Opportunity in College Sports on the Eve of Title IX’s Fiftieth Anniversary*, 32 MARQ. SPORTS L. REV. 259, 267 (2021) (“In subsequent litigation, this ‘three-part test’ would become the key metric by which federal courts would measure the institutional defendant’s compliance, or lack thereof, with Title IX.”); 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, 339 (2012) (“[N]o test has received more publicity than the three-part effective accommodation test.”). OCR has clarified that the three-part “effective accommodation” test applies both to intercollegiate and high school athletics. Letter from Dep’t of Educ. to Pacific Legal Foundation 2 (March 27, 2008), <https://www2.ed.gov/about/offices/list/ocr/letters/title-ix-2008-0327.pdf>. The letter also affirms the focus of the third prong on the underrepresented sex. *Id.* at 3.

⁵⁴ 34 C.F.R. § 106.41(c).

⁵⁵ A Policy Interpretation, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979). These factors include providing and maintaining equipment and supplies; scheduling games and practices; allowances for travel and per diem; coaching and tutoring opportunities; assigning and compensating coaches and tutors; providing competitive and practice facilities as well as locker rooms; supplying medical and training facilities and services; offering housing and dining facilities and services; and publicity. *Id.* See 34 C.F.R. § 106.41(c)(2)-(10).

⁵⁶ A Policy Interpretation, 44 Fed. Reg. at 71415. The Policy Interpretation continues, “Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effects of any differences is negligible. If comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability, a finding of compliance may still be justified if the differences are the result of nondiscriminatory factors.” *Id.*

⁵⁷ A Policy Interpretation, 44 Fed. Reg. at 71415; see 34 C.F.R. § 106.37(c).

explains that a disparity in scholarship aid “refers to the difference between the aggregate amount of money athletes of one sex received in one year, and the amount they would have received if their share” had been awarded proportionally.⁵⁸ In other words, if a school’s athletic program is composed of 60% males, then men should (normally) receive 60% of scholarship aid.

Deviations from a substantially proportionate distribution of aid are sometimes permissible, however.⁵⁹ Such disparities are judged according to the unique facts of each case, as a variety of potential nondiscriminatory factors may explain a disparity.⁶⁰ That said, a recipient institution must demonstrate that an asserted factor does not reflect underlying discrimination.

The 1998 letter indicates that when evaluating scholarship programs, OCR first adjusts for any legitimate nondiscriminatory reasons for a disparity.⁶¹ Following this adjustment, if any unexplained disparity in the scholarship budget for a particular sex is 1% or less, there is a strong presumption that the disparity is reasonable.⁶² Alternatively, any unexplained disparity greater than 1% results in a strong presumption that a school is in violation of the “substantially proportionate” standard.⁶³

Judicial Examination of Title IX and Athletics

Although ED’s OCR enforces Title IX’s athletics requirements directly against recipient schools, Title IX’s requirements may also be enforced by individuals via private lawsuits brought in federal court. Even in these private cases, ED’s Title IX regulations and policy statements have shaped judicial interpretation of the requirements of Title IX regarding athletics. For one thing, numerous courts have deferred to the 1979 Policy Interpretation as a reasonable articulation of the requirements of Title IX,⁶⁴ as well as the 1996 Clarification.⁶⁵

Some courts have generally distinguished between two types of Title IX athletics claims: (1) effective accommodation claims and (2) equal treatment claims (with respect to scholarships and other athletic benefits and opportunities).⁶⁶ Generally, courts have reviewed effective accommodation claims more commonly than equal treatment claims.⁶⁷ In many ways, courts have examined these claims in accordance with the considerations outlined by ED in its various

⁵⁸ Dear Colleague Letter from Norma V. Cantu, Assistant Sec’y for Civil Rights, U.S. DEP’T OF EDUC. 3 (July 23, 1998), <https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html#bowlgrn1>.

⁵⁹ *Id.* at 4.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See, e.g.,* McCormick *ex rel.* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 290 (2d Cir. 2004); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002); Chalenor v. Univ. of N.D., 291 F.3d 1042, 1047 (8th Cir. 2002); Neal v. Bd. of Trs., 198 F.3d 763, 771 (9th Cir. 1999); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993); Kelley v. Bd. Of Trs., 35 F.3d 265, 271 (7th Cir. 1994); Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993); Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993).

⁶⁵ *See, e.g.,* Biediger v. Quinnipiac Univ., 691 F.3d 85, 96–97 (2d Cir. 2012); Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 965 (9th Cir. 2010).

⁶⁶ *See* Pederson v. Louisiana State Univ., 213 F.3d 858, 865 n.4 (5th Cir. 2000) (“Alleged violations of Title IX in the area of athletics are often divided into effective accommodation claims and equal treatment claims.”); *Mansourian*, 602 F.3d at 964–65; Boucher v. Syracuse Univ., 164 F.3d 113, 115 (2d Cir. 1999).

⁶⁷ *See* Parker v. Franklin Cnty. Cmty. Sch. Corp., 667 F.3d 910, 916 (7th Cir. 2012); *McCormick*, 370 F.3d at 291 (“Most circuit court opinions in Title IX cases have addressed ‘accommodation’ claims rather than ‘equal treatment’ claims.”).

guidance documents discussed above.⁶⁸ For instance, although the regulations provide for various factors that are relevant considerations in determining whether a school has provided equal athletic opportunities, in line with ED's policy documents, courts have ruled that a failure to effectively accommodate student interests and abilities alone violates Title IX.⁶⁹

Effective Accommodation Claims

Plaintiffs bringing effective accommodation claims against a school bear the burden of showing a disparity in athletics opportunities and unmet interest for the underrepresented sex.⁷⁰ Substantial proportionality between participation rates and enrollment essentially operates as a safe harbor for schools.⁷¹ If a school shows substantial proportionality of participation opportunities for the sexes in its athletics programs, then it has effectively accommodated its students' athletics interests. Courts have consistently concluded that schools can establish substantial proportionality by increasing the athletic opportunities for the underrepresented sex or by decreasing them for the overrepresented sex.⁷² For instance, courts have rejected challenges brought by male athletes against school decisions that rely on sex to cut men's teams in order to achieve proportionality.⁷³

In examining whether a school has provided participation opportunities that are substantially proportional, courts look carefully at the actual numbers of students participating in intercollegiate or interscholastic athletics and demand proportionality that is fairly close to the enrollment makeup of the school.⁷⁴ Consistent with OCR guidance, participation opportunities are substantially proportional if the number of additional participants needed to achieve exact proportionality is not sufficient to sustain a viable team.⁷⁵ In *Ollier v. Sweetwater Union High School District*, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's ruling

⁶⁸ See *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 92–94 (2d Cir. 2012); *Ollier v. Sweetwater Union High School Dist.*, 768 F.3d 843, 854–59 (9th Cir. 2014).

⁶⁹ *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Cohen*, 991 F.2d at 897.

⁷⁰ *Roberts*, 998 F.2d at 830 n.5; *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265, 275 (6th Cir. 1994); see, e.g., *Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264, 1272 (S.D. Cal. 2009), aff'd, 768 F.3d 843 (9th Cir. 2014) ("The Court must conclude, as a matter of law, that plaintiffs have demonstrated that defendants fail to provide female students with opportunities to participate in athletics in substantially proportionate numbers as males. But the District's failure to meet substantial proportionality at CPHS does not preclude it from complying with Title IX in either of the other two approved methods.").

⁷¹ *Roberts*, 998 F.2d at 829 ("In effect, 'substantial proportionality' between athletic participation and undergraduate enrollment provides a safe harbor for recipients under Title IX."); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 271 (7th Cir. 1994).

⁷² See *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1048–49 (8th Cir. 2002); *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 769–70 (9th Cir. 1999); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 275 (6th Cir. 1994); (observing that "[a]n institution need not pour ever-increasing sums into its athletic programs in order to bring itself into compliance, but has the option of reducing opportunities for the overrepresented gender while keeping opportunities for the underrepresented gender stable) (quoting *Cohen*, 991 F.2d at 898–99 n. 15); *Kelley*, 35 F.3d at 269.

⁷³ *Chalenor*, 291 F.3d at 1048–49 (rejecting a Title IX challenge brought by male athletes against the elimination of university's male wrestling team); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 609 (6th Cir. 2002); *Neal*, 198 F.3d at 769–70; *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 635 (7th Cir. 1999).

⁷⁴ See *Biediger*, 691 F.3d at 108 (affirming a district court decision that a disparity of 3.62% violated Title IX where the school's own actions caused the disparity and it could easily add an additional team given it had just eliminated the women's volleyball team); *Roberts*, 998 F.2d at 830 ("[W]e agree with the district court that a 10.5% disparity between female athletic participation and female undergraduate enrollment is not substantially proportionate."); *Cohen v. Brown Univ.*, 101 F.3d 155, 162 (1st Cir. 1996) (affirming a district court ruling that the university violated Title IX and could not establish substantial proportionality with a 13.01% disparity).

⁷⁵ *Ollier v. Sweetwater Union High School Dist.*, 768 F.3d 843, 850, 857 (9th Cir. 2014); *Biediger*, 691 F.3d at 94; Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, DEP'T OF EDUC. (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two>.

that the school district had violated Title IX by failing to provide equal athletic opportunities to both sexes⁷⁶ based on disparities at the plaintiffs' school between the percentage of female athletes and the percentage of female students over a three-year period.⁷⁷ In other words, while girls made up a certain percentage of the school's enrollment, the percentage of female athletes fell below the enrollment percentage by 6.7%, 10.3%, and 6.7% over the course of three years.⁷⁸ The court determined that female athletic participation and overall female enrollment were not substantially proportional.⁷⁹ Given the school's size, the court indicated that a 6.7% disparity was equivalent to 47 girls who would have played sports if there were exact proportionality, and that number was enough to sustain a competitive and viable team.⁸⁰

Even if a school cannot show substantial proportionality, as mentioned above, Title IX's effective accommodation requirement is satisfied if there is a "history and continuing practice of program expansion" for the underrepresented sex that responds to their abilities and interests, or if "the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program."⁸¹

In practice, at least at the federal appellate level, courts appear to apply these standards relatively stringently.⁸² For example, in *Roberts v. Colorado State Board of Agriculture*, a case brought by female college students whose softball team was eliminated, the Tenth Circuit affirmed district court rulings that the university at issue did not meet any of the three prongs for effective accommodation under Title IX.⁸³ First, the appellate court affirmed the district court's conclusion that participation opportunities were not substantially proportionate based on a disparity in enrollment and athletic participation for women of 10.5%.⁸⁴ Second, the court ruled that the university had not maintained a "history and continuing practice" of expanding women's athletics programs.⁸⁵ Even though the university "created a women's sports program out of nothing in the 1970s," opportunities for women declined in the 1980s; and in the face of budget cuts over the preceding 12 years, women's participation opportunities declined by a greater percentage than men's.⁸⁶ The university argued that more weight should be given to its large expansion of

⁷⁶ 768 F.3d at 850, 854. References to a particular circuit in this report (e.g., First Circuit) refer to the U.S. Court of Appeals for that circuit.

⁷⁷ *Id.* at 856.

⁷⁸ *Id.*

⁷⁹ *Id.* at 856–57.

⁸⁰ *Id.* at 856.

⁸¹ See *supra* "Effective Accommodation and the "Three-Part Test""

⁸² See e.g., *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 973 (9th Cir. 2010) ("UCD took a significant step towards Title IX compliance by adding three women's teams in 1996, but Option Two requires more than a single step. It requires evidence of continuous progress toward the mandate of gender equality that Title IX has imposed on funding recipients for the past thirty years. The record before us does not contain undisputed facts showing a history and continuing practice of program expansion that is responsive to women's interests."); *Ollier*, 768 F.3d at 850, 857–58 ("As Plaintiffs suggest, these "dramatic ups and downs" are far from the kind of "steady march forward" that an institution must show to demonstrate Title IX compliance under the second prong of the three-part test."); *id.* at 858–59 (ruling that prong three was not satisfied because "Castle Park's decision to cut field hockey twice during the relevant time period, coupled with its inability to show that its motivations were legitimate, is enough to show sufficient interest, ability, and available competition to sustain a field hockey team"); *Pederson v. La. State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000); *Cohen v. Brown Univ.*, 101 F.3d 155, 166 (1st Cir. 1996) (affirming a district court's ruling that a college failed prong two where the college had a history of program expansion but failed to demonstrate a continuing practice of expansion for women).

⁸³ *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993).

⁸⁴ *Id.* at 830.

⁸⁵ *Id.*

⁸⁶ *Id.*

opportunities for women’s sports in the 1970s, but the court concluded that doing so would read out the requirement of a “continuing practice” of expansion.⁸⁷

Third, the *Roberts* court concluded that the plaintiffs met their burden of showing that the university did not accommodate the interests and abilities of women athletes “fully and effectively.”⁸⁸ The court credited the district court’s various findings about the unmet interests and abilities of the plaintiff softball players, including “the feasibility of their organizing a competitive season of play.”⁸⁹ Moreover, the court explained, the plaintiffs were members of a women’s softball team that played competitively the year before, and the court reasoned that “[q]uestions of fact under this third prong will be less vexing when plaintiffs seek the reinstatement of an established team rather than the creation of a new one.”⁹⁰

Equal Treatment Claims

Though cases addressing Title IX’s effective accommodation requirement are generally more common, courts have also considered claims that a school is not treating one sex equally in its athletics programs.⁹¹ As described previously, Title IX regulations require schools that operate athletics programs to provide athletic benefits and opportunities for both sexes on an equal basis.⁹² Under the regulations, a variety of factors can be relevant to this requirement, including

- the provision of equipment and supplies;
- scheduling of games and practice time;
- travel and per diem allowance;
- opportunity to receive coaching and academic tutoring;
- assignment and compensation of coaches and tutors;
- provision of locker rooms, practice and competitive facilities;
- provision of medical and training facilities and services;
- provision of housing and dining facilities and services; and
- publicity.⁹³

Consistent with ED’s guidance, courts reviewing Title IX equal treatment claims in athletics consider the overall effect of a disparity in resources for one sex program-wide, rather than solely between specific sports.⁹⁴ Schools have discretion to devote more resources to one sport rather than another and are not required to field a team just because the opposite sex has one.⁹⁵ In other words, a disadvantage in resources in one area can be offset by an advantage in other areas.⁹⁶ On

⁸⁷ *Id.*

⁸⁸ *Id.* at 832.

⁸⁹ *Id.* at 831.

⁹⁰ *Id.* at 832.

⁹¹ See *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 916 (7th Cir. 2012); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 291 (2d Cir. 2004) (“Most circuit court opinions in Title IX cases have addressed ‘accommodation’ claims rather than ‘equal treatment’ claims.”).

⁹² 34 C.F.R. § 106.41(c)(2)-(10).

⁹³ *Id.*

⁹⁴ See *A Policy Interpretation*, 44 Fed. Reg. 71413, 71,422 (Dec. 11, 1979); *Parker*, 667 F.3d at 922.

⁹⁵ *Id.*

⁹⁶ *McCormick*, 370 F.3d at 293–94.

the other hand, if no comparable advantage offsets resources, a disparity between specific sports for one sex versus the other can be evidence of a Title IX violation.⁹⁷

One issue that appellate courts have addressed with respect to equal treatment claims is whether scheduling in an athletics program is discriminatory.⁹⁸ In *Parker v. Franklin County Community School Corporation*, the Seventh Circuit ruled that the plaintiffs had alleged sufficient facts to allow their equal treatment claim to go forward.⁹⁹ In that case, half of the girls' basketball games were scheduled for non-primetime nights (such as weekday evenings) while the boys' basketball games were scheduled primarily for primetime nights on Friday and Saturday.¹⁰⁰ According to the court, the defendants failed to offer evidence that females received better treatment in another area of athletics that would offset this disparity.¹⁰¹ The court concluded that a factfinder could determine that the disparity was substantial enough to deprive female students of equal athletic opportunity.¹⁰² The disparity could have a negative impact on girls, the court reasoned, through imposing unfair academic burdens as a result of playing more weeknight games as opposed to games on the weekend, loss of an audience, decrease in school and community support, and psychological harms such as feelings of inferiority.¹⁰³

Likewise, in *McCormick v. School District of Mamaroneck*, the Second Circuit affirmed a lower court ruling that a school district violated Title IX through its scheduling of the girls' soccer season.¹⁰⁴ In that case, the school district scheduled girls' soccer (but not boys') in the spring, rather than the fall, meaning that girls could not compete for a state championship while the boys could.¹⁰⁵ The Second Circuit determined that this scheduling had a negative impact on girls, creating a disparity that was not offset by any other comparably better treatment for female athletes.¹⁰⁶ The court concluded that this disparity denied girls equal athletic opportunities in violation of Title IX.¹⁰⁷ The court reasoned that denying girls the opportunity to compete for a state championship indicated to those girls "that they are not expected to succeed and that the school does not value their athletic abilities" compared to boys.¹⁰⁸ The court also rejected the argument that the girls were not interested in winning, concluding that measuring athletic opportunity on the premise that "lesser value" could be placed on "success for girls" would contradict the statute.¹⁰⁹

Emerging Legal Issues

Two recently developing legal issues surrounding athletics and Title IX's requirements are the participation of transgender students in athletics programs and compensation for collegiate

⁹⁷ See, e.g., *Parker*, 667 F.3d at 924.

⁹⁸ See *Communities for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 696 (6th Cir. 2006).

⁹⁹ *Parker*, 667 F.3d at 924.

¹⁰⁰ *Id.* at 913.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 279 (2d Cir. 2004).

¹⁰⁵ *Id.* at 280–81.

¹⁰⁶ *Id.* at 294.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 295.

¹⁰⁹ *Id.* at 296. The court also concluded that the scheduling was not justified by nondiscriminatory factors. *Id.* at 297–98.

athletes through entities such as Name, Image, and Likeness (NIL) collectives. The participation of transgender athletes in school sports has sparked substantial debate in the past few years. Various states have passed laws restricting transgender girls from playing on teams consistent with their gender identity, and ED has recently issued a notice of proposed rulemaking under Title IX on the subject.¹¹⁰ Likewise, the recent ability of college athletes to enter deals in which they profit from their NIL, often through third-party collectives, has raised questions about the role of universities in facilitating such deals and the potential application of Title IX.¹¹¹

Participation of Transgender Students in Athletics and Title IX

The participation of transgender students in athletics has received sustained attention in recent years; states, the federal government, and courts have each played a role in addressing the issue.¹¹² With respect to Title IX, some have argued that permitting certain transgender students, particularly transgender girls and women, to participate in athletics consistent with their gender identity can violate the law. Others take the opposite view—that prohibiting transgender students from participating in athletics consistent with their gender identity violates the statute.¹¹³

State Approaches

States have taken a range of approaches on the matter, with both state laws and the policies of high school athletics associations being potentially relevant. Some state athletics associations permit transgender students to participate in athletics consistent with their gender identity with no particular requirements or restrictions.¹¹⁴ Others impose certain conditions, such as a documented period of testosterone suppression therapy for transgender girls to participate on female athletics teams.¹¹⁵ By contrast, numerous states have recently passed laws imposing categorical prohibitions.¹¹⁶ For instance, some states classify school athletics teams according to biological sex and prohibit transgender girls from participation in athletics consistent with their gender identity in sports sponsored by public high schools and public postsecondary institutions.¹¹⁷

¹¹⁰ See *infra* “Federal Approach: ED-Proposed Regulation.”

¹¹¹ See *infra* “Name, Image, and Likeness Collectives and Compensation for College Athletes.”

¹¹² See CRS Legal Sidebar LSB10993, *Regulating Gender in School Sports: An Overview of Legal Challenges to State Laws*, by Madeline W. Donley (2024).

¹¹³ Compare *Soule v. Conn. Ass’n of Sch., Inc.*, 90 F.4th 34, 43 (2d Cir. 2023) (“In Plaintiffs’ view, the CIAC Policy of allowing participation consistent with an individual’s established gender identity discriminated against them by requiring Plaintiffs to compete against transgender girls, who Plaintiffs allege have a ‘physiological athletic advantage.’ Plaintiffs claim that by putting them at this alleged competitive disadvantage, the CIAC Policy violates Title IX.”), with *B.P.J. v. W. Va. State Bd. of Educ.*, 649 F. Supp. 3d 220, 225 (S.D.W. Va. 2023) (“B.P.J. alleges that H.B. 3293 violates . . . Title IX.”). Prohibitions can also raise issues under the Constitution’s Equal Protection Clause. See *Hecox v. Little*, 79 F.4th 1009, 1016 (9th Cir. 2023) (affirming lower court decision that state prohibition of transgender girls from participation in athletics violated the Equal Protection Clause).

¹¹⁴ See, e.g., *Soule*, 90 F.4th at 40 (“Ten years ago, the conference governing interscholastic sports in Connecticut made the decision to permit high school students to participate in school-sponsored athletics consistent with the gender identity established in their school records.”); CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE, 2021–2022 HANDBOOK By-Laws art. IX, § B, https://www.casciac.org/pdfs/ciachandbook_2122.pdf.

¹¹⁵ See *Transgender Participation Policy*, WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION (2018), <https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAAtransgenderpolicy.pdf>.

¹¹⁶ See Adeel Hassan, *States Passed A Record Number of Transgender Laws. Here’s What They Say*, N.Y. TIMES (June 27, 2023), <https://www.nytimes.com/2023/06/27/us/transgender-laws-states.html>; Sophia R. Pfander, *Let Them Play Ball: Seeking Solutions to the Recent Spate of Trans Sports Bans*, 2023 WIS. L. REV. 345, 352 (2023).

¹¹⁷ See, e.g., W. VA. CODE § 18-2-25d (2023) (Save Women’s Sports Act); FLA. STAT. § 1006.205 (2023) (Fairness in (continued...))

Students have brought Title IX challenges to both permissive and restrictive policies, and litigation on these questions is ongoing in federal court.¹¹⁸ For instance, the Second Circuit, sitting en banc in *Soule v. Connecticut Association of Schools*, ruled that a group of “non-transgender” girls had standing to challenge a policy permitting transgender girls to participate in sports consistent with their gender identity without restriction.¹¹⁹ The court reasoned that the plaintiffs could bring their claim for a denial of equal athletic opportunity because they alleged facts showing that, but for the participation of transgender girls in competitions, they would have placed higher in athletics contests.¹²⁰

By contrast, the Fourth Circuit recently heard oral argument in *B.P.J. v. West Virginia State Board of Education*, a case brought by a transgender girl against a state law that prohibits her from participating in sports consistent with her gender identity.¹²¹ That case challenges West Virginia’s Save Women’s Sports Act, which provides that only “biological women” may compete on female teams in “[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education.”¹²² The plaintiff in *B.P.J.* has argued that the law amounts to “complete exclusion from school sports altogether.”¹²³ The district court in the case ruled that because Title IX authorizes separate athletic teams based on sex, and does so according to biological sex, the state law did not violate Title IX.¹²⁴ Subsequently, the district court denied a stay of the decision pending appeal,¹²⁵ but a divided Fourth Circuit overturned that denial.¹²⁶ The Supreme Court then denied an application for review of the Fourth Circuit decision, meaning the Fourth Circuit’s decision to stay the district court ruling remains in place as it considers the case.¹²⁷

Federal Approach: ED-Proposed Regulations

ED has issued a Notice of Proposed Rulemaking (NPRM) that, if adopted, would amend the agency’s Title IX regulations with specific provisions regarding the participation of transgender students in athletics programs.¹²⁸ The proposal would prohibit categorical bans on transgender students participating in sports consistent with their gender identity but would allow some

Women’s Sports Act); ARIZ. REV. STAT. § 15-120.02 (2024) (Save Women’s Sports Act). Arizona’s law also applies to “a private school whose students or teams compete against a public school.”

¹¹⁸ See, e.g., *Soule*, 90 F.4th at 5 (concluding that plaintiffs had standing to sue policy allowing transgender girls to participate in athletics without restriction); *B.P.J.*, 649 F. Supp. 3d at 233 (ruling that West Virginia’s ban on transgender girls from competing in sports consistent with their gender identity did not violate Title IX); *Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831, at *19 (D. Ariz. July 20, 2023) (granting a preliminary injunction against Arizona’s state ban because it likely violated Title IX).

¹¹⁹ *Soule*, 90 F.4th at 40–41.

¹²⁰ *Id.*

¹²¹ See *B.P.J.*, 649 F. Supp. 3d at 233. See also *Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831, at *19 (D. Ariz. July 20, 2023) (granting a preliminary injunction against Arizona’s state ban because it likely violated Title IX).

¹²² W. VA. CODE § 18-2-25d (2023).

¹²³ *B.P.J.*, 649 F. Supp. 3d at 233.

¹²⁴ *Id.*

¹²⁵ *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-CV-00316, 2023 WL 1805883, at *1 (S.D.W. Va. Feb. 7, 2023).

¹²⁶ *B.P.J. v. W. Va. State Bd. of Educ.*, No. 23-1078, 2023 WL 2803113, at *1 (4th Cir. Feb. 22, 2023).

¹²⁷ *W. Virginia v. B.P.J.*, 143 S. Ct. 889 (2023). Justice Alito, joined by Justice Thomas, dissented from the denial because the case “concerns an important issue that this Court is likely to be required to address in the near future.” *Id.* at 889 (Alito, J., dissenting from denial of application to vacate injunction).

¹²⁸ See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (April 13, 2023).

restrictions that—for each grade level, sport, and level of competition—are substantially related to an important educational objective and are aimed to minimize harm to those students whose participation consistent with their gender identity is limited.¹²⁹ More broadly, ED’s athletics NPRM follows another Title IX NPRM that would, if adopted, define the scope of Title IX’s general prohibition against sex discrimination to include discrimination based on sexual orientation and gender identity.¹³⁰

Both proposals follow a 2020 Supreme Court decision, *Bostock v. Clayton County*, in which the Court ruled that the ban on sex discrimination in the workplace under Title VII of the Civil Rights Act of 1964 extends to discrimination based on sexual orientation and gender identity.¹³¹ A number of federal appellate courts have applied the reasoning of that case to Title IX, concluding that sex discrimination under the statute includes discrimination based on sexual orientation and gender identity.¹³²

ED’s Title IX athletics NPRM appears to reflect an attempted middle ground position between a restrictive categorical ban and a permissive policy without limitations. The proposal does not appear to require schools to limit the participation of transgender student athletes.¹³³ Schools with permissive policies would likely not need to alter their practices under the proposal. The proposed regulations would, however, prohibit a categorical ban on transgender student athlete participation, including a ban on transgender girls from participating in female athletics, as categorical bans would not account for the considerations required by the NPRM.¹³⁴ Instead, under the proposed regulations, limitations on the participation of transgender athletes would only be acceptable when—for each sport, educational level, and level of competition—they are both substantially related to achieving an important educational objective and framed to minimize harm.¹³⁵

“Important Educational Objective”

Under ED’s Title IX athletics NPRM, one requirement for any limitation on transgender student athletes’ participation in sports would be that such limitation is substantially related to an important educational objective.¹³⁶ The NPRM discusses two such objectives that could justify limitations (though it indicates that the regulations would not necessarily preclude another objective). First, under the NPRM, fairness in competition could be an important educational objective, as competition is key to many sports, particularly at the college and high school

¹²⁹ *Id.* at 22891.

¹³⁰ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022).

¹³¹ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020). *See* 42 U.S.C. § 2000e-2(a)(1).

¹³² *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023), *cert. denied sub nom.* *Metro. Sch. Dist. v. A. C.*, No. 23-392, 2024 WL 156480 (U.S. Jan. 16, 2024); *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). By contrast, the en banc Eleventh Circuit has ruled that separating school bathrooms according to biological sex does not violate Title IX. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 796 (11th Cir. 2022) (holding that “separating school bathrooms based on biological sex passes constitutional muster and comports with Title IX”).

¹³³ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (April 13, 2023).

¹³⁴ *Id.* at 22873.

¹³⁵ *Id.* at 22891.

¹³⁶ *Id.*

levels.¹³⁷ Second, preventing injuries in sports could be an important objective, and limitations might be acceptable on this basis.¹³⁸

ED’s proposal also points out several objectives that would not be acceptable under the NPRM’s provisions, such as codifying disapproval of a student’s gender identity; requiring adherence to sex stereotypes; or solely relying on administrative convenience to support a policy.¹³⁹ Recipients also would not be permitted to establish criteria “solely for the purpose of excluding transgender students from sports” under the NPRM, or as a pretext for singling out transgender students for harm.¹⁴⁰

“Substantially Related”

According to the NPRM, limitations on the participation of transgender athletes consistent with their gender identity must, for each sport, education level, and level of competition, be “substantially related” to achieving an important educational objective. Drawing from judicial application of principles originating in the Fourteenth Amendment’s Equal Protection Clause, ED asserts that there must be a “‘direct, substantial relationship between’ a recipient’s objective and the means used to achieve that objective,” and restrictions may not rely on “overly broad generalizations” about the capacities of males and females.¹⁴¹ For example, ED explains that a school district or university might invoke fairness in competition to support certain sex criteria for transgender athletes, but those criteria must be substantially related to achieving fairness in competition in the specific sport at issue, at the particular level of competition, and at that grade level.¹⁴²

Grade Levels, Sports, and Levels of Competition

ED’s position is that students of different grades may not be similarly situated in terms of athletic skills and the larger purposes of athletics participation.¹⁴³ For students in lower grade levels, such as elementary and middle school, participation in team sports may reflect purposes beyond competition such as introducing students to new activities and developing physical fitness and teamwork.¹⁴⁴ By contrast, at the high school and college level, some athletics teams might be more focused on elite competition.¹⁴⁵

ED’s Title IX athletics NPRM thus indicates that there would be “few, if any” sex eligibility criteria for elementary students that would satisfy the proposed regulations’ requirements, and that it would be “particularly difficult” to satisfy the standard with criteria imposed in grades immediately following elementary school.¹⁴⁶ On the other hand, at the high school and college

¹³⁷ *Id.* at 22873.

¹³⁸ *Id.*

¹³⁹ *Id.* at 22872.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 22873 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). See *United States v. Virginia*, 518 U.S. 515, 533 (1996).

¹⁴² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860, 22873 (April 13, 2023).

¹⁴³ *Id.* at 22874.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 22875.

¹⁴⁶ *Id.*

levels, sex criteria imposed to ensure fairness in competition might be more likely to comply with the proposed regulations.¹⁴⁷

The NPRM acknowledges that schools' athletics programs take a wide variety of formats. In lower grades, the emphasis is often on participation and learning rather than elite competition (as in an intercollegiate setting).¹⁴⁸ Within athletics programs, some levels of competition may differ within grade levels.¹⁴⁹ Those programs that promote broad participation, such as intramural or junior varsity programs, may differ from the competition considerations for a varsity team.¹⁵⁰ ED observes that certain sports' national governing bodies allow transgender athletes to participate consistent with their gender identity without restriction below the elite level.¹⁵¹ Therefore, the NPRM indicates that eligibility criteria for transgender athletes would be more likely to satisfy the proposed regulations at the high school and university levels, perhaps reflecting the possibility that considerations related to elite competition are more likely in that context than for elementary and middle school students.¹⁵²

Harm Minimization

Eligibility criteria must also, according to the proposal, be crafted in a manner that minimizes harms to those students whose opportunity to participate in sports consistent with their gender identity is limited or denied.¹⁵³ Even eligibility criteria that are substantially related to an important educational objective would violate the proposal if a school could reasonably apply less harmful criteria that achieve those objectives.¹⁵⁴ For example, according to ED, if a school requires documentation of a student's gender identity, the school must take steps to minimize the potential harm that this documentation might cause for students, such as privacy invasion or disclosure of confidential information.¹⁵⁵

Name, Image, and Likeness Collectives and Compensation for College Athletes

Another emerging issue under Title IX concerns compensation and benefits for university athletes and the ability to profit from the use of their own name, image, and likeness (NIL).

NCAA NIL Policy Pre-July 2021

Prior to July 2021, the NCAA prohibited student athletes from obtaining compensation for the commercial use of their NIL.¹⁵⁶ In practice, that meant college athletes were historically barred by

¹⁴⁷ *Id.* at 22875.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 22876.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 22877.

¹⁵⁵ *Id.*

¹⁵⁶ See CRS Report R46828, *Student Athlete Name, Image, Likeness Legislation: Considerations for the 117th Congress*, by Whitney K. Novak (2021).

NCAA rules from entering into compensation agreements, such as endorsement deals, if they wanted to maintain eligibility to participate in college athletics.¹⁵⁷

NCAA NIL Interim Policy

Following the passage of a number of state laws that provided student athletes the right to earn NIL compensation,¹⁵⁸ as well as judicial decisions ruling that certain NCAA rules concerning education-related compensation and benefits violated antitrust laws,¹⁵⁹ the NCAA in 2021 issued an interim policy suspending its rules related to NIL compensation for student athletes.¹⁶⁰ The NCAA explained that under the interim policy, student athletes could engage in NIL activities consistent with the law of the state where the school is located.¹⁶¹ That policy also indicated that students could use a “professional services provider” to facilitate NIL compensation deals.¹⁶²

Since the adoption of the NCAA’s Interim Policy in July 2021, college athletes have entered into NIL deals reaching millions of dollars.¹⁶³ Collectively, college athletes are estimated to have made almost a billion dollars in the first year that they could profit from their NIL.¹⁶⁴ It appears that universities sometimes directly facilitate NIL benefits for their athletes.¹⁶⁵ Other times, NIL compensation may occur through the formation of third-party entities, known as “collectives,” that raise funds and help facilitate NIL deals for a particular university’s athletes.¹⁶⁶ Although there is no established legal definition of these entities, collectives generally collect and pool resources from fans, alumni, donors, and businesses, sometimes referred to as “boosters,”¹⁶⁷ to generate NIL opportunities for athletes at a university.¹⁶⁸ Players might be paid for endorsements, appearing at events, signing autographs, or posting on social media.¹⁶⁹ Generally, collectives

¹⁵⁷ See *id.*; Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107, 1120 (2023).

¹⁵⁸ For more information on these state laws, see CRS Report R46828, *Student Athlete Name, Image, Likeness Legislation: Considerations for the 117th Congress*, by Whitney K. Novak (2021).

¹⁵⁹ See *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2166 (2021); *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1053 (9th Cir. 2015). See CRS Legal Sidebar LSB10613, *National Collegiate Athletic Association v. Alston and the Debate over Student Athlete Compensation*, by Whitney K. Novak (2021).

¹⁶⁰ *Interim NIL Policy*, NAT’L COLLEGIATE ATHLETIC ASS’N (July 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See Barry Werner, *Top NIL Earners in NCAA*, YAHOO SPORTS (Sept. 14, 2023), <https://perma.cc/L93V-SVG4>; NIL Valuations and Rankings, ON3NIL, <https://www.on3.com/nil/rankings/> (last visited Jan. 24, 2024).

¹⁶⁴ See Josh Moody, *The Current State of NIL*, INSIDE HIGHER ED (June 7, 2023), <https://www.insidehighered.com/news/students/athletics/2023/06/07/two-years-nil-fueling-chaos-college-athletics>.

¹⁶⁵ See Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107, 1125–26 (2023).

¹⁶⁶ Memorandum from Office of Chief Counsel, Internal Revenue Service on Whether Operation of an NIL Collective Furthers an Exempt Purpose Under Section 501(c)(3) (May 23, 2023), <https://www.irs.gov/pub/irsoia/am-2023-004-508v.pdf>; David Fahrenthold and Billy Witz, *The Best Teams That Money Could Buy*, N.Y. TIMES (Dec. 31, 2023), <https://www.nytimes.com/2023/12/31/us/college-athletes-nil-sugar-rose-bowl.html>.

¹⁶⁷ See Pete Nakos, *What Are NIL Collectives and How Do They Operate?* ON3NIL (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/>; Noah Henderson, *A Pragmatic Argument Against Title IX’s Reach to Collectives*, SPORTS ILLUSTRATED (Nov. 2, 2023), <https://www.si.com/fannation/name-image-likeness/news/a-pragmatic-argument-against-title-ix-reach-nil-collectives-noah9>.

¹⁶⁸ See Dennis Dodd, *Inside the World of ‘Collectives’ Using Name, Image, and Likeness to Pay College Athletes, Influence Programs*, CBS SPORTS (Jan. 26, 2022), <https://www.cbssports.com/college-football/news/inside-the-world-of-collectives-using-name-image-and-likeness-to-pay-college-athletes-influence-programs/>.

¹⁶⁹ Eric Olson, *If College Athletes Can Earn NIL Money From the Schools, What Becomes of Donor-Backed* (continued...)

formally operate independently of the university whose athletes participate, and increasingly, multiple NIL collectives might support the same university's athletes.¹⁷⁰ Some collectives are focused on only a small number of athletes, others on specific sports, while others are intended to benefit all athletes at a university.¹⁷¹ The Collective Association, which is composed of various such collectives, has indicated that collectives are responsible for about 80% of the money paid to athletes via NIL activities.¹⁷² According to news reports, there is at least one collective for every school in each of the major college football conferences.¹⁷³

While a university's athletics department is subject to the requirements of Title IX due to the school's receipt of federal financial assistance, an independent third party is not itself subject to Title IX requirements unless it also received federal funding. NIL collectives are generally separate legal entities from a university.¹⁷⁴ Some are formed as nonprofit entities under state law and have recognized tax exemptions.¹⁷⁵ As mentioned above, the amount of money and benefits that have recently flowed to college athletes through NIL compensation following the NCAA's Interim Policy is significant.¹⁷⁶ Some commentators have observed that the NIL marketplace has generated higher compensation for male athletes than female athletes.¹⁷⁷ Some have argued that universities are evading Title IX requirements through their relationships with third-party NIL collectives.¹⁷⁸ Put another way, some have questioned whether universities are coordinating with third-party NIL collectives to benefit their athletics programs for men more than women.

Potential Application of Title IX to NIL Compensation

Given the large number of universities and NIL collectives and the potentially wide variety of formal and informal relationships that may arise between a school and a third-party NIL

Collectives?, AP NEWS (Dec. 11, 2023), <https://apnews.com/article/nil-collectives-bad6da24e03742cda9fdb66db6ace95>.

¹⁷⁰ Memorandum from Office of Chief Counsel, Internal Revenue Service on Whether Operation of an NIL Collective Furthers an Exempt Purpose Under Section 501(c)(3) (May 23, 2023), <https://www.irs.gov/pub/irsoia/am-2023-004-508v.pdf>.

¹⁷¹ *Id.*

¹⁷² *Name Image, and Likeness, and the Future of College Sports: Hearing Before the Sen. Comm. on the Judiciary*, 118th Cong. (2023) (statement of Walker Jones, Executive Director, The Grove Collective).

¹⁷³ David Fahrenthold and Billy Witz, *How Rich Donors and Loose Rules are Transforming College Sports*, N.Y. TIMES (Oct. 21, 2023), <https://www.nytimes.com/2023/10/21/us/college-athletes-donor-collectives.html>.

¹⁷⁴ *Federal Tax/Exempt Organizations Advisory: The IRS's Latest Play on NIL Collectives: Tax-Exempt Status on the Defensive*, ALSTON & BIRD (Oct. 18, 2023), <https://www.alston.com/en/insights/publications/2023/10/the-irss-latest-play-on-nil-collectives>.

¹⁷⁵ Memorandum from Office of Chief Counsel, Internal Revenue Service on Whether Operation of an NIL Collective Furthers an Exempt Purpose Under Section 501(c)(3) (May 23, 2023), <https://www.irs.gov/pub/irsoia/am-2023-004-508v.pdf>.

¹⁷⁶ Josh Schafer, *NIL: Here's How Much Athletes Earned in the First Year of New NCAA Rules*, YAHOO FINANCE (July 1, 2022), <https://finance.yahoo.com/news/nil-heres-how-much-ncaa-athletes-earned-185901941.html>.

¹⁷⁷ See Carly Wanna and Bloomberg, *Men Make Twice as Much Money as Women Under the NCAA's New Rules That Allow College Basketball Players to Cash In*, FORTUNE (Mar. 16, 2023), <https://fortune.com/2023/03/16/how-much-do-college-basketball-players-make-ncaa-men-twice-as-much-women-nil/>; Letter from the Drake Group to Dep't of Educ., Office for Civil Rights (Aug. 1st, 2023), <https://www.thedrakegroup.org/wp-content/uploads/2023/08/Aug.-5-The-Drake-Group-to-OCR-Letter-RE-NILs-2023.pdf>; Letter from the Drake Group to Dep't of Educ., Office for Civil Rights (Mar. 9, 2023), <https://www.thedrakegroup.org/wp-content/uploads/2023/06/OCR-TDG-Meeting-March-9-2023.pdf>.

¹⁷⁸ See Letter from the Drake Group to Dep't of Educ., Office for Civil Rights 1 (Aug. 1st, 2023), <https://www.thedrakegroup.org/wp-content/uploads/2023/08/Aug.-5-The-Drake-Group-to-OCR-Letter-RE-NILs-2023.pdf>.

collective, as well as the lack of case law or federal agency guidance, application of Title IX in this context is uncertain. In contexts not involving a third-party NIL collective, a recipient university's direct negotiation of NIL benefits for some of its athletics teams but not for others might be a relevant consideration in a challenge under Title IX that the school is not treating one sex equally in its athletics programs.¹⁷⁹

In the context of third-party NIL collectives, one possibility of a Title IX challenge might be based on the argument that a university's active facilitation of NIL deals for athletes with a third-party NIL collective provides more athletic benefits and opportunities for men than for women.¹⁸⁰ A recently filed lawsuit argues that a university provides better publicity for men than women by giving male athletes "greater NIL-related training, opportunities, and income than its female student-athletes."¹⁸¹ In that case, there appears to be a third-party NIL collective that supports the university athletics program and an officially university-licensed "NIL marketplace."¹⁸²

Another theory of Title IX liability might be that a particular NIL collective's structure and relationship with a university's athletics program are so closely aligned that it effectively constitutes a program or activity of the school.¹⁸³ Under that theory, one might argue that the benefits and compensation provided by that NIL collective should be considered as resources devoted to the school's athletics program, essentially imputing those benefits to the university itself, in a Title IX challenge that examines whether the school is treating the sexes equally or providing proportional athletic scholarships.¹⁸⁴

Whether a university has violated Title IX through its relationship with an NIL collective would likely turn on the specific facts regarding its relationship with that entity. One important consideration might be how close the ties are between a university and a NIL collective, or the extent of coordination between them. While OCR has not issued public guidance or regulations specific to the application of Title IX to NIL-related compensation, Title IX itself provides that a "program or activity" includes "all the operations of ... a college [or] university" that receives

¹⁷⁹ See generally Alicia Jessop & Joe Sabin, *The Sky Is Not Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men's Sport and Women's Sport Athletes*, 31 J. LEGAL ASPECTS OF SPORT 53, 71 (2021).

¹⁸⁰ See generally Letter from The Drake Group to Dep't of Educ., Office for Civil Rights (Mar. 9, 2023); Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107, 1146 (2023); *Lawsuit with Claim of Unequal Access to NIL Opportunities Raises New Title IX Concerns*, HOLLAND AND KNIGHT (Dec. 19, 2023), <https://www.hklaw.com/en/insights/publications/2023/12/lawsuit-with-claim-of-unequal-access-to-nil-opportunities-raises>.

¹⁸¹ See Class Action Complaint, *Schroeder v. Univ. of Or.*, No. 6:23-cv-01806 (D. Or. Dec. 1, 2023).

¹⁸² See *University of Oregon Launches First Licensed School NIL Marketplace in College Athletics*, GODUCKS (Mar. 3, 2022), <https://goducks.com/news/2022/3/3/general-university-of-oregon-launches-first-licensed-school-nil-marketplace-in-college-athletics.aspx>. The website can be found here: <https://opendorse.com/oregon-ducks>.

¹⁸³ See generally Letter from The Drake Group to Dep't of Educ., Office for Civil Rights 1 (Aug. 1st, 2023), <https://www.thedrakegroup.org/wp-content/uploads/2023/08/Aug.-5-The-Drake-Group-to-OCR-Letter-RE-NILs-2023.pdf>; Noah Henderson, *A Pragmatic Argument Against Title IX's Reach to Collectives*, SPORTS ILLUSTRATED (Nov. 2, 2023), <https://www.si.com/fannation/name-image-likeness/news/a-pragmatic-argument-against-title-ix-reach-nil-collectives-noah9> ("However, as every day passes, these collectives become increasingly enmeshed with their respective universities. Athletic departments have become gradually more liberal in their practices: telling collectives how to distribute funds to players, advertising the collective, and adopting these collectives as an arm of their own fundraising strategies. As the independent nature of collectives dissipates, the legal argument for Title IX application grows stronger.").

¹⁸⁴ See generally Letter from The Drake Group to Dep't of Educ., Office for Civil Rights 3–4 (Aug. 1st, 2023), <https://www.thedrakegroup.org/wp-content/uploads/2023/08/Aug.-5-The-Drake-Group-to-OCR-Letter-RE-NILs-2023.pdf>.

federal funding.¹⁸⁵ Title IX regulations also provide that schools may not “[a]id or perpetuate discrimination ... by providing significant assistance” to third parties that discriminate in providing a “benefit or service to students or employees.”¹⁸⁶ To the extent that a NIL collective, or perhaps the benefits delivered through a collective, can be said to constitute an operation, program, or activity of a university under Title IX, that could indicate that benefits distributed by the NIL collective to student athletes are relevant considerations in a Title IX suit and could be considered benefits provided by the university’s athletics program.

Analogous Title IX Caselaw

Though it does not concern NIL collectives directly, one federal court case that might be relevant to the relationship between a university’s programs and NIL collectives for Title IX purposes is the Eighth Circuit’s decision in *Chalenor v. University of North Dakota*.¹⁸⁷ In that case, male wrestlers whose team was eliminated from the athletics program sued the school under Title IX.¹⁸⁸ The defendant university argued that continuing to fund the team would have violated Title IX, because a larger percentage of men than women participated in intercollegiate athletics and men received a disproportional share of the athletics budget. The plaintiffs countered that a private donor had offered to fund the team, so the team “would not have used resources that otherwise” would be available for women, rendering the school’s decision essentially a quota system that they argued violated Title IX.¹⁸⁹ The court ruled for the university, reasoning that the school could not avoid Title IX requirements through the substitution of private funding.¹⁹⁰ According to the court, if the university had accepted the donation, its disbursement would have been subject to Title IX.¹⁹¹ The court effectively concluded that schools may not avoid providing equal athletic opportunities by using outside funding to give one sex greater than proportional opportunities.¹⁹²

The reasoning of *Chalenor* appears to support the proposition that a university relying on resources that result in unequal athletic opportunities in its programs will not avoid Title IX liability simply because the funding stems from outside the university. Put another way, the origin of the resources devoted to a university’s athletics program may be irrelevant to a Title IX analysis. Once athletics resources become part of the university’s operations, the benefits and opportunities in the athletics program must be distributed equitably. Consistent with this reasoning, ED has explained that when booster clubs support and supplement certain athletic teams in a program, schools must still ensure that treatment, benefits, and opportunities are equivalent for men and women.¹⁹³ Once the resources from a booster club support an athletic

¹⁸⁵ 20 U.S.C. § 1687.

¹⁸⁶ 34 C.F.R. § 106.31(b)(6).

¹⁸⁷ 291 F.3d 1042, 1044 (8th Cir. 2002).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1048.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX AND ATHLETIC OPPORTUNITIES IN COLLEGES AND UNIVERSITIES (Feb. 2023) (citing to *Chalenor* for this principle), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf>.

team or program, those resources are considered in the overall examination of providing equal athletic opportunities and benefits.¹⁹⁴

Conclusion

Since Title IX's enactment, participation rates for girls and women in athletics have increased substantially. Schools are under an obligation to provide proportional athletics scholarships, equivalent benefits and opportunities for each sex, and to accommodate interests and abilities effectively. If Congress disagrees with the implementation of the statute at the agency level, or judicial application of Title IX in court, Congress has substantial discretion to amend the statute or direct the modification of agency regulations. Congress could, for instance, change the applicable considerations in a Title IX athletics claim, or establish new requirements that could be tailored to the high school or postsecondary context.

Emerging legal issues under Title IX pose new considerations for Congress, such as the participation of transgender athletes in sports and compensation for college athletes. While these disputes are ongoing in the federal courts, Congress could, for example, address the participation of transgender athletes in school sports. For instance, the House of Representatives passed the Protection of Women and Girls in Sports Act, which would define sex as based on “reproductive biology and genetics at birth” and prohibit schools from allowing “a person whose sex is male to participate in an athletic program or activity that is designated for women or girls.”¹⁹⁵ Alternatively, Congress could instead enact provisions consistent with ED's pending athletics NPRM. If, however, Congress disagrees with the substance of ED's pending NPRM on athletics, it could supersede any final rule with alternative requirements, or even direct a new rulemaking consistent with different standards. In addition, if the NPRM were adopted and Congress wished to limit its effect, pursuant to the Congressional Review Act, Congress could pass a joint resolution of disapproval within the time limits that statute establishes.¹⁹⁶

Likewise, Congress could amend the law with specific requirements for federally funded athletics programs regarding their relationships with third-party NIL collectives. Several bills have been introduced to regulate NIL contracts that might have implications for Title IX.¹⁹⁷

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¹⁹⁴ See *Daniels v. Sch. Bd. of Brevard Cnty., Fla.*, 985 F. Supp. 1458, 1462 (M.D. Fla. 1997) (granting a preliminary injunction for a Title IX athletics violation by a K–12 school board where the boys' program was favored over the girls'; the defendant argued that because it provided equal funding for the boys' and girls' programs it was not responsible for booster club fundraising, but the court concluded defendant had acquiesced to this funding system and was responsible for it).

¹⁹⁵ H.R. 734, 118th Cong. (2023).

¹⁹⁶ See CRS Report R45248, *The Congressional Review Act: Determining Which “Rules” Must Be Submitted to Congress*, by Valerie C. Brannon and Maeve P. Carey (2019).

¹⁹⁷ See, e.g., S. 2495, 118th Cong. (2023); H.R. 4948, 118th Cong. (2023).

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