

Avoiding Imputed Liability Under Title IX For NIL Collectives’ Football Favoritism

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In our last article, we discussed how Title IX provides guardrails for universities’ actions in light of the quickly changing NIL landscape. As we discussed, a school is always responsible for its own compliance with Title IX—including a responsibility to provide equitable financial assistance and publicity to its student-athletes—and can be liable for its own failure to comply with the requirements of Title IX.

However, a school’s responsibilities under Title IX may not stop with the school’s own conduct, and might extend to the conduct of entities or organizations with which the school is closely involved.

If schools wish to become more involved with, or even partner with, NIL collectives to enhance earning opportunities for their student-athletes, schools should ensure that their support and involvement with collectives do not rise to a level that could dissolve the legal “separateness” between the school and the collective.

IMPUTED LIABILITY UNDER TITLE IX

Individual and corporate “separateness” is a central tenet of the American legal system—individuals and entities are not generally liable for the conduct of others. However, there are circumstances in which the law will hold one person or entity responsible for the conduct of another based on the relationship between them. For example, employers are sometimes held to be vicariously liable for the conduct of their employees even if the employer did not authorize the employee’s actions. Likewise, under certain circumstances, a school could be

held responsible under Title IX for the discriminatory actions of another entity.

Under Title IX, a school can be liable for the actions of a third-party if the school provides “significant assistance” to the third-party and the third-party

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discriminates on the basis of sex in its provision of benefits or services to the school’s students or employees. 45 C.F.R. § 86.31(b)(6). The regulation is designed to prevent a school from indirectly discriminating on the basis of sex through a third-party with which it is “so connected” that the third-party’s discriminatory conduct should be attributable to the school. See 40 Fed. Reg. 24,128, at 24,153 (1975).

Whether a school provides “significant assistance” to a third-party is a factual determination, but the regulation makes clear that factors such as (i) direct financial assistance, (ii) faculty sponsors, (iii) the use of the school’s facilities, and (iv) the use of the school’s administra-

tive staff or employees are all considered to determine whether the school has provided a third-party with “significant assistance.” Each factor standing alone may be “significant enough to create the nexus” required for a school to be liable for a third-party’s discriminatory actions under Title IX. *Id.*

In the modern NIL landscape, universities may feel compelled by competitive pressures—to actively support or partner with NIL collectives in order to increase NIL earning opportunities for their student-athletes. A school’s potential assistance to NIL collectives can take many forms: the use of university facilities for meetings with student-athletes and content creation, the use of university trademarks on the collective’s content and in connection with the collective’s events, the attendance of the school’s coaches at collective events, and even direct funding from the school to the collective.

NIL collectives are not recipients of federal funds and therefore do not have to comply with the requirements of Title IX—collectives are not required to provide equitable financial assistance or publicity to male and female student-athletes, and will largely take actions based on actual or assumed market forces. But if a collective directs most of its resources and efforts towards the most popular collegiate sports—football and men’s basketball—with non-market-based payments (see our October article), then a school that provides substantial support to such a collective might be deemed to provide the collective with “significant assistance” such that the school could become responsible for discriminatory conduct of the collective.

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criminating” in providing more benefits to a school’s male student-athletes, then the school conceivably could find itself liable under Title IX for the affiliated collective’s actions.

Universities can provide some assistance to support NIL collectives, but they should be proactive in determining how much support they are willing to provide and how the relationship will be structured. Schools should ask themselves what resources they will make available to the collective and whether engagement with the collective is more extensive than with sponsors or other third-parties with whom the school has a business relationship. By being measured in their support of NIL collectives, schools can maintain legal “corporate separateness” and reduce the risk that they will be held responsible under Title IX for discriminatory actions taken by the collective.

UPDATED NCAA GUIDANCE

The NCAA issued updated guidance on October 26, 2022 (the “Updated Guidance”) in an attempt to clarify the involvement that schools can have in the NIL marketplace. Under the Updated Guidance, schools are permitted to provide education to students and NIL collectives in connection with NIL opportunities. However, schools are not permitted to provide services, such as graphics design, tax preparation, contract review, or access to equipment to support NIL activity unless the same benefit is generally available to the school’s student body. With respect to collectives, schools are not permitted to subscribe and donate cash to the collective, provide assets to a donor as an incentive for providing funds to the collective, or permit an athletics department staff member to be employed by the collective.

While the Updated Guidance can provide schools and athletics departments with some guardrails to avoid

providing “significant assistance” to NIL collectives, the Updated Guidance is not law. A school that follows the Updated Guidance is not guaranteed to avoid imputed liability under Title IX for the potential discriminatory actions of a NIL collective. A school should ensure that any engagement it has with a NIL collective is compliant with both the Updated Guidance and the requirements of Title IX to avoid potential legal responsibility for discriminatory conduct by the collective.

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VICARIOUS LIABILITY UNDER STATE AND COMMON LAW

In addition to the potential for imputed liability under Title IX, schools could also be liable for the actions of NIL collectives under state and common law theories of liability.

A school that interacts heavily with a NIL collective could be at risk of being held vicariously liable for the collective’s actions under a principal-agent theory.

A school could be at risk for the actions of a NIL collective based on a theory of “apparent authority” if a third-party reasonably believed that the collective had authority to act on the school’s behalf based on the school’s own actions. If a school frequently publishes content, financially supports, or otherwise interacts with a NIL collective, it could imply that

the collective is authorized to act on the school’s behalf.

Under the employment theories urged by the FLSA plaintiffs in Johnson and by the NLRB in its action against prominent university in California, the Pac-12 and the NCAA, a school conceivably could be liable under a “joint employer” theory with a collective that contracts directly with student-athletes in return for the provision of personal services.

In addition to conducting a “significant assistance” analysis under Title IX, a school should carefully consider state and common law theories of vicarious liability in connection with the current NIL landscape.

CONCLUSION

Although a school is always responsible for its own compliance with Title IX in connection with NIL—including providing equitable financial assistance and publicity to its student-athletes—a school also could be liable under Title IX for actions committed by a NIL collective if it provides “significant assistance” to the collective. Although schools want to assist their students with maximizing their NIL opportunities and earnings, including through support and partnership with NIL collectives, schools need to be diligent and intentional to avoid providing “significant assistance” to any collectives they choose to engage with. As the NIL landscape continues to grow and evolve, schools should ensure that sufficient separation exists between its athletics department and NIL collectives in order to avoid being responsible for the collectives’ actions.

For more information on the [Nelson Mullins Collegiate Athletics Team’s](#) guidance on NIL topics, please visit our website or contact a member of the team.