NIL in College Athletics Adds Layer of Complexity to Title IX

By T. Markus Funk, White & Case and Jack Uhde, Florida State University

Few areas of law have changed as quickly as college athletics. What began as a targeted antitrust challenge to education-related benefits has, in a few years, produced a world in which universities write checks directly to athletes, booster-funded collectives operate in the open, and the term "amateurism" feels dated.

Title IX, which has not moved nearly as quickly, was drafted long before anyone imagined college athletes earning seven figures before their sophomore year. But its requirement of institutional equal treatment still applies to this new economic reality.

The emergence of name, image, and likeness deals has not curtailed Title IX's reach, either. It has given the statute new, complex terrain defined by substantial cash flows, broad institutional discretion, and daily decisions by schools that may not fully understand the long-term consequences of their choices.

Two Distinct Questions

Whether Title IX applies to NIL is often posed as a single question, but it actually consists of two distinct inquiries that yield different answers.

First, there are private, third-party NIL deals. When a retailer pays a women's basketball player for endorsements, that is a commercial transaction between private parties. But schools can plausibly argue that the statute governs institutional conduct, not the independent choices of sponsors and brands.

The second inquiry involves what the institution itself does, where legal exposure is far greater. Once schools provide resources that shape NIL outcomes, those resources look like institutional "benefits" under Title IX and must be allocated equitably between men's and women's programs.

Alston* to *House

NCAA v. Alston, the Supreme Court's 2021 decision holding that the NCAA's restrictions on education-related compensation violated federal antitrust law, spurred this legal shift. *House v. NCAA* then pushed the system into an entirely new phase.

Under the 2025 settlement, schools may distribute up to 22% of average power-conference revenues, estimated at about $20.5 million per school for 2025–26, with scheduled increases thereafter. The settlement also includes roughly $2.6 billion to $2.8 billion in damages over 10 years for classes of athletes, with football and men's basketball expected to receive the largest share. The university is no longer just a facilitator; it is now a direct payor.

The NCAA's direct regulatory role over NIL and revenue sharing has, in turn, been partially supplanted by the College Sports Commission. Under the *House* settlement, the CSC administers revenue sharing, NIL Go (the portal where athletes must report NIL deals of $600 or more), and the College Athlete Payment System.

Plaintiffs' counsel and the Department of Education's Office for Civil Rights, or OCR, will be able to use the data generated to build pattern-and-practice gender equity cases regarding both institutional NIL support and revenue-sharing allocations. Firms involved in *Alston and House* are already soliciting athletes; Title IX claims built on *House* allocation data are an obvious next step.

> **Every NIL staffing decision is also a Title IX decision. Every revenue-sharing choice is a Title IX choice.**

NIL Support

Across major Division I programs, athletic departments now feature NIL coordinators, branding consultants, media training studios, licensing platforms, and relationships with the key decision-makers who run school-affiliated collectives. These resources exist because NIL has become a recruiting tool, a retention mechanism, and a competitive differentiator.

Schools that have built sophisticated NIL support systems primarily around football and men's basketball, while offering women's programs only a fraction of those resources, already face a significant Title IX problem under existing law.

The *House* settlement adds a second, even more consequential dimension. Many schools now control large pools of *House*-authorized compensation dollars and must decide how to allocate them. That allocation is an institutional decision within Title IX's reach.

The familiar argument that football and men's basketball generate most of the revenue and therefore should receive the largest share of payments is intuitive but legally vulnerable. Courts and the Department of Education have consistently rejected revenue generation as a lawful basis for unequal treatment under Title IX.

Schools such as Western Michigan and Coastal Carolina reportedly have turned to proportional, roster-based allocation models (sometimes referred to as "roster management") as a practical way to implement gender equity. That may evidence good-faith effort, but it is not yet settled as legal compliance.

No court has squarely resolved how Title IX applies to House revenue-sharing allocations, and OCR has not issued binding guidance on the question, though complaints and investigations are beginning to test these issues. Schools must decide on allocation formulas, NIL staffing, and support structures without an authoritative compliance framework, even though those same decisions will likely shape the evidentiary record in future litigation.

Practical Imperative

Title IX counsel should get involved in decision-making before a revenue-sharing methodology is finalized. NIL support services, including staffing, programming, and access to resources, should be audited with the same rigor historically applied to facilities and scholarships.

Title IX coordinators should be at the table for NIL policy discussions from the start, not brought in at the end to bless decisions already made. Emerging OCR activity and litigation should be monitored as operational intelligence, not abstract legal commentary.

The institutions that built and documented a defensible, good-faith gender-equity analysis for NIL support and revenue sharing while others focused largely on the competitive scoreboard will be best positioned when enforcement catches up—not those that waited for an official safe harbor.

The Larger Point

As schools lock in 2025–26 allocation formulas, NIL staffing structures, and reporting lines under College Sports Commission rules, those choices bake potential exposure into the architecture of athletic department governance—one staffing hire, and one revenue-sharing decision, at a time.

Every NIL staffing decision is also a Title IX decision; every revenue-sharing choice is a Title IX choice. Every recruiting message touting institutional NIL support likewise has Title IX implications. Institutions that recognize and document this reality now will be in a far stronger position than those that do not when the legal reckoning arrives.

T. Markus Funk, a former federal prosecutor (Chicago) who represents college and professional athletes, NFL franchises, and major universities, is a partner in White & Case's Commercial Litigation and White Collar & Investigations Practices and a member of its Sports Practice. Special thanks to Jack Uhde for his outstanding research and editing assistance for this article.