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Keeping Up with the Joneses: Texas' NIL Battle for Student-Athletes

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**KEEPING UP WITH THE JONESES: TEXAS’ NIL BATTLE FOR
STUDENT-ATHLETES**

By: Stephanie Garner[†]

Abstract

Starting in 2021, college athletes could earn financial compensation from their name, image, and likeness (“NIL”). With the change in laws, the National Collegiate Athletic Association (“NCAA”) created an interim regulation for states to follow. After the Supreme Court decision, some states’ trigger laws went into effect, some states made new NIL regulations, and some states continued to follow the regulation set out by the NCAA. With all these laws and no federal regulation, each state stands on different footing. In Texas, a restrictive NIL statute will affect its recruiting for years unless adjusted. This Comment suggests improvements to the Texas NIL law, such as allowing universities to assist student-athletes in finding potential NIL deals and creating and supplying resources and programs for collegiate athletes to obtain the highest return on NIL deals. Texas can also repeal its statute like states have done with similar NIL laws. This Comment will also discuss the potential Title IX impacts of suggested additions to the Texas NIL law.

I.	INTRODUCTION	218
II.	BACKGROUND	220
	A. NIL	220
	B. Title IX	223
III.	COMPARISON OF STATE STATUTES	226
	A. Statutes from Other States	226
	B. Texas Statute	230
IV.	PROPOSED PLANS FOR TEXAS STATUTE	231
	A. University Assistance in Procurement	231
	B. Addition of University Programs	236
	C. Repeal the Texas Statute	239

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V.	TITLE IX AND NIL.....	241
	A. <i>The Benefit of Title IX and NIL</i>	241
	B. <i>How to Prevent Title IX Implications</i>	243
VI.	CONCLUSION	245

I. INTRODUCTION

Prior to June 2021, college athletes had limited options. Athletes had to choose between using their status as college athletes to make money or continuing to play the sport they love, but athletes could not do both.¹ One of these stories involved former University of Central Florida (“UCF”) athlete Donald De La Haye.² Before stepping foot on the UCF campus, De La Haye started gaining YouTube subscribers.³ At the beginning of his time at UCF, the football coach did not allow De La Haye to participate in extracurricular activities such as his YouTube videos; that changed in 2016, however, when a new coach came to UCF.⁴ De La Haye had reached a level of success on the platform that allowed him to monetize his YouTube channel.⁵ After posting videos and monetizing them, De La Haye received a letter from UCF saying that he could no longer post videos on his YouTube channel portraying himself playing football; the video referenced in the letter was of De La Haye and his girlfriend throwing a football.⁶ Eventually, De La Haye had an impossible choice: quit playing football or stop making money from his YouTube videos.⁷ De La

1. Paolo Uggetti, *How Things have Come Full Circle for the UCF Kicker who Chose YouTube over Football*, ESPN (Sept. 9, 2022, 09:00 AM ET), https://www.espn.com/college-football/story/_/id/34494288/how-things-come-full-circle-ucf-kicker-chose-youtube-football [https://perma.cc/DY2Z-3856].

2. *Id.*

3. *Id.*

4. Joe Mario Pedersen, *Orlando Social Media Stars: After Choosing YouTube over UCF, Former Kicker is ‘Deestroying’*, ORLANDO SENTINEL (Oct. 3, 2021, 8:53 PM), <https://www.orlandosentinel.com/features/gone-viral/os-ne-youtube-deestroy-ucf-kicker-donald-de-la-haye-20211003-kycudfmz5ff4hfuy5dh6e3twke-story.html> [https://perma.cc/2XDV-GS45].

5. *Id.*

6. Jenna Lemoncelli, *Donald De La Haye’s ‘Crazy’ Decision to Quit College Football Turned Him into a YouTube Millionaire*, N.Y. POST (Sept. 1, 2021, 12:29 PM), <https://nypost.com/2021/09/01/donald-de-la-haye-quit-college-football-now-hes-a-youtube-millionaire/> [https://perma.cc/4N94-8WR4].

7. Andrea Adelson, *UCF Asks Kicker to Stop Making Money off YouTube Videos*, ESPN (June 13, 2017, 03:03 PM ET), https://www.espn.com/college-football/story/_/id/19626695/ucf-kicker-donald-de-la-haye-asked-stop-making-money-youtube-videos [https://perma.cc/GF4L-7S67].

Haye expressed that the money from his YouTube channel was helping his family.⁸ The NCAA “compromised” with De La Haye and offered him a waiver that allowed him to keep making videos, but he could not mention his status as a student-athlete, and he would have to return any money he received from YouTube.⁹ De La Haye did not adhere to the NCAA’s terms and was subsequently removed from the football team, losing his eligibility and scholarship.¹⁰ To provide income for his family, De La Haye left school, lived in Tampa, Florida, and continued making YouTube videos.¹¹

While De La Haye’s story in hindsight was regrettable, he has reached a new level of success.¹² Currently, De La Haye is creating videos with teams in the National Football League, amassing nearly five million YouTube subscribers and making millions of dollars a year.¹³ Not all college athletes before 2021 had to make this impossible decision, but some did. Thankfully, due to the changes in NIL legislation, student-athletes no longer have to decide between athletics or money to support their families while at school.

This Comment analyzes different states’ NIL laws, compares the laws to current Texas law, assesses Texas law, provides suggestions to improve Texas law, explains potential Title IX implications and benefits, and finally makes recommendations on how Texas can avoid Title IX implications. Part II discusses the background of NIL and Title IX’s involvement in college athletics and the evolution of the laws over time. In addition, Part II discusses seminal cases involving both topics. Part III will first discuss state statutes from competing states. Then, Texas law will be compared to the other states, analyzing the pros and cons of the Texas statute. Part III also discusses the possibility of federal law and the NCAA’s interim regulation. Part IV discusses the proposed plan for the Texas NIL statute. Part IV starts with the addition of university involvement in assisting athletes in finding NIL deals, then proceeds into universities being allowed to create NIL-related programs and classes, ending with an option to

8. *Id.*

9. Associated Press, *Ex-UCF Kicker Says There Was No Compromise as He Defends Choice to Give Up Eligibility*, ESPN (Aug. 1, 2017, 07:06 PM CST), https://www.espn.com/college-football/story/_/id/20221232/former-ucf-kicker-donald-de-la-haye-stands-decision-give-eligibility [https://perma.cc/7MAC-8XNU].

10. *Id.*

11. Uggetti, *supra* note 1.

12. *Id.*

13. *Id.*; Lemoncelli, *supra* note 6.

repeal the Texas statute. Lastly, Part V discusses Title IX benefits, potential consequences universities could face in this new NIL era, and how best to avoid repercussions.

II. BACKGROUND

A. NIL

Before July 2021, amateur athletes could not make money off their NIL.¹⁴ Prior to the creation of the NCAA, college athletics started as student-controlled events and evolved into institutions regulating events due to the increase in risk.¹⁵ This increase in danger and even deaths led President Roosevelt to call for a conference, inviting people from the most significant college football programs to come and discuss athletics with him.¹⁶ The NCAA began with the combined assistance of the White House and educators nationwide and initially formed “the Intercollegiate Athletic Association,” which eventually became the NCAA.¹⁷ The NCAA was formed in 1906 to create regulations for college sports to follow, mainly for athlete safety.¹⁸

The forefront of many NCAA requirements was the stipulation that student-athletes remain amateurs to be able to participate in college athletics.¹⁹ The NCAA’s definition of amateurism developed and changed over time. It has led us to where we are today with athletes’ ability to earn income based on their NIL and remain amateurs.²⁰ In the early years of the NCAA, amateurism prohibited “all financial aid based on athletic ability.”²¹ With this law, athletes could not receive any athletic scholarship or financial support to participate in this

14. Dan Whateley & Colin Salao, *How College Athletes are Getting Paid from Brand Sponsorship as NIL Marketing Takes Off*, BUSINESS INSIDER (Sep. 7, 2022, 1:29 PM), <https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals-2021-12> [https://perma.cc/8LMS-G6NL].

15. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 11 (2000).

16. *Id.* at 12.

17. *Id.*

18. *Id.*

19. Robert Litan, *The NCAA’s “Amateurism” Rules: What’s in a Name?*, MILKEN INST. REV. (Oct. 28, 2019), <https://www.milkenreview.org/articles/the-ncaas-amateurism-rules> [https://perma.cc/T7EL-TY43].

20. *Id.*

21. Jayma Meyer & Andrew Zimbalist, *A Win-Win: College Athletes Get Paid for Their Names, Images, and Likenesses, and Colleges Maintain the Primacy of Academics*, 11 HARV. J. SPORTS & ENT. L. 247, 250 (2020).

program.²² Even though the NCAA had a regulation in place, universities were not adhering to it, meaning the NCAA needed stricter guidelines to monitor and regulate the institutions they controlled.²³

The NCAA defined amateurism for the first time in 1916 as “one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom.”²⁴ The NCAA amended the definition in their Seventeenth Annual Convention in 1922 but kept the same overall idea.²⁵ Institutions continued to ignore the NCAA’s rules and regulations. A 1929 report based on an NCAA investigation determined that three-quarters of the institutions violated the rules.²⁶ Almost two decades later, in response to universities not following their rules and regulations, the NCAA implemented the “Sanity Code,” allowing universities to provide certain student-athletes with athletic financial aid.²⁷ This code lasted only two years before being removed.²⁸ In 1951, the NCAA created the Committee of Infractions to monitor their institution members more closely.²⁹

Eventually, in 1956 the NCAA allowed student-athletes to receive “no-need based compensation” by allowing athletes to receive certain “educational expenses.”³⁰ These expenses included but were not limited to tuition, “books, fees, and cash for incidental expenses such as laundry.”³¹ The 1956 regulation shut down any idea of “pay to play” for student-athletes to keep the NCAA clear from potential workers’ compensation claims.³² A shift in NCAA regulation occurred in 1967. Then, the NCAA added rules that an institution could immediately cancel an athlete’s scholarship should that athlete voluntarily leave.³³

22. Litan, *supra* note 19.

23. See Smith, *supra* note 15, at 13.

24. Peyton Woods & Adam Love, *College Athletes’ Voices Are Sidelines in Media Coverage of NIL Debate*, THE SOC’Y PAGES (May 21, 2021), <https://thesocietypages.org/engagingsports/tag/college-sport/#:~:text=In%201916%2C%20the%20National%20Collegiate,initial%20definition%2C%20which%20prohibited%20any> [https://perma.cc/T3R8-FAWW].

25. Meyer & Zimbalist, *supra* note 21, at 251.

26. *Id.*

27. *Id.* at 252.

28. *Id.*

29. Smith, *supra* note 15, at 15.

30. Meyer & Zimbalist *supra* note 21, at 252.

31. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1063 (N.D. Cal. 2019).

32. Meyer & Zimbalist, *supra* note 21, at 253.

33. *Id.* at 253.

In 1973, the NCAA steered further away from the definition of amateurism by making scholarships renewable yearly.³⁴

In recent years, the NCAA's rules and regulations have continued to evolve surrounding the concept of amateurism. For example, beginning in 2012, the NCAA permitted universities to give out multiyear scholarships to athletes.³⁵ In 2015, the NCAA made the groundbreaking ruling of providing college athletes with "cost of attendance stipends."³⁶ This stipend was given to athletes for food and transportation but was deposited directly to the athlete without monitoring how the stipend was spent.³⁷ The NCAA also began to allow other forms of compensation. They created a "Student Assistance Fund" and "Academic Enhancement Fund," which assist student-athletes financially for many purposes.³⁸

Finally, in 2021, after years of dialogue over the NCAA concept of amateurism, the regulation changed based on a court case. In *NCAA v. Alston*, the plaintiffs were football and basketball players who were either currently or formerly participating in NCAA athletics.³⁹ The student-athletes alleged that the NCAA violates §1 of the Sherman Act, "which prohibits contracts, combination[s], or conspiracies in restraint of trade or commerce."⁴⁰ The appellate court enjoined the NCAA from "limiting educational-related compensation or benefits" that student-athletes could receive.⁴¹ The Supreme Court affirmed this decision.⁴² After the ruling, the Court forced the NCAA's hand, opening the door for college athletes to earn money based on their NIL, which the NCAA and universities had already been doing for years.

34. *Id.*

35. Michelle Brutlag Hosick, *Multiyear Scholarship Rule Narrowly Upheld*, NCAA (Feb. 17, 2012, 12:00 AM), <https://www.ncaa.org/news/2012/2/17/multiyear-scholarship-rule-narrowly-upheld.aspx> [<https://perma.cc/WDM2-59DU>].

36. Christopher Smith, *Full Cost of Attendance: What Will It Mean for Power Five Players*, SAT. DOWN S., <https://www.saturdaydownsouth.com/sec-football/full-cost-of-attendance-explained/> [<https://perma.cc/3D6R-5AMZ>].

37. *Id.*

38. *NCAA v. Alston*, 141 S.Ct. 2141, 2150 (2021).

39. *Id.* at 2151.

40. *Id.*

41. *Id.* at 2153.

42. *Id.* at 2166.

B. Title IX

Before 1972 and the creation of Title IX of the Education Amendments of 1972, women were not treated the same as men in education programs around the United States.⁴³ As a result, women were routinely excluded from certain universities, or when admitted, they were not allowed to participate in specific programs.⁴⁴ The exclusion of women from participating in sports was not because women did not want to compete; when given the opportunity they thrived.⁴⁵ For example, in 1931, 17-year-old Jackie Mitchell was allowed to play baseball on an all-male minor league baseball team.⁴⁶ A month into her minor league career, Mitchell faced off against the New York Yankees and, as a pitcher, struck out baseball legends Babe Ruth and Lou Gehrig.⁴⁷ The creation of Title IX gave women like Mitchell a chance to play, significantly impacting women's sports. Women's participation in sports has grown through the years due to Title IX; previously, one in 27 girls participated in sports, and now two in every five participate.⁴⁸

In 1972, Congress created Title IX as a part of the Education Amendments.⁴⁹ The statute stated, “[n]o 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.”⁵⁰ Over time Title IX has changed and expanded, giving universities a better understanding of how to comply with the law and giving students an understanding of how to recover under Title IX.

The inception of Title IX created confusion because its regulations did not apply to all institutions. In 1984, with *Grove City*, the Supreme Court limited Title IX's coverage to “educational programs” that are

43. Alvin Powell, *How Title IX Transformed Colleges, Universities over Past 50 Years*, THE HARV. GAZETTE (June 22, 2022), <https://news.harvard.edu/gazette/story/2022/06/how-title-ix-transformed-colleges-universities-over-past-50-years/> [https://perma.cc/8CLB-4C9L].

44. *Id.*

45. Maria Cramer, *How Women's Sports Teams Got Their Start*, THE N.Y. TIMES (Apr. 28, 2022), <https://www.nytimes.com/2022/04/28/sports/title-ix-anniversary-womens-sports.html#:~:text=In%20the%20late%2019th%20century,and%20sexuality%20in%20women's%20sports.> [https://perma.cc/R3ZS-S894].

46. *Id.*

47. *Id.*

48. Powell, *supra* note 43.

49. See generally 20 U.S.C.A. § 1681 (Westlaw through Pub. L. No. 118-7).

50. *Id.*

direct recipients of federal funding and not to the institution overall.⁵¹ In 1986, the Supreme Court ruled that the programs receiving federal financial assistance are the programs that are required to follow Title IX regulations.⁵² With the issue of institutions subjected to Title IX enforcement somewhat resolved, new issues arose involving Title IX.

The creation of Title IX did not correct all discrimination against women in educational institutions, and further clarity surrounding the legislation was needed. As a result, in 1974, Congress recommended that the Department of Health, Education, and Welfare (“HEW”) create an amendment to Title IX that includes intercollegiate athletics as activities to which Title IX applies.⁵³ HEW thus created “the 1975 Regulation.”⁵⁴ This regulation said, “[n]o person shall, on the basis of sex, be excluded from participation in . . . any interscholastic, intercollegiate, club, or intramural athletics offered by recipient.”⁵⁵ In July 1978, HEW received many complaints alleging sex discrimination in athletic departments nationwide.⁵⁶ In 1979, due to the mass amount of complaints HEW received, the department created a policy interpretation of Title IX that still answers many of the questions Title IX generates today.⁵⁷

In 1979, HEW divided into two departments, with the Department of Education (“ED”) taking administrative agency over Title IX.⁵⁸ With the creation of the ED, a new version of HEW’s 1975 regulations was adopted and published.⁵⁹ The 1975 regulation adopted by the ED required that educational institutions have separate teams and equal opportunities for both males and females.⁶⁰ The 1975 regulation gave universities a nonlimiting list of factors to determine whether similar opportunities exist at institutions.⁶¹ Some factors looked at are: “[t]he provision of equipment and supplies, scheduling of games and practice time, travel and per diem allowance, opportunity to receive coaching

51. *Grove City Coll. v. Bell*, 465 US 555, 571-72 (1984).

52. *U.S. Dep’t of Transp. v. Paralyzed Veterans of America*, 477 US 597, 607 (1986).

53. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974).

54. 34 C.F.R. § 106.41 (2023).

55. *Id.*

56. Title IX of the Education Amendments of 1979; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 (1979).

57. *Id.*

58. *McCormick v. Sch. Dist. Of Mamaroneck*, 370 F.3d 275, 287 (2d Cir. 2004).

59. 34 C.F.R. § 106.1 (2023).

60. 34 C.F.R. § 106.41 (b)-(c) (2023).

61. 34 C.F.R. § 106.41 (c) (2023).

and academic tutoring . . . publicity.”⁶² The interpretation clarified that schools are not breaking their Title IX compliance just by a complaint of an inequality involving one of these factors.⁶³ Before finding that a university has violated Title IX there has to be a “systemic, substantial disparity that amounts to a denial or equal opportunity.”⁶⁴

The 1979 policy interpretation lists factor information on each Title IX equal treatment section. The interpretation lists some factors to determine if a school broke the “publicity” portion of the similar treatment statute.⁶⁵ The ED looks at: “the quality and availability of sports information personnel, access to other publicity resources for men’s and women’s programs, and quantity and quality of publications and other promotional devices.”⁶⁶ The policy interpretation also states that under the support services aspect of Title IX, schools will have to provide equal “administrative assistance” and “secretarial and clerical assistance” to both their male and female athletes.⁶⁷

Finally, the 1979 policy interpretation declared that male and female programs need not be identical but must be “equal or equal in effect.”⁶⁸ Title IX’s application has evolved and changed over time. As new legal advancements continue in the collegiate sports world, more confusion will arise over where Title IX applies and where it does not.

Enforcement of Title IX is an area of the statute that confuses. For example, Title IX can regulate in two ways: through “administrative methods,” “judicial means,” or both.⁶⁹ In *Cannon v. University of Chicago*, the Supreme Court determined that collegiate athletes could pursue claims under Title IX.⁷⁰ With both methods in place, it is up to the student to decide which way to use them.

Today, Title IX violations in college sports are still highly prevalent.⁷¹ While significant areas of college sports are regulated

62. 34 C.F.R. § 106.41(c)(2)-(5), (10) (2023).

63. See *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910 (7th Cir. 2012).

64. *Id.* at 922.

65. Title IX of the Education Amendments of 1972, *supra* note 56, at 71414.

66. *Id.*

67. *Id.*

68. *Id.* at 71415.

69. Janet P. Judge & Cameryn A. Mercurio, *Title IX and its Application to Intercollegiate Athletics*, COLL. & UNIV. L. MANUAL (2021).

70. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979).

71. See *Radwan v. Manuel*, 55 F.4th 101 (2d Cir. 2022).

(e.g., scholarships, programs, schedules), there are still issues with different treatment of women and men.⁷² For example, in 2014, a soccer player at the University of Connecticut had her scholarship terminated mid-term for raising her middle finger after winning a championship.⁷³ Noriana Radwan sued UConn on Title IX violations due to the disparate treatment by the university for similar actions by male athletes.⁷⁴ Radwan provided evidence that her male counterparts at UConn received different and more lenient punishments for similar violations.⁷⁵ The Court held that this was a violation of her Title IX rights.⁷⁶ Similar to the Title IX violation of unequal discipline, publicity is one area of Title IX that is a minor focus for universities but will be prevalent with NIL changes.⁷⁷

III. COMPARISON OF STATE STATUTES

A. Statutes from Other States

With the Supreme Court's holding in *NCAA v. Alston*, states were allowed to create and regulate their laws involving NIL.⁷⁸ In June 2021, after the ruling, the NCAA released an interim NIL policy for schools nationwide to follow.⁷⁹ Along with "the NCAA's interim policy," states were allowed to create statutes for their universities to follow, and any state that did not create its law would follow the NCAA's policy.⁸⁰ The NCAA also stated during their interim policy that they would "continue to work with Congress to adopt federal legislation to support student-athletes."⁸¹

With no current federal law and individual states creating NIL legislation, universities in different states are playing under different

72. *See id.*

73. *Id.* at 105.

74. *See id.*

75. *Id.* at 136-39.

76. *Id.* at 141.

77. Amanda Christovich, *Advocacy Group Asks DOE to Fix Gender Inequalities in NIL*, FRONT OFF. SPORTS (Jan. 17, 2023, 3:36 PM), <https://frontofficesports.com/drake-group-nil/> [<https://perma.cc/6DRR-C8VL>].

78. *See Alston*, 141 S. Ct. at 2166.

79. Michelle Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/K4AM-D4Q3>].

80. *Id.*

81. *Id.*

rules regarding recruiting.⁸² University sports programs compete with other university sports programs nationwide, and these universities often follow different NIL laws.⁸³ Student-athletes now benefit from NIL, which has significantly impacted recruiting and allows students to consider how much they can make on NIL at certain schools while deciding which school to attend.⁸⁴

To begin with, since *NCAA v. Alston*, 29 states have passed NIL statutes.⁸⁵ New Mexico's law ranks as one of the country's best NIL laws, with the most student-athlete-focused state statute enacted in July 2021.⁸⁶ The New Mexico statute states:

A post-secondary educational institution shall not uphold any rule . . . that prevents a student athlete of that institution from fully participating in athletics without penalty: . . . for earning compensation from a third party as a result of the use of the student athlete's name, image, likeness or athletic reputation.⁸⁷

The statute does not limit student-athletes' opportunities to earn financial compensation, allowing them to keep their options open to many deals.⁸⁸ New Mexico's law is superior because it focuses on student-athletes first and does not limit their options on what NIL deals they can enter.⁸⁹

82. Pete Nakos, *How NIL Legislation Varies on State-by-State Basis*, ON3NIL (July 8, 2022), <https://www.on3.com/nil/news/how-nil-legislation-varies-on-a-state-by-state-basis/> [<https://perma.cc/8GSQ-EY76>].

83. Jay Bilas, *Why NIL Has Been Good for College Sports ... and the Hurdles that Remain*, ESPN (June 29, 2022), https://www.espn.com/college-sports/story/_/id/34161311/why-nil-good-college-sports-hurdles-remain [<https://perma.cc/FE7V-69AM>].

84. Tyler Calvaruso, *Friday Night Notes: NIL Continuing to Shift the Recruiting Landscape*, USA TODAY (Mar. 18, 2022, 3:28 PM), <https://usatodayhss.com/lists/football-recruiting-nicholaus-iamaleava-nil> [<https://perma.cc/GN8S-GSDE>].

85. *Your Guide to Federal and State Laws on Name, Image and Likeness Rules for NCAA Athletes*, SAUL EWING, <https://www.saul.com/nil-legislation-tracker#:~:text=To%20date%2C%20the%2029%20states,NIL%20laws%20in%20hose%20states> [<https://perma.cc/YT7M-QATN>].

86. Daley Craft, *Want to Make it Rain? Check Out the Top 5 States in NIL Rankings*, 2ADAYS (Apr. 22, 2022), <https://www.2adays.com/blog/want-to-make-it-rain-check-out-the-top-5-states-in-nil-rankings/> [<https://perma.cc/AE28-3XK6>].

87. N.M. STAT. ANN. § 21-31-3 (West through Chapter 3 of the 2023 First Reg. Sess. of the 56th Leg.).

88. *Id.*

89. Craft, *supra* note 86.

Some states with more restrictive NIL statutes than New Mexico's have adjusted their legislation to loosen their laws.⁹⁰ Tennessee's first NIL statute, passed in April 2021, is similar to other state statutes because it allows collegiate athletes personal financial gain off NIL.⁹¹ The problem with Tennessee's initial statute is that it did not allow for institutional involvement in the student athletes' NIL process.⁹² In 2022, the Tennessee legislature signed off on an amendment to their NIL law that removed the provision of the statute that prohibited university involvement.⁹³ Tennessee's changes created a more athlete-friendly law, putting their universities on equal footing with other state universities.⁹⁴

By comparison, in July 2021, Florida passed a statute on compensation for collegiate student-athletes that limits an athlete's NIL benefits.⁹⁵ The most controversial part of the Florida statute is a provision that states "[a] postsecondary educational institution . . . may not compensate or cause compensation to be directed to a current or prospective intercollegiate athlete for her or his name, image, or likeness."⁹⁶ This provision of the Florida statute limits collegiate athletes from fully maximizing their NIL deals. In February 2023, the Florida legislature voted unanimously, and the governor signed a bill to amend their NIL statute.⁹⁷ The amendment removes the statute section that disallows university involvement and adds a section that focuses on educational programs.⁹⁸ A Florida senator stated that the

90. Nakos, *supra* note 82.

91. H.B. 1351, 2021 Leg. Reg. Sess. (Tenn. 2021).

92. *Id.*

93. TENN. CODE ANN. § 49-7-2802 (Lexis through the 2022 Reg. Sess.).

94. Kristi Dosh, *State of Tennessee Amends NIL Law to Further Empower Institutions and Collectives*, BUS. OF COLL. SPORTS (Apr. 23, 2022), <https://businessofcollegesports.com/name-image-likeness/state-of-tennessee-amends-nil-law-to-further-empower-athletic-departments-and-collectives/> [<https://perma.cc/HE3V-WVFB>].

95. FLA. STAT. ANN. § 1006.74 (West through the 2022 Spec. A Sess. and 2023 Spec. B Sess. of the Twenty-Eight Leg.).

96. *Id.*

97. Matt Baker, *Florida House Votes 113-0 to Effectively Repeal Name, Image, Likeness Law*, TAMPA BAY TIMES (Feb. 9, 2023), <https://www.tampabay.com/news/florida-politics/2023/02/09/florida-nil-law-repeal-name-image-likeness/> [<https://perma.cc/6G75-8LV7>]; Pete Nakos, *Florida Governor Signs House Bill 7B, Amending State's NIL Law*, ON3 (Feb. 16, 2023), <https://www.on3.com/nil/news/florida-house-bill-7b-nil-name-image-likeness-ron-desantis-signed-deal/> [<https://perma.cc/H3TE-CW5B>].

98. Matt Baker, *Florida Name, Image and Likeness Repeal Clears 2 Committee Hurdles Wednesday*, TAMPA BAY TIMES (Feb. 8, 2023), <https://www.tampabay.com/news/florida-politics/2023/02/08/nil-law-name-image->

bill amendment is because the initial version has “prevent[ed] our colleges and universities from recruiting and retaining student athletes.”⁹⁹

In July 2021, Alabama enacted its state NIL law.¹⁰⁰ Alabama prohibited student-athletes from getting into deals with tobacco and alcoholic beverage companies and other brands.¹⁰¹ Alabama also prohibited student-athletes from using the school’s logo in their NIL deal and refused university involvement in student-athletes’ NIL process.¹⁰² The state of Alabama thought it was best to repeal its state statute because it was more restrictive than the NCAA policy and put it at a recruiting disadvantage compared to other states.¹⁰³

In October 2022, the NCAA released a “clarification” of its July 2021 NIL policy.¹⁰⁴ The NCAA wanted to clarify how universities following the NCAA’s policy can participate in student athletes’ NIL deals.¹⁰⁵ One of the clarifications the NCAA gives is that universities “can and should supply student-athletes with classes they can take to receive the best value from their NIL.”¹⁰⁶ The clarification also allow universities to assist students in finding potential NIL deals.¹⁰⁷ These NCAA clarifications have broadened the universities’ rights in states that follow the NCAA’s policy.¹⁰⁸ Universities compete at different levels in the recruiting world depending on the NIL policy they must follow.¹⁰⁹

likeness-gators-fsu-usf/ [https://perma.cc/SY8F-3MAS].

99. Lynn Hatter, *Florida Wants to Level the Playing Field in NIL When It Comes to Student-Athlete Compensation*, WUSF (Feb. 9, 2023), <https://wusfnews.wusf.usf.edu/politics-issues/2023-02-09/florida-level-playing-field-nil-student-athlete-compensation> [https://perma.cc/PCN7-J99J].

100. H.B. 404, 2021 Leg., Reg. Sess. (Ala. 2021).

101. *Id.*

102. *Id.*

103. *Why Alabama Repealed its NIL Law*, AGRICOLA L. (Apr. 14, 2022), <https://www.agricolalaw.com/blog/2022/04/why-alabama-repealed-its-nil-law/> [https://perma.cc/X76A-GJWX].

104. Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA (Oct. 26, 2022, 1:21 PM), <https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx#:~:text=Under%20the%20interim%20policy%2C%20schools,student%2Dathletes%20with%20those%20opportunities> [https://perma.cc/75UC-VR4A].

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Bilas, *supra* note 83.

The best solution to level the playing field created by varying state laws and the NCAA policy is for Congress to create a federal NIL law.¹¹⁰ The NCAA president called for Congress to create a law to “provide uniform protections for college athletes nationwide.”¹¹¹ Over the last three years, Congress has introduced at least eight laws, but they have yet to receive enough support.¹¹² Creating a uniform federal law is the only solution to keeping all universities playing in the same arena under the same rules.¹¹³ Until Congress enacts federal legislation, states will continue participating in different playing fields.¹¹⁴

B. Texas Statute

In July 2021, Texas created its NIL statute, which allows college athletes in Texas to benefit from their NIL without violating their amateur status.¹¹⁵ Texas’s NIL law is “one of the most restrictive state laws in the nation.”¹¹⁶ The Texas law allows student-athletes to make money off their NIL but limits how they can receive compensation.¹¹⁷

The Texas NIL law is similar to the repealed statute from Alabama and the amended statute from Florida.¹¹⁸ Texas prohibits student-athletes from entering into contracts that include using school logos or other property owned by the school.¹¹⁹ Texas also prohibits students from entering into contracts to promote “alcohol, tobacco products . . . sports betting . . .” and other products.¹²⁰ Another unique part of the Texas NIL statute is requiring student-athletes to take a course on financial literacy twice before they can capitalize off their deals.¹²¹

110. Andrew King, *How US Federal and State Legislatures Have Addressed NIL*, 7 NAT. L. REV. 194 (2022).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. TEX. EDUC. CODE ANN. § 51.9246 (West through the 2023 Reg. Sess.).

116. Nakos, *supra* note 82.

117. Tex. Educ. Code Ann. § 51.9246.

118. H.B. 404, 2021 Leg., Reg. Sess. (Ala. 2021); FLA. STAT. ANN. § 1006.74 (West through the 2023 Spec. B Sess. and the 2023 first reg. sess.); TEX. EDUC. CODE ANN. § 51.9246 (West through the 2023 Reg. Sess.).

119. TEX. EDUC. CODE ANN. § 51.9246(g)(2)(B)(iii) (West through the 2023 Reg. Sess.).

120. TEX. EDUC. CODE ANN. § 51.9246(g)(2)(B)(iv) (West through the 2023 Reg. Sess.).

121. TEX. EDUC. CODE ANN. § 51.92469(i) (West through the 2023 Reg. Sess.).

A significant issue with the Texas statute that puts Texas universities at a disadvantage compared to other state universities is that Texas universities are not allowed to assist student-athletes in finding NIL deals.¹²² Texas universities cannot assist in any way; the Director of Athletics at Texas A&M said the university “cannot set up agreements between an athlete and a business. Between an athlete and a booster. Between an athlete and an entity . . . we can’t arrange anything.”¹²³ This provision was something that Tennessee, Alabama, and Florida have all taken steps to change to create a better situation for their universities in recruiting student-athletes.¹²⁴

The differences and unique aspects of its NIL law put Texas a step behind other state universities they compete against in recruiting.¹²⁵ The Texas Legislature mentioned that the purpose of creating Senate Bill 1385 (“NIL law”) was to ensure that Texas universities “are competing on an equal playing field with other states” while waiting for Congress to create federal legislation.¹²⁶ Texas needs to meet its goal of competing on an equal playing field with the law in place today.¹²⁷ Since the NCAA has clarified its NIL policy, the 31 states without NIL legislation can now assist their student-athletes with an NIL deal.¹²⁸ However, at the same time, no Texas university can provide assistance.¹²⁹ Texas is at a massive disadvantage compared to most other states on the recruiting front because of its NIL law.¹³⁰

IV. PROPOSED PLANS FOR TEXAS STATUTE

A. University Assistance in Procurement

The Texas Legislature should amend its NIL law to remove the section that disallows universities from being involved in promoting

122. TEX. EDUC. CODE ANN. § 51.92469(c)(2) (West through the 2023 Reg. Sess.).

123. *State of Texas NIL Laws, What College Athletes and Sponsors Need to Know*, ICON SOURCE, (last visited Mar. 8, 2023) <https://iconsource.com/texas-nil-laws/> [<https://perma.cc/69P9-6C5S>].

124. TEX. EDUC. CODE ANN. § 51.9246 (West through the 2023 Reg. Sess.); H.B. 404, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 1351, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021).

125. Nakos, *supra* note 82.

126. S. Comm. on Higher Educ., S. 87-1385, Reg. Sess., at 1 (Tex. 2021).

127. Nakos, *supra* note 82.

128. Durham, *supra* note 104.

129. TEX. EDUC. CODE ANN. § 51.92469(c)(2) (West through the 2023 Reg. Sess.).

130. Nakos, *supra* note 82.

their athletes to help them receive NIL deals. If universities can assist their athletes, they can move away from the current landscape of NIL collectives controlling deals and allow more protection for student-athletes. Under the NCAA's policy, no university in any state can use a potential NIL deal to attain a prospective student-athlete's commitment to the school.¹³¹ Many states allow university employees to assist student-athletes already at the university in procuring NIL deals, yet Texas is not one of these states.¹³² States that do not allow university involvement rely on "NIL collectives" that work with student-athletes to help them navigate the NIL market.¹³³ An NIL collective is a third party that agrees to work with student-athletes to use the athletes' NIL to receive compensation.¹³⁴ NIL collectives are the middlemen between athletes and sponsors; they provide the money while the athlete provides the commercials, sponsored posts, or other promotions for the brand.¹³⁵ While NIL collectives have many pros, there are also cons, including that a university's employees cannot be involved in an athlete's deals.¹³⁶ No university employee can comment on a student-athlete's NIL deal, meaning the safety a coach or administrator could provide their athlete is unavailable.¹³⁷

131. *Three Name, Image and Likeness (NIL) Trends for Universities and Collectives to Understand in 2023*, VINSON & ELKINS (Jan. 27, 2023), <https://www.velaw.com/insights/three-name-image-and-likeness-nil-trends-for-universities-and-collectives-to-understand-in-2023/> [https://perma.cc/45XZ-C2FH].

132. See TEX. EDUC. CODE ANN. § 51.9246 (West through the 2023 Reg. Sess.); FLA. STAT. ANN. § 1006.74 (West through the 2023 Spec. B Sess. and the 2023 First Reg. Sess.); N.M. Stat. Ann. § 21-31-3 (West through Chapter 3 of the 2023 First Reg. Sess. of the 56th Leg.).

133. Peter 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/> [https://perma.cc/8GSQ-EY76].

134. Jim L. Pattillo, *What Do High School Recruits Need to Know About NIL Collectives?*, CHRISTIAN SMALL (Oct. 26, 2022), <https://csattorneys.com/2022/10/26/what-do-high-school-recruits-need-to-know-about-nil-collectives/#:~:text=In%20short%2C%20NIL%20Collectives%20are,name%2C%20image%2C%20and%20likenes> [https://perma.cc/9DDQ-ZQXV].

135. *Id.*

136. *Id.*

137. *Id.*; Ralph D. Russo, *Rashada Case in Florida Highlights Issues in NIL, Recruiting*, AP (Jan. 30, 2023), <https://apnews.com/article/sports-compensation-in-athlete-recruiting-miami-hurricanes-florida-b8e7fc40b359e85deb90eea8c2a380c9> [https://perma.cc/GH7L-8BYD].

Recently there have been examples of NIL collectives not putting the school or the student-athletes first.¹³⁸ University of Florida (“UF”) recruit Jaden Rashada is a prime example of the safeguard university involvement could provide a student-athlete.¹³⁹ Rashada was a top football commit at UF, who, before starting school, signed a \$13 million deal with the “Gator Collective,” a third-party NIL collective involved with UF.¹⁴⁰ After Rashada signed with UF, the Gator Collective pulled the deal.¹⁴¹ This left Rashada with what he felt was his only option in deciding he would not bring his athletic talent to UF.¹⁴² UF released Rashada from his commitment, leaving him to find a new university, and UF had to find a new quarterback to fill his role.¹⁴³ At the time, Florida’s NIL statute did not allow universities to participate in the NIL deals of their athletes.¹⁴⁴ If Florida allowed their university employees to participate in the NIL deal, a safeguard would exist that does not exist with NIL collectives.¹⁴⁵ Even though it might be for selfish reasons, universities and their employees care about keeping top recruits at their schools and not losing them to rival universities.¹⁴⁶ Since the employees have a vital interest, there is a higher likelihood that when they are involved in procuring these deals, they will protect the athletes by ensuring that they are not left out to dry by companies or collectives.¹⁴⁷ University participation in

138. See generally *Top QB Recruit Reportedly Attempting to Leave Florida amid NIL Issues*, FOX SPORTS (Jan. 18, 2023, 5:00 PM ET), <https://www.foxsports.com/stories/college-football/top-qb-recruit-reportedly-attempting-to-leave-florida-amid-nil-issues> [https://perma.cc/BF6N-95WF].

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Kevin Brockway, *It’s Official: Quarterback Jaden Rashada Released from Florida Gators Letter of Intent*, GATORSPORTS (Jan. 20, 2023, 2:56 PM ET), <https://www.gatorsports.com/story/sports/college/football/2023/01/20/florida-gators-qb-recruit-jaden-rashada-released-from-letter-of-intent/69826660007/> [https://perma.cc/EV98-HQNP].

144. FLA. STAT. ANN. § 1006.74 (West through the 2023 Spec. B Sess. and the 2023 first reg. sess.).

145. See Russo, *supra* note 137.

146. See generally Emmanuel Rivas Valenzuela, *Is the NCAA Transfer Portal Hurting Schools?*, THE PROSPECTOR (Nov. 10, 2022), <https://www.theprospectordaily.com/2022/11/10/is-the-ncaa-transfer-portal-hurting-schools/> [https://perma.cc/DG2P-YVDU].

147. See Andrew W. Coffman, *Five Reasons for Universities and Colleges to Update Their NIL Policies*, MONDAQ (Dec. 29, 2022), <https://www.mondaq.com/unitedstates/education/1266062/five-reasons-for-universities-and-colleges-to-update-their-nil-policies> [https://perma.cc/HL6M-

procuring NIL deals for athletes creates more safety for student-athletes and universities.¹⁴⁸

Another negative with collectives handling NIL deals for universities is that they are outside of Title IX, as they are third parties and not programs run or managed by the school.¹⁴⁹ Universities could use these collectives to evade the rules of Title IX.¹⁵⁰ NIL collectives do not have to follow Title IX regulations, as they are not “federally funded programs” defined by the statute.¹⁵¹ Funding for NIL collectives comes from boosters and sponsors that only have to follow the rules laid out by the collective.¹⁵² With this lack of regulation, collectives can focus all their benefits on prominent male athletes from football and basketball teams and ignore female athletes.¹⁵³ If universities help procure NIL deals, they would be required to follow the rules laid out by Title IX, essentially providing equal treatment to their male and female athletes.¹⁵⁴

A significant problem for Texas universities is that disallowing university involvement in procuring NIL deals isolates student-athletes, forcing them to deal solely with third parties, and completely removes university advice. Texas can remedy this gap and potential issue for athletes by allowing university personnel to assist and act as a safeguard for athletes. In the current Texas statute, there is a section that states, “an institution to which this section applies may not: . . . provide or solicit a prospective student athlete of an intercollegiate athletic program at the institution with compensation in relation to the prospective student athlete’s name, image, or likeness.”¹⁵⁵ Removing this section from the statute may create the need for further regulation for universities but adds more protection for universities and student-athletes than is currently available. Universities could create programs run by the university similar to NIL collectives, hiring NIL experts and creating a program for college athletes on campus that provides

ZNDZ]; *see* Russo, *supra* note 137.

148. *See* Russo, *supra* note 137.

149. Jonathan L. Israel, *Giving Title IX Its Props in the NIL Era of College Sports*, FOLEY & LARDNER (Jan. 27, 2023), <https://www.foley.com/en/insights/publications/2023/01/giving-title-ix-props-nil-era-college-sports> [<https://perma.cc/GK5M-JSMY>].

150. *Id.*

151. 20 U.S.C.A. § 1681.

152. Pattillo, *supra* note 134.

153. *See* Israel, *supra* note 149.

154. *See id.*

155. TEX. EDUC. CODE ANN. § 51.92469(c)(2) (West through the 2023 Reg. Sess.).

student-athletes with NIL procurement assistance. Student-athletes can consult their trusted coaches, administrators, or NIL experts at the university to receive advice on deals. These administrators could also work with the collectives or the businesses to ensure safeguards are in place to protect their athletes. Universities must follow the laws of Title IX and other university regulations and are better equipped to ensure student success is at the forefront of the endeavor.

In early 2023, Florida representative Chip LaMarca stated that amending their statute “will allow Florida to remain competitive with every other state that our collegiate athletes compete against while ensuring that we prepare them for their future.”¹⁵⁶ Like Florida with its original statute, Texas should consider amending its current regulation.¹⁵⁷ One of the major downfalls of the original Florida statute, as stated by the legislators involved, is that it puts them at a disadvantage to universities in other states, as it prohibits the involvement of “coaches, schools and support organizations from directing name, image, and likeness compensation toward players.”¹⁵⁸ The Texas statute has a similar requirement.¹⁵⁹

The goal of the NIL landscape is to provide athletes with what they deserve for using their NIL, but safety and protection should always be at the forefront for students when entering any deals. Additionally, university employees want to ensure that their student-athletes receive the best opportunities to succeed and do not leave for rival schools. Therefore, allowing universities into the process of NIL deals in Texas is the best way to remain competitive in recruitment.¹⁶⁰ There will be an added sense of safety for the student-athlete if universities are allowed to assist, and the athletes will benefit from the help of trusted individuals.¹⁶¹ NIL collectives do not need to go away completely; there needs to be a sense of monitoring and regulation added to the

156. Baker, *supra* note 97.

157. TEX. EDUC. CODE ANN. § 51.9246 (West through the 2023 Reg. Sess.); FLA. STAT. ANN. § 1006.74 (West through the 2023 Spec. B Sess. and the 2023 first reg. sess.).

158. Baker, *supra* note 97.

159. TEX. EDUC. CODE ANN. § 51.92469(c)(2) (West through the 2023 Reg. Sess.).

160. See Ezzat Nsouli & Andrew King, *How Schools and Private Entities Have Engaged in NIL Activity*, SPORTS SHORTS (July 19, 2022), <https://www.sports.legal/2022/07/how-schools-and-private-entities-have-engaged-in-nil-activity/> [<https://perma.cc/ATG2-3DVC>] (explaining how other universities have assisted their athletes in NIL deals).

161. Russo, *supra* note 137.

environment, which can quickly be done by allowing universities to enter into the process of the NIL deals.

B. Addition of University Programs

Another modification to the Texas NIL statute that universities could benefit from is adding a section that allows schools to create programs to assist and support their student-athletes during the NIL journey. For example, the current Texas statute requires universities to have financial literacy classes for student-athletes.¹⁶² The statute also lists detailed requirements for the university classes and when athletes should participate.¹⁶³ Financial literacy is only one step in furthering student-athlete education in this new NIL environment. One of the goals of allowing students to gain from their NIL is that “student-athletes will have a network of connections and build their brands before graduating.”¹⁶⁴ This goal will only be met if universities provide students with resources to attain this goal. Therefore, Texas collegiate athletes can benefit significantly from the Texas statute requiring schools to supply other classes and resources for student-athletes.

Even before the *Alston* ruling, universities have worked hard to create the best environment for their student-athletes once profiting from NIL became legal.¹⁶⁵ Universities see the NIL regulation as a recruiting tactic to build the best sports programs and a way to “innovate and empower their athletes.”¹⁶⁶ One university that started early with its NIL innovations was the University of Nebraska.¹⁶⁷ Nebraska created an initiative with three separate parts to benefit their

162. TEX. EDUC. CODE ANN. § 51.92469(i) (West through the 2023 Reg. Sess.).

163. *Id.*

164. Joe Weber, *The Impact of Name, Image, and Likeness (NIL) Deals on the NCAA, GIRLS SOCCER NETWORK* (Feb. 9, 2022), <https://girlssoccernetwork.com/what-are-name-image-and-likeness-deals-nil/#:~:text=The%20NIL%20ruling%20will%20help,sports%20will%20gain%20more%20visibility> [https://perma.cc/F2TY-VKC8].

165. Lila Bromberg, *In the NIL Arms Race, Some Schools Are Going the Extra Mile to Help Their Athletes*, SPORTS ILLUSTRATED (July 1, 2021), <https://www.si.com/college/2021/07/01/name-image-likeness-programs-schools-ncaa#:~:text=In%20the%20NIL%20Arms%20Race,and%20unique%20tools%20and%20education> [https://perma.cc/79XD-8545].

166. *Id.*

167. *Nebraska to Launch Industry-Leading NIL Program: #NILbraska*, NEB. ATHLETICS (June 3, 2021), <https://huskers.com/news/2021/6/3/athletics-nebraska-to-launch-industry-leading-nil-program-nilbraska.aspx> [https://perma.cc/XGP6-2SY3].

student-athletes.¹⁶⁸ The initiative created a program that all student-athletes must complete, which includes learning about “networking and communication, brand building, financial literacy, and compliance.”¹⁶⁹ The innovative aspect of the Nebraska program is that it includes all students in the campus community by offering “pop-up classes” about content creation.¹⁷⁰ One example given for the benefit of these pop-up classes is that a student or student-athlete who is looking to start a podcast could potentially “receive access to recording equipment and be guided through the process.”¹⁷¹ In today’s world of technological innovation, these opportunities are invaluable for all students looking to create a profitable brand for their future. In addition, adding these classes and providing access to all students could help draw other students into these universities, not just student-athletes.¹⁷²

Texas universities have begun offering new programs to their students that are consistent with other states.¹⁷³ Texas A&M University offers similar but less comprehensive programs than Nebraska’s program.¹⁷⁴ Texas A&M’s program entitled “AMPLIFY” has educational resources for students; some of them include “mock interviews, understanding the Aggie Network . . . social media audits,” but not much more.¹⁷⁵ The University of Texas (“UT”) also has its program, which includes a list of UT athlete profiles allowing those interested in potentially working with athletes to view their profiles.¹⁷⁶ The UT program also includes access for their athletes to “brand building and monetization” education, among other areas.¹⁷⁷ Lastly, the University of Houston (“UH”) has an NIL program for

168. Bromberg, *supra* note 165.

169. *Id.*

170. *Nebraska to Launch Industry-Leading NIL Program: #NILbraska*, *supra* note 167.

171. Bromberg, *supra* note 165.

172. See Delaney Sullivan, *A Wider Selection of Electives Would Benefit Students*, THE RED & BLUE (Apr. 19, 2021) <https://rhsredblue.com/2031/opinion/a-wider-selection-of-electives-would-benefit-students/> [<https://perma.cc/72Q4-EDC3>].

173. *State of Texas NIL Laws*, *supra* note 123.

174. *Id.*

175. *Id.*

176. *Texas Athletics Further Enhancing Access to Student-Athletes for NIL Opportunities*, TEX. SPORTS (Apr. 4, 2022), <https://texassports.com/news/2022/4/4/name-image-and-likeness-texas-athletics-further-enhancing-access-to-student-athletes-for-nil-opportunities.aspx> [<https://perma.cc/USC8-YQ9H>].

177. *Id.*

student-athletes, but it is less expansive than Nebraska's program.¹⁷⁸ UH is providing their student-athletes with "services such as live consultation sessions with industry experts and on-demand NIL masterclass, and monetization and financial literacy from brands such as Instagram and Twitter."¹⁷⁹ UH also provides its athletes with "tools" to enhance their NIL deals, but they are not offering the opportunities or classes they could.¹⁸⁰

Student-athletes could benefit from Texas amending its statutes to require universities to create classes and programs for athletes to get hands-on brand management experience. One example is the Nebraska podcast equipment provided to all interested students.¹⁸¹ If the Texas Legislature is unwilling to require their universities to create these classes or programs for all students, they could encourage the creation of these classes. The NIL interim policy is a perfect example of this.¹⁸² The NIL interim policy only allows universities to provide equipment or services to their collegiate athletes if they also offer those services and equipment to all students.¹⁸³ Texas can add a similar amendment to its statute or encourage universities to participate in these activities. In addition, the interim policy does not require schools to provide education on NIL aspects but strongly encourages schools to do so.¹⁸⁴ The Texas Legislature can amend its statute to include a section that builds off the required financial literacy class to include more courses such as brand management, entrepreneurship, content creation, or social media strategies. They can also build off the statute to encourage providing university equipment and spaces for all students to build their brands, such as podcast equipment or a videography room. Finally, universities can expand the educational value of these classes by taking a page from Nebraska's book and including all the university's students in these programs to innovate and benefit all students.¹⁸⁵

178. *State of Texas NIL Laws*, *supra* note 123.

179. *Id.*

180. *Id.*

181. Bromberg, *supra* note 165.

182. Durham, *supra* note 104.

183. *Id.*

184. *Id.*

185. Bromberg, *supra* note 165.

C. Repeal the Texas Statute

If the Texas Legislature does not want to amend its current NIL statute to make it more student-athlete-focused, it can completely repeal its statute. History shows that Texas is a state that tends to prefer deregulation.¹⁸⁶ Texas's preference towards deregulation appears through the liberalization of the energy market in 2002.¹⁸⁷ Deregulation in the energy markets is opening the supply to improve and create competition among companies.¹⁸⁸ Texas can do something like the energy market and deregulate its NIL market to make its universities more competitive. Alabama recently did something similar with its NIL regulation to create the best recruiting environment for its universities and athletes.¹⁸⁹

Since July 2021, the universities that have created state statutes have been at a regulation disadvantage to universities that do not have NIL statutes and are following the NCAA policy.¹⁹⁰ Alabama repealing its NIL statute has given athletes and universities more freedom and less regulation.¹⁹¹ After only ten months of having an NIL statute, Alabama repealed it so that its universities are now following the NCAA policy.¹⁹² The NCAA policy will allow Alabama's "top-tier colleges [to stay] competitive in recruitment," in place of the state's original restrictive policy.¹⁹³

Repealing the Texas statute and defaulting to the NCAA policy would improve recruitment opportunities and put Texas universities on the same footing as many other states' schools.¹⁹⁴ Texas

186. *The Ultimate Guide to Texas Electricity Regulation*, ELEC. CHOICE, <https://www.electricchoice.com/blog/guide-texas-electricity-deregulation/> [https://perma.cc/P4CZ-AXWC].

187. *Id.*

188. *Id.*

189. *Why Alabama Repealed its NIL Law*, *supra* note 103.

190. Rudy Hill & Jonathan D. Wohlwend, *Alabama and Florida Call an Audible on NIL Laws*, BRADLEY (Mar. 7, 2022), <https://www.bradley.com/insights/publications/2022/03/alabama-and-florida-call-an-audible-on-nillaws#:~:text=On%20February%203%2C%202022%2C%20Alabama,NIL%20law%20in%20its%20entirety> [https://perma.cc/VNE6-QTD9].

191. *Id.*

192. *Id.*

193. Brian Lyman, *Why State Legislature is Considering Repeal of NIL Law to Help Alabama, Auburn Recruiting*, MONTGOMERY ADVERTISER (Jan. 14, 2022), <https://www.montgomeryadvertiser.com/story/news/2022/01/14/alabama-house-considers-repeal-college-athlete-endorsement-nil-law/6529601001/> [https://perma.cc/QZ5R-QSLD].

194. See Braly Keller, *NIL Incoming: Comparing State Laws and Proposed*

universities are currently held back in recruitment by the state's almost seven-page-long statute, which does not allow their student-athletes to use school logos in their endorsements or universities to help procure NIL deals for student-athletes, and it restricts student-athletes from the ability to endorse particular products.¹⁹⁵ These restrictions can limit recruitment opportunities for state universities in Texas. While Texas schools have yet to see the worst of the recruitment effects, the increase in the use of the transfer portal and the ever-evolving NIL landscape will eventually catch up to Texas.¹⁹⁶ In addition, the less restrictive NIL laws are more attractive for student-athletes looking to gain the most from their deals.¹⁹⁷

Instead of amending its NIL law, Texas could follow in the footsteps of Alabama, repeal its current statute, and follow the NCAA policy until a federal law is in place. If Texas decides to repeal its statute, universities will not have complete freedom, as they would still have to follow the NCAA policy, but they will have more freedom than they currently do.¹⁹⁸ Following the NCAA policy, Texas schools would be able to offer some assistance in the procurement of NIL deals.¹⁹⁹ Also, Texas universities would be allowed and encouraged to offer "educational services" for their student-athletes.²⁰⁰ In addition, collegiate athletes could utilize their school logo in their endorsements and be able to endorse any product without restrictions.²⁰¹ The NCAA policy is more student-athlete-focused than the current Texas statute.

Legislation, OPENDORSE (Nov. 30, 2022), <https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/> [https://perma.cc/75MY-JPUB].

195. Derin Dickerson & Trenton Hafley, *State Experiments with NIL Rules Put Athletes on Defense*, BL (Apr. 1, 2022), <https://news.bloomberglaw.com/ip-law/state-experiments-with-nil-rules-put-athletes-on-defense> [https://perma.cc/2JHU-PEQA].

196. See Robert J. Romano, *NIL Opportunities and the Impact on Student-Athletes Entering the NCAA's 'Transfer Portal'*, SPORTS LITIG. ALERT (May 6, 2022), <https://sportslitigationalert.com/nil-opportunities-and-the-impact-on-student-athletes-entering-the-ncaas-transfer-portal/> [https://perma.cc/PN6B-E859].

197. Dickerson & Hafley, *supra* note 195.

198. *NCAA Provides Updated NIL Rules Guidance to Member Schools*, ESPN (Oct. 26, 2022, 3:45 PM), https://www.espn.com/college-sports/story/_/id/34883738/ncaa-provides-updated-nil-rules-guidance-member-schools [https://perma.cc/69PX-DYB2].

199. *Id.*

200. *Id.*

201. See James Fielding & Philip L. Lu, *NCAA Rules to Be Aware of Before Reaching an NIL Deal*, LITTLER (Nov. 28, 2022), <https://www.littler.com/publication-press/publication/ncaa-rules-be-aware->

Overall, the option for Texas to repeal its “highly restrictive” NIL statute and move towards deregulation would be entirely beneficial for recruitment purposes for universities in Texas.²⁰² The NCAA policy provides freedom with control. Still, universities would have much more space in the NIL landscape.²⁰³ Repealing the Texas statute would help keep Texas universities on equal footing with other universities and allow them the greatest opportunity to recruit the best student-athletes.²⁰⁴

V. TITLE IX AND NIL

A. *The Benefit of Title IX and NIL*

Since July 21, 2021, both male and female athletes have received lucrative deals due to their NIL.²⁰⁵ In 2023, Livvy Dunne, a female gymnast from Louisiana State University, became the highest-earning female collegiate athlete in the NIL landscape.²⁰⁶ High school basketball player Bronny James and University of Texas freshman Arch Manning are the only athletes earning more than Dunne.²⁰⁷ Dunne has amassed 8.3 million followers on social media and has an NIL value of over two million dollars.²⁰⁸ Even though Dunne is the second-highest earner for a college athlete and the third-highest earner overall, she is the only female athlete in the top ten.²⁰⁹ So while females earn from their NIL, men still find more NIL deals than women.

For years, Title IX has affected college sports and the treatment of female collegiate athletes.²¹⁰ Within the first year and a half of NIL

reaching-nil-deal [<https://perma.cc/C7HS-NDB5>].

202. Keller, *supra* note 194.

203. Fielding & Lu, *supra* note 201.

204. Hill & Wohlwend, *supra* note 190.

205. *NIL Valuations & Rankings*, ON3, <https://www.on3.com/nil/rankings/> [<https://perma.cc/Z4C9-7MFH>].

206. *Id.*

207. *Id.*

208. Pete Nakos, *Who Falls in the Top 10 Female Athlete On3 NIL Valuations?*, ON3 (Oct. 4, 2022), <https://www.on3.com/nil/news/who-falls-in-top-10-female-athlete-on3-nil-valuations-sedona-prince-livvy-dunne/> [<https://perma.cc/P26A-YKB5>].

209. *NIL Valuations & Rankings*, *supra* note 205.

210. See 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 SPORT 253 (2021).

deals, only 34 percent of groups offered deals to female athletes.²¹¹ In 2023, the Drake Group requested that the Biden Administration launch an investigation into handling NIL deals, as most NIL money went to male athletes.²¹² Currently, most NIL deals in Texas are handled between NIL collectives, student-athletes, and companies, meaning that there are few Title IX regulation issues, as collectives do not fall under Title IX regulation.²¹³ While Title IX regulation is seen only as a potential problem for universities, Title IX having more regulation over the NIL landscape could benefit females in college sports.

Hypothetically, if Texas removes the section of its statute that disallows university involvement in procuring NIL deals for athletes. In that case, universities must follow Title IX regulations in assisting athletes in procurement.²¹⁴ Currently, Texas A&M University does not have a female athlete in their top 50 earners based on NIL, and the University of Texas does not have a woman in their top 25.²¹⁵ Amending the Texas statute to allow university involvement will require universities to help male and female athletes in the same way, which could help female athletes in Texas earn more off of their NIL and enhance the ability to recruit top-tier female athletes to Texas schools. In addition, with university personnel involved in funneling or promoting NIL deals to their athletes, they would need to ensure that they offer their male and female athletes the same opportunities.²¹⁶

Some see NIL as a way for female athletes to generate publicity for women's sports and help to create an equal playing field between male and female athletes.²¹⁷ NIL can possibly help create more publicity for female athletes. Currently, most of that work must be done by the

211. Christovich, *supra* note 77.

212. Jeremiah Poff, *NCAA Athlete NIL Deals Unfairly Favor Men, May Violate Title IX, Group Says*, WASH. EXAM'R (Jan. 23, 2022), <https://www.washingtonexaminer.com/restoring-america/fairness-justice/ncaa-athlete-nil-favor-men-violate-title-ix> [<https://perma.cc/7U9R-D3JJ>].

213. See Academic Integrity in Collegiate Sports, *supra* note 149.

214. Jessop & Sabin, *supra* note 210, at 288.

215. *Top Texas A&M NIL Players*, ON3, <https://www.on3.com/nil/rankings/player/nil-100/?team-key=23590> [<https://perma.cc/R9DJ-VD64>]; *Top Texas NIL Players*, ON3, <https://www.on3.com/nil/rankings/player/nil-100/?team-key=23628> [<https://perma.cc/C53K-QAPS>].

216. Arthur Bryant & Cary Joshi, *College Sports NIL is Headed for a Collision with Title IX*, SPORTICO (Nov. 21, 2021), <https://www.sportico.com/law/analysis/2021/college-sports-nil-title-ix-1234645328/> [<https://perma.cc/H5YN-AGFQ>].

217. See Jessop & Sabin, *supra* note 210, at 254.

female athletes through using social media.²¹⁸ The top female athlete NIL earners receive most of their NIL money by agreeing to brand deals to post videos and sponsored posts to their million-plus Instagram, TikTok, or YouTube followers.²¹⁹ While male athletes also receive brand sponsorships to post on social media, male athletes are likelier to be seen—like previous Alabama Quarterback Bryce Young—in mainstream media television commercials for major brands.²²⁰

Allowing university participation in procuring NIL deals would require employees to follow Title IX regulations.²²¹ If Texas universities can form on-campus collectives, those collectives will be required to assist male and female athletes in procuring NIL deals.²²² Title IX regulation in this form would benefit female athletes in requiring university personnel to provide female athletes at the university with similar opportunities as men.²²³ This change will likely lead to more female athletes gaining big NIL deals and receiving deals similar to male athletes in Texas.

B. How to Prevent Title IX Implications

Title IX is not a regulation intended to punish universities; it protects students and universities and ensures that all participants are treated equally, regardless of sex.²²⁴ While NIL regulation is a new area for universities to navigate, Title IX is familiar. In early 2023, the NCAA handed down its first NIL discipline.²²⁵ The NCAA sanctioned the University of Miami's ("UM") women's basketball team for

218. Kaitlin Balasaygun, *In the College Sports Pay Era, Female Athletes Are Emerging as Big Economic Winners*, CNBC: THE BOTTOM LINE (Oct. 15, 2022), <https://www.cnbc.com/2022/10/15/that-nike-bronny-james-nil-deal-was-a-big-deal-for-women-too.html> [<https://perma.cc/5J4E-Y4TL>].

219. SI Staff, *The Biggest NIL Earners in Women's Sports from 2022*, FOX 59: SPORTS ILLUSTRATED (Dec. 22, 2022), <https://fox59.com/sports/sports-illustrated/6b5a6949/the-biggest-nil-earners-in-womens-sports-from-2022/> [<https://perma.cc/SZD6-M59H>].

220. Andy Wittry, *Alabama QB Bryce Young Uses NIL in Nissan Heisman House Ads*, ON3 (Sep. 1, 2022), <https://www.on3.com/nil/news/bryce-young-alabama-crimson-tide-nil-nissan-heisman-house-commercials/> [<https://perma.cc/E6UB-4DR9>].

221. Jessop & Sabin, *supra* note 210, at 288.

222. *See* 20 U.S.C. § 1681.

223. Jessop & Sabin, *supra* note 210, at 264.

224. *See Cannon v. Univ. of Chi.*, 441 US 677 (1979).

225. Jenna Lemoncelli, *Haley, Hanna Cavinder Dinner with Miami Booster Sparks First NIL Crackdown*, N.Y. POST (Feb. 24, 2023, 6:51 PM), <https://nypost.com/2023/02/24/cavinder-twins-dinner-with-miami-booster-sparks-nil-crackdown/> [<https://perma.cc/M4GX-QXNG>].

violating NIL rules while recruiting twins.²²⁶ The twins and their family had dinner with a UM booster during the recruiting process.²²⁷ The UM women's basketball coach sat out for three games, and the NCAA issued fines of \$5,000 and "[1 percent] of the [program's] budget."²²⁸ Title IX violations in the NIL realm could see similar punishments as the UM case or similar court cases like the Radwan case at UConn.²²⁹ If Texas makes the proposed changes and allows universities to be involved in the procurement and adds more NIL academic programs, or if the statute is repealed, there will be Title IX concerns for all Texas universities.

For universities to assist in procuring NIL deals, the university administration must ensure they offer similar opportunities to male and female athletes. An inequity exists between men and women and between different sports, mainly due to media exposure of the particular sport. Title IX regulations do not mean that if a university administrator finds a lucrative NIL deal for one of their male football players, they immediately need to find the same one for a women volleyball player.²³⁰ It simply means opportunities must be open and accessible for both women and male athletes.²³¹ Universities could create on-campus NIL programs similar to an NIL collective run by university employees. These programs would have to be available to all student-athletes, and each sports team could have its NIL advisor that works closely with the players and staff to find deals or generally to provide NIL help to athletes. Offering these programs to all sports teams would help universities avoid Title IX implications as they offer similar assistance to all sports teams regardless of gender.

226. Isabel Gonzalez, *NCAA Hands Down First Known NIL Ruling in Miami Women's Basketball Cavinder Twins Infraction Case*, CBS (Feb. 24, 2023, 2:35 PM), <https://www.cbssports.com/womens-college-basketball/news/ncaa-hands-down-first-known-nil-ruling-in-miami-womens-basketball-cavinder-twins-infraction-case/> [https://perma.cc/EK3U-TEJL].

227. *Id.*

228. *Id.*

229. *See supra* Part II.

230. Haley Dominique, *Title IX and Dollar Signs: Where the New NIL World May Be Heading*, U. CIN. L. REV. (Jan. 1, 2023) <https://uclawreview.org/2023/01/11/title-ix-and-dollar-signs-where-the-new-nil-world-may-be-heading/> [https://perma.cc/D4CC-863X].

231. Jonathan L. Israel & Nicole M. Marschean, *Giving Title IX its Props in the NIL Era of College Sports*, FOLEY & LARDNER LLP (Jan. 27, 2023), <https://www.foley.com/en/insights/publications/2023/01/giving-title-ix-props-nil-era-college-sports> [https://perma.cc/JJ9T-TCCS].

Universities also could run into problems with Title IX if the Texas statute is amended to create more comprehensive university programs involving NIL. When a school starts offering programs to its athletes, it will have to make sure that these same opportunities are available to everyone, not just singling out a group of highly sought-after athletes.²³² In addition, repealing the NIL statute will create Title IX concerns in the publicity area and the expansion of NIL academic programs.²³³

Schools must comply with Title IX requirements when creating new school programs involving NIL.²³⁴ In this scenario, schools cannot create an entrepreneurship class only available to their baseball team or a videography class only available to their softball team.²³⁵ Universities must ensure that any program they create is available to all their student-athletes and even their student population in general, as provided by the NCAA interim policy.²³⁶ Universities could implement podcast or photography rooms that all students can rent out or book daily. Universities could also create entrepreneurship classes available to their entire student population during the semester. These additions to universities could create new classes for all students to learn how to gain from their NIL without interfering with any potential Title IX or NIL lawsuits.²³⁷

With the changes to the NIL statute and potential Title IX implications, universities should see this heightened Title IX regulation into NIL as an added benefit for all students, and not an added headache.²³⁸ While Title IX violations may still happen, they can be mitigated if universities are diligent and offer new programs and opportunities to all their students, regardless of gender or athletic ability.²³⁹

VI. CONCLUSION

Overall, college athletes have made considerable strides in gaining the right to profit from their name, image, and likeness. College

232. Bryant & Joshi, *supra* note 216.

233. *Id.*

234. Jessop & Sabin, *supra* note 210, at 288.

235. Bryant & Joshi, *supra* note 216.

236. Israel & Marschean, *supra* note 231; Durham, *supra* note 104; TEX. EDUC. CODE ANN. § 51.9246 (West through the 2023 Reg. Sess.).

237. Bryant & Joshi, *supra* note 216.

238. Israel & Marschean, *supra* note 231..

239. *Id.*

athletes do not have to decide between making money and continuing their college athletic journey. Even with these significant changes, more need to be made. Texas needs to amend or repeal its NIL law to remove certain restrictions and allow athletes in the state to benefit from NIL deals. Universities must provide athletes with university-funded resources to learn how to achieve the most successful NIL deals. With these changes, Texas universities can be proactive and stay ahead of universities in competing states by allowing them to have the most inclusive NIL laws. If Texas is unwilling to make amendments to its statute to make it more student-athlete-friendly, it can also go down the path of repealing it. In either scenario, Texas universities must be aware of Title IX. Title IX could create problems for universities; however, it could also create opportunities. Texas universities must be aware of and avoid only potential problems in order to have a successful NIL program with Title IX inclusion. In conclusion, with these changes, Texas can prepare itself for an increasingly competitive student-athlete recruitment landscape by having the nation's most progressive all-encompassing student-athlete-focused NIL laws.