



“Not So Fast My Friend!” Thoughts on Capturing or Flushing Your NIL Collective

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Way back in 2022 when NIL and collectives were still new and LEAD1 first started asking legal experts to discuss the landscape, we wrote an article called “Collective Wisdom,” which was intended as a roadmap for working more effectively with your collective.

Now with changed NCAA guidance, and the likely House antitrust settlement, allowing schools to bring their collectives either in-house or at least into much closer collaboration, has our advice changed? It has not. Two years later, we still see it the same way. Having a structurally independent but collaborative collective is critical in 2024 and beyond.

As we survey the NIL landscape, however, we are now seeing some attempts by schools to push out or take over their collectives. In that regard, the reasons for wanting to bring your collective in-house are obvious. First, they have likely made inroads to new and possibly unexpected donor streams. Second, there is a significant desire to have greater control and certainty over those revenue streams in a landscape that is growing more and more competitive and where every dollar counts. Third, providing a mechanism to compensate student-athletes, within the rules but outside of the institution, was the driving force behind the rise of the collective structure in the first place. Yet, when NCAA rules eventually allow schools to directly compensate athletes, we still believe that keeping your collective apart from the institution will be well advised for three reasons.

The first, very practical reason you want your collective to be remain external is NCAA rules on Countable and Required Athletically Related Activities (CARA & RARA, respectively) remain. While NIL activity can now take place during games, practices and travel, there are still events that your collective can pull off, especially for individual athletes, more effectively than your department can, and exempt from time restrictions. If your coaches are already struggling to fit team stretching into their CARA windows, adding athlete NIL activities like paid autograph signings and/or personal appearances on top of this will be even harder to manage.

The second reason you want your collective to have some independence from your institution came into focus just last week, when the U.S. Department of Education made a public statement that any future revenue sharing with athletes must also comply with Title IX.

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"Schools must provide equal athletic opportunities based on sex, including with respect to benefits, opportunities, publicity, and recruitment, and must not discriminate in the provision of financial aid," Catherine Lhamon, the assistant secretary for the department's Office for Civil Rights, said in a written statement to ESPN. "In the new NIL environment, these same principles apply."

This could change in 2025, with a possible new administration, but for now this figures to be the dividing line for school-based compensation.

As to whether collectives are also covered by Title IX, and the answer remains possibly yes, the Schroeder et. al v. University of Oregon, case is litigating that question right now. However, a collective with some level of independence from the institution may offer added utility where Title IX compliance is concerned especially on an individual athlete level.

Finally, in the likely "capped" environment that emerges from a settlement in the House case, the flexibility to have an independent collective work on behalf of certain athletes to provide NIL opportunities based on exceptional achievement or value to the institution ought not be overlooked.

To quote Lee Corso, when considering taking over your collective, "not so fast, my friend." There are still benefits that an external, experienced, athlete-focused marketing arm offers in terms of compliance, flexibility, and opportunity in expanding the total "pie" and working with unofficial brands and sponsors.

Recognizing the incentives related to bringing your collective in house, we think the proper course is to begin to prioritize areas where you and your collective enhance the greater whole. Together with your collective and Media and Marketing Rights partner, another area that has recently been taken in house at some schools, work to synergize your efforts rather than necessarily consolidate them.

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