

**2026 National Conference on Special Needs Planning
and Special Needs Trusts**

Name, Image, and Likeness and Public Benefits

Right of Publicity, Substantial Gainful Activity, and Special
Needs Trust Planning

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I. Introduction and Scope

Name, Image, and Likeness—commonly shortened to NIL—has received sustained attention as the college athletics landscape reorganizes around athlete compensation. However, its relevance extends beyond sports, as people increasingly monetize social media accounts and artificial intelligence enables the commercial recreation of a person’s likeness. NIL is not, however, a distinct body of law. Rather, it is commercial shorthand for exploiting a person’s *right of publicity*, and that right—not an NIL-specific statute—determines what a client owns, whether it can be transferred, and to whom. For a special needs planner, the central questions are not the traditional sports and business law issues, but whether NIL activity jeopardizes a disability determination and, if the client wishes to preserve public benefits, how those benefits may be protected.

This paper addresses:

1. How NIL activity is evaluated in determining disability, and why that evaluation differs between Title II (Social Security Disability Insurance) and Title XVI (Supplemental Security Income);
2. How NIL income is characterized as earned or unearned for Supplemental Security Income (“SSI”) purposes; and
3. Whether and how NIL rights—as distinct from NIL income—may be assigned to a special needs trust.

This is a rapidly developing area, and several of the propositions below rest on authority that was not drafted with NIL in mind.

II. The Right of Publicity

A. History and Current Landscape of the Right of Publicity

The right of publicity is a distinctly American development that emerged from a dispute over baseball cards. In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, the Second Circuit recognized that a person possesses, apart from any privacy interest, a right in the publicity value of his own photograph and, critically, may grant that right exclusively to another.¹ Although earlier academic commentary generally treated the interest as personal, *Haelan's* recognition of an exclusive grant helped recast it as a property right. That characterization matters for planning because a property right may be licensed, assigned, and held in trust, while a personal privacy right generally may not.

There is no federal right of publicity, and despite substantial discussion, Congress has not preempted the field. Most states recognize some form of the right, either by statute or at common law, and many follow the property characterization. The absence of a federal rule has nevertheless produced a fifty-state patchwork, requiring the planner to identify the governing jurisdiction and evaluate its particular rules concerning the right's scope, assignability, and duration.

¹ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

Where a state treats the right as property, assignability generally follows, and some statutes say so expressly. However, in states where the right is personal, the right may not be assignable. It is necessary to review both state statute and case law regarding the right of publicity.

B. NIL in College Athletics

On June 15, 2020, several Division I college student-athletes sued the National Collegiate Athletic Association (NCAA), claiming that NCAA rules limiting student-athlete compensation violated federal antitrust law.² Specifically, in House v. NCAA, plaintiffs claimed that student-athletes should be permitted to profit from their NIL.³ Prior to this litigation, benefits to student-athletes were limited to scholarships, grants-in-aid, and other education-related resources.

The NCAA settled the consolidated cases on June 6, 2025, in what is now known as the House Settlement, or *House*.⁴ The result has been significant, with broad and wide-ranging changes sweeping the collegiate athletics landscape. Student-athletes are now permitted to receive, among other benefits, direct compensation for their NIL in promoting their universities and third-party businesses.⁵

² *In re College Athlete NIL Litigation*, No. 4:20-cv-03919 (N.D. Cal. 2020).

³ *House v. NCAA*, 545 F. Supp. 3d 804 (N.D. Cal. 2021).

⁴ See *In re College Athlete NIL Litigation*, Dkt. No. 717.

⁵ *Id.*, Dkt. No. 979.

1. NIL Compensation

In its most basic form, *House* allows student-athletes to receive three separate forms of NIL compensation: revenue sharing with their university, endorsement income from third-party businesses or organizations, and back pay from the NCAA.

Revenue Sharing. The area receiving the most news coverage is revenue sharing, where universities make direct payments to student-athletes. The amount that a university may spend in any given year is capped; however, the amount paid to an individual is unlimited. For example, in 2026, universities may not spend more than approximately \$21 million in revenue sharing across all sports. The university could choose the best way to allocate those dollars. The entire amount could be paid to the star tennis player, or it could be divided among athletes on any roster in any number of ways.

Universities are not, however, paying student-athletes for competitive performance. They are only allowed to share certain types of revenue with student-athletes, and in return, the university has the right to use the student-athlete's NIL to promote the athletics department. Further, revenue sharing payments may not exceed the period of the student-athlete's eligibility.

Third-Party Endorsements. Businesses and organizations that are not affiliated with the university may also pay student-athletes for the right to use their NIL in promoting their goods and services. There is no limit to the amount that a student-

athlete may receive from these third-party deals, and they may continue their business relationship after the student-athlete is no longer eligible to compete.

Back Pay. *House* did not simply open the door for current and future NIL compensation; it provided former student-athletes the right to pursue claims for prior use of their NIL. The NCAA agreed to fund more than \$2 billion in a claims pool for student-athletes dating back to 2016. In other words, former student-athletes are being made whole for the NCAA's use of their NIL in broadcast and other media.

2. Standard Licensing Language

Whether through revenue sharing or third-party payments, the grant of NIL rights most often occurs through a license agreement. The basic legal terms of these agreements have become fairly standard among larger universities and their conferences. Samples of the most significant terms are provided below.

Sample NIL Grant of Rights Provision. Student-Athlete hereby grants to the University an irrevocable, non-exclusive right and license to use their name, image, likeness, right of publicity, initials or original autograph/signature or other attributes or indicia for use in the sponsorship, endorsement, promotion, or marketing related to student-athlete's participation in the University's athletic program. Student-athlete hereby consents to such use to promote the University, its athletic program, and as otherwise contemplated by this Agreement.

Sample Ownership Provision. All materials created in connection with the rights granted in this Agreement shall be referred to as the “Materials.” University shall be the exclusive owner of all results and proceeds of the Materials. Such results and proceeds shall be considered a work made for hire and University shall own all rights in any such results and proceeds. To the extent the Materials are for any reason not considered a work made for hire, student-athlete hereby irrevocably grants to University a perpetual, fully paid, non-exclusive, worldwide, royalty free and freely assignable license, with the right to sublicense the results and proceeds of all of the Materials.

Sample Relationship of the Parties Provision. The Parties agree that student-athlete shall furnish all services as an independent contractor and that student-athlete shall not be deemed an employee, agent, partner, or joint venturer of University for any purpose whatsoever. University has no obligation to withhold any federal or state taxes from payments or provide any workers’ compensation, unemployment insurance, medical insurance, or similar employee benefits. This Agreement does not constitute an agency, partnership or joint venture between the Parties.

III. Disability Determination: Substantial Gainful Activity

A. What SGA Means

Substantial gainful activity is work activity that is both substantial and gainful. The regulations define each half separately. Substantial work activity “is work activity that

involves doing significant physical or mental activities,” and work may be substantial even if performed part-time or with less responsibility than before. Gainful work activity “is work activity that you do for pay or profit,” and work is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is in fact realized.⁶ An individual who builds an audience without yet monetizing it, or who performs uncompensated promotional work while income is routed elsewhere, is therefore not outside the definition. The test looks to the character of the activity, not to whether the individual banked the proceeds.

B. The Title II / Title XVI Divide

For SSI, the Social Security Administration’s guidance is explicit: “SGA determinations are required to establish initial disability for SSI but are not required for continuing SSI eligibility purposes.”⁷ Section 1619(a) permits a recipient whose gross earnings reach or exceed the SGA level to continue in cash-payment status, and section 1619(b) preserves Medicaid where earnings displace the cash payment entirely.⁸ For a client already receiving SSI, NIL work at the SGA level does not by itself end disability status; the exposure is to the income-counting rules.

⁶ 20 C.F.R. § 416.972(a)–(b); see also 20 C.F.R. § 404.1572(a)–(b) (parallel Title II provision).

⁷ POMS SI 02302.010, 1619 Policy Principles.

⁸ Social Security Act § 1619(a)–(b), 42 U.S.C. § 1382h(a)–(b); POMS SI 02302.010; POMS SI 02302.015.

This is not true of Title II (Social Security Disability Insurance; “SSDI”) benefits. For a concurrent beneficiary or a Title II-only claimant, SGA remains a live and continuing test, absent the return to work programs and exceptions. A structure built to protect an SSI recipient may leave the same client’s SSDI benefit fully exposed.

C. Title II Eligibility for College Athletes

Because a college athlete who suffers a major injury is likely very young—late teens to early twenties—he or she may not have worked at a significant enough level to qualify for Social Security Disability Insurance. The number of quarters (or credits) necessary to qualify operates on a sliding scale.⁹ Per the Social Security Administration, the number of credits necessary to meet the recent work test depends on the age you become disabled. The rules are as follows:¹⁰

Before age 24. You may be eligible if you have six credits earned in the three-year period ending when your disability starts.¹¹

⁹ 42 U.S.C. § 423(c)(1)(B); 20 C.F.R. § 404.130.

¹⁰ Soc. Sec. Admin., How Does Someone Become Eligible?, <https://www.ssa.gov/benefits/disability/qualify.html> (last visited Sept. 18, 2026)

¹¹ 20 C.F.R. § 404.130(c)(3)(ii) (“If the period has less than 12 quarters, you must have at least 6 QCs in the 12-quarter period ending with that quarter.”). The regulation states no

Age 24 to 31. In general, you may be eligible if you have credit for working half the time between age 21 and the time your disability began. As an example, if you develop a disability at age 27, you will need three years of work (12 credits) out of the past six years (between ages 21 and 27).¹²

Age 31 or older. In general, you must have at least 20 credits in the 10-year period immediately before your disability began.¹³

Credits are based on your total wages and self-employment income for the year. You might work all year to earn four credits, or you might earn enough for all four in less time.¹⁴

The amount of earnings it takes to earn a credit may change each year. In 2026, you earn one Social Security and Medicare credit for every \$1,890 in covered earnings

separate rule for claimants under age 24; the six-quarter requirement operates as a floor within the rule for claimants who have not reached age 31.

¹² 20 C.F.R. § 404.130(c)(3) (Rule II) (requiring quarters of coverage “in at least one-half of the quarters during the period ending with that quarter and beginning with the quarter after the quarter you became age 21”).

¹³ 20 C.F.R. § 404.130(b) (Rule I).

¹⁴ 42 U.S.C. § 413; 20 C.F.R. §§ 404.140–.146; POMS RS 00301.230, Assignment of Quarters of Coverage (QC).

each year. You must earn \$7,560 to get the maximum four credits for the year.

Those earnings may be received all at once.¹⁵

Accordingly, an individual could now accumulate six credits through NIL within the first two years of college, by age nineteen or twenty, making SSDI a realistic option for these athletes.¹⁶ If the credit requirement is not met, the athlete is likely limited to SSI—or, if the disabling event occurred before age twenty-two, to Childhood Disability Benefits (Disabled Adult Child) on a parent’s work record, payable once the parent begins drawing Social Security, becomes disabled, or dies.¹⁷

D. Self-Employment and the Three Tests

Where NIL activity is conducted as self-employment, SGA is evaluated under three tests:

1. significant services and substantial income;

¹⁵ Soc. Sec. Admin., How You Earn Credits, SSA Pub. No. 05-10072 (Jan. 2026). Quarters of coverage are credited on total covered earnings for the calendar year rather than quarter by quarter. 20 C.F.R. § 404.140(b).

¹⁶ This conclusion assumes the NIL proceeds are covered earnings. Quarters of coverage accrue only on wages or net earnings from self-employment.

¹⁷ 42 U.S.C. § 402(d)(1)(B)(ii); 20 C.F.R. § 404.350(a)(5); POMS DI 10115.001.

2. comparability of the work to that of unimpaired individuals in the same community engaged in similar businesses; and
3. the worth of the work activity measured against the earnings guidelines.¹⁸

For a business with more than one person involved, an owner or partner renders significant services where the individual contributes more than half the total time required to manage the business, or renders management services for more than forty-five hours a month.¹⁹

The measure is *management* time. An individual who appears on camera as talent, and who neither owns nor manages the entity that commercializes the appearance, is not obviously rendering significant services within that test, which pushes the analysis toward wage-based evaluation of whatever the entity pays the individual rather than toward self-employment evaluation of the enterprise's profits.

E. Why Assignment Is Not a Safe Harbor

Assigning NIL income to an entity or a trust is not a safe harbor against SGA. Income-diversion addresses whose income it is, but SGA addresses what the individual *does*. These are distinct issues.

¹⁸ POMS DI 10510.010, SGA Criteria in Self-Employment.

¹⁹ POMS DI 10510.015, Test One of General Evaluation Criteria: Significant Services and Substantial Income.

IV. Income Characterization Under the POMS

A. The Earned/Unearned Divide

Assuming the activity does not defeat the disability determination, the next question is whether NIL proceeds are earned or unearned income. The distinction is not academic. Earned income receives the \$65 monthly exclusion and the one-half exclusion of the remainder, while unearned income is reduced only by the \$20 general exclusion and otherwise offsets the benefit dollar for dollar.²⁰

Characterization turns on the nature of the individual's involvement. Service-based income—coaching at a camp, paid appearances, scheduled social media posts—is likely earned. Passive income—licensing or merchandising the NIL, or residual copyright material—is likely royalty income. Where the individual conducts the activity as a trade or business, net earnings from self-employment are gross income from the business less allowable deductions, and whether an activity is a trade or business turns on holding oneself out as a provider, intent to produce income, ongoing and regular participation, a third-party customer relationship, and profit motivation.²¹

²⁰ POMS SI 00820.001 (earned income); POMS SI 00830.001 (unearned income); POMS SI 00820.500 (earned income exclusions).

²¹ POMS SI 00820.200, Net Earnings from Self-Employment (NESE); POMS SI 00820.210 (computation).

B. Royalties

Royalty treatment is governed by two POMS sections read together. POMS SI 00830.510 defines royalties as “compensation paid to the owner for the use of property, usually copyrighted material (e.g., books, music, or art) or natural resources,” and places them in the unearned income series. POMS SI 00820.450 supplies the exceptions that move them into earned income.²²

Therefore, royalties are unearned income unless received as part of a trade or business, or received by an individual in connection with any publication of that individual’s work—a manuscript, magazine article, or artwork.²³ The trade-or-business exception is the one most likely to be triggered by an individual who has organized his NIL activity into an operating enterprise, and it converts what the parties may have drafted as a royalty into earned income. Additionally, the expense rule runs opposite to what one may expect. Expenses incurred in obtaining royalty income are deductible where the royalty is unearned, but not where it is treated as earned.²⁴

²² POMS SI 00830.510, Royalties; POMS SI 00820.450, Royalties and Honoraria.

²³ POMS SI 00820.450(A); POMS SI 00830.510(B).

²⁴ POMS SI 00820.450(C).

C. Honoraria, Appearance Fees, and In-Kind Compensation

An honorarium is an honorary or free gift, reward, or donation provided gratuitously for services rendered, with no legal obligation to pay. Payment for the service itself is earned income, while any other payment received in cash or in kind in connection with the service is unearned income to the extent it exceeds the individual's expenses.²⁵

NIL deals frequently pay in product rather than cash. There may be an instinct to treat this in-kind compensation as in-kind support and maintenance. However, free apparel, equipment, or travel supplied by a sponsor is not ISM and will likely be treated as "other in-kind income," valued at its current market value.²⁶

D. Category Mapping

The following table states, for each common form of NIL monetization, the default SSI characterization and the factor most likely to change it.

Table 1. Default Characterization of Common NIL Monetization

²⁵ POMS SI 00820.450(B), (D).

²⁶ POMS SI 00810.020(A)(2)(b) (ISM is unearned in-kind income that is food or shelter; "the amount of other in-kind unearned income is generally equal to its CMV, subject to the rules in SI 00835.310"). Where the in-kind item is received as remuneration for employment, see POMS SI 00820.010.

NIL activity	Default characterization	What changes it
Merchandising / trading card / video game licensing	Unearned — royalty	Trade-or-business exception where the individual operates an enterprise
Group licensing pool distributions	Unearned — royalty	Trade-or-business exception where the individual operates an enterprise
Royalty paid by an operating entity	Unearned — royalty	Whether the individual, rather than another party, operates the business
Sponsored posts / endorsements	Contested; earned where regular	Regularity and holding out; a genuine one-off falls in a gap the POMS does not cleanly resolve
Appearance fees	Earned (honorarium split)	A regular circuit converts the analysis to self-employment (NESE)
Affiliate / referral codes	Earned — NESE	Absence of regularity or profit motive
Coaching, training, camps	Earned — NESE or wages	Existence of an employment relationship
Platform content monetization	Earned — NESE	Rarely; ongoing labor and profit motive usually satisfy all factors
Speaking engagements	Earned (honorarium split)	A regular circuit converts to NESE
Collective payments	No clean default	Whether the agreement obligates services; substance controls over the recited consideration and the trade-or-business exception where the individual operates an enterprise may tip the characterization
Institutional revenue share	Unresolved	No agency guidance addresses these directly, but the authors believe this would be treated as unearned income unless the trade-or-business exception tips the characterization

V. Assigning NIL to a Special Needs Trust

A. The Irrevocability Requirement

Where the income stream is assigned, the assignment must be irrevocable: “A legally assignable payment that is assigned to a trust or trustee is income for SSI purposes, to the individual entitled or eligible to receive the payment, unless an SSI income exclusion applies or the assignment is irrevocable.”²⁷ If the assignment is revocable, the income is counted to the beneficiary exactly as though the assignment had not been made. The same requirement applies whether what is assigned is the income stream or the underlying right.

B. The Non-Assignable Payment Bar

In an NIL matter, the bar to assignment may be contractual rather than statutory. Anti-assignment clauses in the underlying licensing, collective, or endorsement agreement are common commercial boilerplate. Such a clause can render the payment non-assignable and it is important to review the underlying agreements for an anti-assignment clause before the assignment is papered.

C. Payback and Entity Placement

Assigning NIL or NIL rights to a first-party trust subjects them to the Medicaid payback. Whether there is anything to reach depends on state law and whether the right of publicity survives death at all. Where it is not descendible, it ends, and no remainder interest exists

²⁷ POMS SI 01120.200(G)(1)(d).

for the payback to attach to, though royalties already collected into the trust remain corpus subject to payback in the ordinary course.

VI. Scenarios and Fact Patterns

A. Scenario One: Jane Doe

Jane Doe is an 18-year-old with Down syndrome. She has social media accounts and a YouTube channel featuring videos of her golfing with her father and competing in adaptive opens and pro-am tournaments. Jane views golf as a fun hobby. Her role is limited to showing up and playing, and she is not involved in or concerned with the production, scheduling, promotion, or business aspects of the accounts and channel. Her father manages those matters, including filming and editing the content and handling scheduling. Jane has also entered into apparel and equipment arrangements under which she receives free gear in exchange for featuring and promoting it on her accounts and channel.

Questions and Planning Considerations

1. How might the social media accounts and YouTube channel be structured, and how could each structure affect the treatment of income?
2. How might Jane's involvement amount to work for SGA purposes?
3. How might the apparel and equipment arrangements affect eligibility for or the amount of public benefits?

B. Scenario Two: John Doe

John Doe is a junior running back for a college football team ranked among the nation's top 10. He has a one-year, \$2 million revenue-sharing agreement with the school, along with a separate one-year arrangement involving the college's collective and a local car dealership. Under that arrangement, he receives the use of a car in exchange for the use of his NIL. As a sophomore, John set the school's single-season records for rushing yards and touchdowns, becoming a school legend. As a hobby, he also started a YouTube channel where he streams himself playing college football video games while talking with friends. John is projected to be a top-10 draft pick and has an insurance policy that will pay benefits if an injury prevents him from continuing his career. He has used his NIL earnings to buy homes for his parents, both sets of grandparents, and his older sister's family. Each home remains titled in his name.

A motorcycle accident leaves John paralyzed from the waist down. During his recovery, he continues producing videos for his YouTube channel. Prominent athletes and celebrities begin appearing in the videos, where John interviews them about the setbacks and challenges they have faced while they play. As the channel's popularity grows, John begins receiving offers to speak to local groups and appear on television.

Questions and Planning Considerations

1. What issues should be considered regarding the contracts and other arrangements in place before the accident?
2. How would income from the YouTube channel be treated if John manages and edits the channel himself?

3. What planning opportunities should be considered for the YouTube channel, speaking engagements, television appearances, and future income from signed memorabilia?

Appendix A — Practice Checklist

1. Identify the governing jurisdiction and determine its rules concerning the right's scope, assignability, and duration.
2. Obtain and read every underlying NIL agreement; check specifically for anti-assignment clauses and duration limits.
3. Determine which benefits the client receives—SSI, SSDI, or both—and run the SGA analysis separately for each.
4. Characterize each income stream on the property-services spectrum.
5. Where an entity is used, confirm no ownership interest is held by the beneficiary individually.
6. Where the trust will hold an operating business, confirm the trustee is willing and authorized to do so.
7. Where a related party licenses from or manages an interest, obtain independent support for the rate or the compensation.
8. Make every assignment irrevocable and document the irrevocability on its face.

Appendix B — Social Media Requirements

Below is a survey of requirements for an individual's social media account to be eligible for a platform's creator fund or partner program.

Instagram²⁸

- Age 18 or older
- Have a professional account
- Reside in an eligible country
- Have at least 10,000 followers

TikTok

Pulse²⁹

- At least 100,000 followers
- Content must rank in the top 4% of all TikTok content on a given day
- Age 18 or older

Creator Rewards³⁰

- At least 10,000 followers

²⁸ Instagram, About Product Eligibility Requirements for Monetization Tools on Instagram, <https://help.instagram.com/427415519366046> (last visited Sept. 18, 2026).

²⁹ TikTok, TikTok Pulse: Bringing Brands Closer to Community and Entertainment, <https://newsroom.tiktok.com/en-us/tiktok-pulse-is-bringing-brands-closer-to-community-and-entertainment> (last visited Sept. 18, 2026).

³⁰ TikTok, Creator Rewards Program, <https://support.tiktok.com/en/business-and-creator/creator-rewards-program/creator-rewards-program>; TikTok, Creator Rewards

- Content must receive 100,000 views in the last 30 days
- Age 18 or older
- Have a personal account in good standing
- Videos must be at least one minute long
- Content must be original
- Be located in an available country

YouTube³¹

- Be in good standing with YouTube
- Follow all YouTube monetization policies
- Be located in a region where the program is available
- Meet eligibility requirements
- Become a YouTube Partner
 - 500 subscribers and 3 qualified uploads (past 90 days), AND
 - 3,000 qualified watch hours on long-form videos (past 365 days) OR
 - 3 million qualified Shorts views (past 90 days)

Program Terms (U.S.), <https://www.tiktok.com/legal/page/global/creator-rewards-program-us/en> (last visited Sept. 18, 2026).

³¹ YouTube Partner Program Overview & Eligibility:

<https://support.google.com/youtube/answer/72851?hl=en&sjid=8797740589436112039->

NA

- Ads and YouTube Premium Revenue
 - 1,000 subscribers with 4,000 valid public watch hours in the last 12 months,
 - OR
 - 1,000 subscribers with 10 million valid public Shorts views in the last 90 days
- Applicants must complete a standard review process confirming compliance with platform policies and guidelines
 - Review typically takes about one month
- The creator must be 18 to open the account with the right to contract
 - If the creator is under 18, a guardian with the power to contract may open the account on the creator's behalf.

Cameo³²

- Must have a social media account to link to.

Appendix C — People with Disabilities as “Influencers”

Jared Stancil — Down syndrome; golfer (Bradenton, Florida)

- 161,000 followers on Instagram
- 147,000 followers on TikTok (two posts with over a million views)
- 3,200 subscribers on YouTube
- Has a Cameo

³² Cameo, Join as Talent on Cameo, <https://www.cameo.com/enroll>

Amy Bockerstette — Down syndrome; golfer (Arizona)

- 12,800 followers on Instagram
- First person with Down syndrome to receive an athletic scholarship to attend college and to compete in a national collegiate championship

Tatyana McFadden — spina bifida; track and field

- 94,000 followers on Instagram
- 2,000 followers on TikTok
- Most decorated U.S. Paralympic track and field competitor.

For additional examples, see Athletes of the Special Olympics USA Games 2022, Orlando:

<https://mynews13.com/fl/orlando/news/2022/06/01/special-olympics-going-for-gold>