

Staying Title IX Compliant: OCR Finally Provides Schools with Guidance on Student-Athlete NIL

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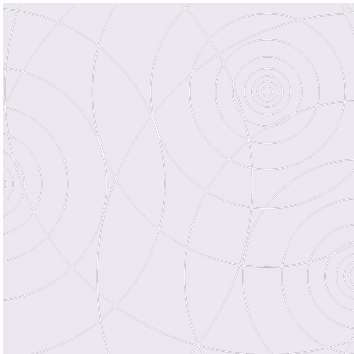
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Takeaways

- New OCR guidance advises that name, image, and likeness agreements between schools and student-athletes will be considered financial aid and must be substantially proportionate to the participation of each sex in the school's athletic programs.
- Publicity and support services will be part of the equivalent benefits, opportunities, and treatment analysis.
- Agreements between student-athletes and third parties will be assessed on a case-by-case basis at this time.

Related link

- [Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs for Students](#)

Article

How to engage in name, image, and likeness activities (NIL) without running afoul of Title IX of the Education Amendments of 1972 is a question colleges and universities have wrestled with since the NCAA first permitted the activities on July 1, 2021. Schools finally have some guidance.

The Department of Education's Office for Civil Rights (OCR), which enforces Title IX and its implementing regulations, issued a [fact sheet](#) clarifying how NIL will be evaluated for Title IX compliance. Title IX prohibits discrimination on the basis of sex in all schools receiving federal financial assistance, including K-12 schools, colleges, and universities, and applies to all programs and activities of these schools, including their athletic programs.

Background

Title IX regulations require schools to provide equal athletic opportunity, regardless of sex. OCR assesses athletic programs for equal opportunity in three areas:

1. Benefits, opportunities, and treatment given to male and female athletic teams;
2. Athletic financial assistance awarded by a school to student-athletes; and
3. A school's accommodation of its students' athletic interests and abilities.

Because NIL was not contemplated when the Title IX regulations and policy interpretations were written, schools were left without any direct guidance as to how to administer such programs and maintain compliance. Some argued that NIL should be assessed through the lens of financial assistance while others advocated that it be assessed as a benefit. The guidance clarifies that both approaches may apply depending on how NIL is administered. The guidance does not address revenue sharing, however.

Equivalence/Equal-in-Effect Test

To determine whether schools provide equal athletic opportunities to male and female student-athletes with respect to the availability, quality, and types of benefits, opportunities, and treatment, OCR looks at the athletic program in totality, not just by team, assessing equipment and supplies, facilities, schedules, travel, per diem allowances, housing and dining facilities and services, publicity, access to coaching, and recruitment (the so-called laundry list). Program components need not be identical. Rather, they must be equivalent or equal in effect. For example, it would not violate Title IX if some teams take coach buses to competitions while others fly, as long as male and female athletes are doing so at an equivalent rate or there are other legitimate nondiscriminatory reasons for the difference. If, in totality, the men's and women's programs are receiving the same level of benefits overall, the program will be in compliance.

Substantially Proportionate Test

The test for complying with the athletic financial assistance prong is entirely numerically derived. "OCR assesses whether the total amount of athletic financial assistance made available by the school to men and women is substantially proportionate to the number of students of each sex participating in interscholastic or intercollegiate athletics at that school." For example, if 54 percent of student-athletes are females and 46 percent are males, then the school's athletic financial assistance budget would have 54 percent going to female student-athletes and 46 percent going to male student-athletes. Exact proportionality is not required, since nondiscriminatory reasons or unexpected roster fluctuations can occur. Variances of up to 1 percent have been considered substantially proportionate. Greater variances have been considered discriminatory per se when not explained by nondiscriminatory reasons or unexpected roster fluctuations.

Measuring NIL

OCR addresses three aspects of NIL in its fact sheet:

1. School's assistance in obtaining and managing NIL agreement (with schools or third parties)
2. NIL agreements as athletic financial assistance
3. NIL agreements between students and third parties

NIL Assistance and Support Services = Benefits, Opportunities, Treatment

Assistance a school provides student-athletes in obtaining and managing NIL agreements with schools or third parties and any support services schools provide student-athletes in securing NIL opportunities are benefits, opportunities, and treatment and will be analyzed under the equivalence/equal in effect test.

In addition, OCR will examine a school's provision of publicity in assessing whether NIL support is equivalent, because the failure to provide equivalent publicity could render student-athletes of one sex less likely to attract and secure NIL opportunities.

NIL Agreements with Schools = Athletic Financial Assistance

NIL agreements between a school and a student-athlete are considered part of athletic financial assistance and therefore are measured as such under the substantially proportionate test. Athletic financial assistance includes any financial assistance and other

aid provided by the school to a student-athlete that is connected to a student's athletic participation and can include, without limitation, scholarships, cost-of-attendance awards, and NIL. All athletic financial assistance must be made proportionately available to male and female athletes.

Third-Party NIL Agreements: Fact Specific

Third-party NIL agreements are not athletic financial assistance under Title IX, however, NIL agreements between student-athletes and third parties can trigger disparities and a school's Title IX obligations. The OCR views these agreements as fact specific and evolving. It provides no guidance regarding them at this time, including as to NIL collectives.

Takeaways

- NIL agreements between schools and student-athletes will be considered financial aid and therefore must be substantially proportionate to the participation of each sex in the school's athletic programs.
- Publicity and support services will be part of the equivalent benefits, opportunities, and treatment analysis.
- Trainings relating to NIL, such as brand building and finances, should be offered equally to men's and women's teams.
- Administrative support, such as NIL management, should be provided equally to men's and women's teams.
- Agreements between student-athletes and third parties will be assessed on a case-by-case basis at this time. Schools must remember that a school's Title IX obligations are triggered when there are disparities based on sex in a school's athletic program, even if they are due to private funding. Running NIL agreements through a collective or other private funding will not alleviate the school's Title IX obligations. Schools can expect to see increased Title IX claims involving NIL and publicity as a result of the OCR's guidance.

Whether the Trump Administration will withdraw or enforce the guidance is unclear.

Please contact a Jackson Lewis attorney with any questions or to discuss your school's Title IX compliance.

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