

Navigating the Title IX NIL Landscape Post-DOE Rescission of Biden Guidance

By Susan D. Friedfel, Paul V. Kelly & Danielle Bland

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Meet the Authors



Susan D. Friedfel

Principal
914-872-8027
Susan.Friedfel@jacksonlewis.com



Paul V. Kelly

Principal
(617) 305-1263
Paul.Kelly@jacksonlewis.com



Danielle Bland

(Dani)

Takeaways

- The Department of Education rescinded and rejected prior guidance interpreting Title IX to require NIL compensation to be distributed proportionately to male and female athletes.
- Title IX continues to apply to athletics programs, but the Trump Administration's interpretation of Title IX's requirements with respect to NIL will likely be quite limited.
- Institutions must understand that the courts are not bound by the prior or current administration's guidance and should continue to assess all of their programs and activities for Title IX compliance.

Article

The U.S. Department of Education's Office for Civil Rights (OCR) has rescinded the name, image, and likeness (NIL) guidance under Title IX of the Education Amendments of 1972 issued in the final days of the Biden Administration. The guidance explained how NIL compensation or payments would be evaluated for equity under Title IX.

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.

OCR Acting Assistant Secretary for Civil Rights Craig Trainor said the guidance was "overly burdensome, profoundly unfair, and ... goes well beyond what agency guidance is intended to achieve." Trainor claimed the Biden Administration acted "[w]ithout a credible legal justification" when it posited NIL agreements between schools and student-athletes were "akin to financial aid, and must therefore, be proportionately distributed between male and female athletes under Title IX." Trainor reasoned:

Title IX says nothing about how revenue-generating athletics programs should allocate compensation among student athletes. The claim that Title IX forces schools and colleges to distribute student-athlete revenues proportionately based on gender equity considerations is sweeping and would require legal authority to support it. That does not exist. Accordingly, the Biden NIL guidance is rescinded.

The guidance has been removed from the OCR's website.

Although it does not change the law itself, the Trump Administration's decision to rescind the prior guidance illuminates OCR's current interpretation of the law and enforcement priorities. Based on OCR's rationale for rescinding the NIL guidance, it appears the Trump Administration will adopt a narrow, textual interpretation of Title IX.

Associate
(919) 760-6442
Danielle.Bland@jacksonlewis.com

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Interestingly, Title IX is a rather short and intentionally broad statute:

No 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, [with some explicitly enumerated exceptions].

Historically, Title IX has been effectuated through its implementing regulations and agency guidance such as the now-rescinded guidance on NIL.

Institutions should be mindful that neither the prior guidance nor its rescission is binding on the courts, which have not yet addressed Title IX's application to NIL compensation. Institutions should continue to assess all of their programs and activities for Title IX compliance.

Contact a Jackson Lewis attorney with any questions or to discuss compliance with Title IX.

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