

***Highway to NIL* Podcast: Title IX****Host: Cal Stein****Guests: Mia Marko and Dani Clifford****Recorded: 7/30/24****Cal Stein:**

Hello, and welcome back to *Highway to NIL*, the podcast series that discusses legal developments in the name, image, and likeness, or NIL space. NIL, of course, affects colleges and universities all over the country, particularly those in Division I athletics. In this podcast series, we delve deep into the current NIL rules impacting colleges and universities and their compliance departments.

My name is Cal Stein, and I am a litigation partner at Troutman Pepper. I come to you today with two of my terrific *Highway to NIL* colleagues, Mia Marko and Dani Clifford. We come to you today with an episode that we have been working on for quite some time. It actually involves a topic that we get asked about quite frequently in the context of NIL, and the NCAA's rules about NIL. Even more recently, about the various court cases and settlement involving the future of NIL.

The topic I am talking about is, of course, Title IX. The intersection between this long-standing federal law, applicable to educational institutions, and the new world of NIL. And as it's looking increasingly likely, the new future world of NCAA institutions, paying at least some of their student athletes. Today, we're going to ask and hopefully answer the question that we, as our firms resident NIL experts get asked a lot any time there is some new NIL development. That question is, what about Title IX? Well, what about Title IX indeed?

But before we get to that question, let's do our introductions. Mia, do you want to start?

**Mia Marko:**

Sure. Thanks, Cal. My name is Mia Marko. I am an associate in our firm's Business Litigation Group. I work on all different types of commercial litigation matters. But a large part of my practice is in the higher education space, and involves providing litigation, counseling, and investigative services to colleges and universities. Then, more recently, involves advising them on NIL issues.

**Cal Stein:**

Great. Thanks, Mia. Dani?

**Dani Clifford:**

Hi. My name is Dani Clifford. I am an associate in the corporate practice where I largely focus on M&A and securities.

**Cal Stein:**

Great. Well, welcome both of you back to the podcast. So, let's get into this. What about Title IX? The question itself is just dripping with intrigue within an already intriguing topic. But actually, before we get to that question, let's start with a more basic question to lay some foundation. That is, what is Title IX? Mia, I know that question is a mouthful, and we could probably do an entire podcast episode on that alone. But give us the cliff's notes version of Title IX, if you would.

**Mia Marko:**

Sure, Cal. So, Title IX was passed over 50 years ago in 1972, at a very high level without getting into the long and storied history since then. Title IX protects against sex-based discrimination at any school that receives federal funding. The text of Title IX is quite short. It's only about, at least the operative portion is only about 40 words, which is really interesting given the importance, and the history, and impact of Title IX, and what it has become today.

But without getting too much into the history, initially, the Title IX statute and regulations were focused on athletics, because athletic excellence had traditionally been associated with males; girls and women's sports were often neglected in terms of receiving funding and support from their institutions. Later on in the nineties, the government made it clear that Title IX also prohibits sex discrimination, including sex-based harassment, and sexual assault. So, there's really two buckets to Title IX regulations and compliance, athletics, and sexual harassment. I know many of our college and university clients are very familiar with the new Title IX regulations that just came out this year that focus on the sexual harassment piece. But today, as we're talking about NIL, we're going to be focusing on athletics.

**Cal Stein:**

Great. Thanks, Mia. So, that's a perfect segue into going one step beyond that basic question of what is NIL. Let's ask and then answer the next foundational question, which you alluded to, which is, how does Title IX apply in the college athletics setting? Dani, can you again, give us the cliff's notes version of that answer?

**Dani Clifford:**

Yes. Thank, Call. For the cliff's notes version in college athletics, Title IX regulations require schools to provide equal athletic opportunity, where equal athletic opportunity includes equal treatment of male and female athletes throughout the athletic program. This is all governed by the Department of Education, Office of Civil Rights. The policy interpretation generally divides the obligations of institutions into three areas. The first being, student interests and abilities, the second being athletic benefit and opportunities, and the third being financial assistance.

The regulations identified numerous nonexclusive areas in which colleges and universities must provide equal opportunity, including things like equipment, supplies, facilities, travel, meals, coaching, training, and even tutoring. The list also specifically includes publicity. With it, the potential for universities to run afoul of Title IX, when they get involved in the world of NIL. Title IX guidance does not address direct payments to student athletes, or even revenue sharing arrangements. Prior to *O'Leary* and its progeny, any payments to student athletes are made via

financial aid or scholarship dollars, which is addressed by the guidance and requires proportional distribution.

**Cal Stein:**

Great. Thank you both for giving us, I think, a really solid foundation of Title IX and its application in the athletics context on which we can kind of build in this podcast. So, as I said, initially, we could do an entire podcast answering the question, what is Title IX, but we won't. We're going to get to the good stuff now and talk about the intersection between Title IX and NIL. So Mia, I'm going to have you start us off by answering this question. How does Title IX impact NIL, and really, what does schools have to do to ensure compliance with Title IX in this NIL world?

**Mia Marko:**

Sure. As we mentioned, there have been concerns from institutions about potential violations of Title IX based on NIL since NIL's inception. That continues to be a concern four years later. When the *Olson* decision came out, there was a reference to Title IX in the decision, albeit, and Justice Kavanaugh has a concurring opinion. In his concurring opinion, he raised a question, he said, how would any compensation regime comply with Title IX? Now, he didn't provide an answer. But we've always known this has been an issue since at least 2021, the intersection of NIL and Title IX.

Very recently, there were comments from Katherine Layman, who was the assistant secretary of the Department of Education Office of Civil Rights, which confirmed that Title IX governs universities actions in the NIL space. She said, 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. In the new NIL environment, these same principles apply.

So, before the *House* settlement, which we're going to get to in a little bit, the focus on Title IX compliance in the NIL space really focused on opportunities to student athletes, resources at the schools we're providing, access to collectives. Whether those resources and opportunities were being applied in a nondiscriminatory manner. But now, the focus is on direct payments to student athletes post the *House* settlement.

**Cal Stein:**

We'll certainly talk more about that later. But, thank you, Mia. All right. So, loyal listeners of Highway to NIHL, or others who follow this area closely will recall that in late 2023, the NCAA President Charlie Baker introduced a proposal, that if adopted would effectively create a subdivision of NCAA athletics for the wealthiest tier of school athletic departments. Dani, talk to us a bit about that, and how Title IX could impact that proposal should the NCAA continue to pursue it?

**Dani Clifford:**

Yes, of course. As discussed, this proposal was introduced before the *House* settlement, which we will turn to later, but this proposal would have allowed schools to funnel more money to their

players via an enhanced Educational Trust Fund. In this letter proposal, Baker emphasize that this proposal would help improve gender equality in college sports by more evenly distributing some of that money that flows to athletes. Specifically, the proposal stated, within the framework of Title IX, they would invest at least \$30,000 per year into an enhanced educational trust fund for at least half of the institution's eligible student athletes.

So, how would this be implemented? For money distributed via Trust Fund, Title IX would have required schools to distribute a proportionate amount to women and men. But this doesn't really address NIL deals, and begs the question, would NIL payments be required to be paid equally to men and women? Some schools argue that there's legitimate nondiscriminatory reason for paying more star players if they can show those players have an objectively higher value in the endorsement market? Ultimately, these questions are unable to be answered at this point.

**Cal Stein:**

Yes, that's quite right. As we've alluded to on other podcasts, ultimately, these questions, I think there's really only two ways to answer them. We'll talk about more questions later in this podcast. But really, it's either going to be decided by the US Congress, which seems fairly unlikely, or far more likely by a judge, or judges somewhere in courtrooms across the country. Because as you noted, Dani, it seems likely to me that certain schools are going to take certain positions regarding the applicability or non-applicability of Title IX to these payments, and ultimately, lawsuits, and court decisions will be the way these things get sorted out.

Okay. So, another good segue because really, this podcast would not be complete without a foray into the courtroom. But I want to discuss now some of the relevant Title IX litigation that is out there, that's kind of already happened or is happening me. Mia, since we only have limited time on this, can you talk to us a little bit about Title IX litigation, in particular, the *Schroeder* case, which was filed just last year, and I think is one of the most relevant cases to the discussion we're having today?

**Mia Marko:**

Sure, Cal. Yes. So, the case is *Schroeder v. University of Oregon*. It was the first case that was filed that addressed Title IX compliance with respect to NIL. I believe it's actually the only case that has been filed today that addresses this intersection of Title IX and NIL. In the case, the female student athletes brought suit against *Oregon*, claiming that the university did not provide, among other things, the same NIL opportunities to female athletes that it did to the male athletes. And in particular, the football team. In their complaint, the plaintiffs included some of the more traditional allegations that you would see in a straight Title IX athletics case, claiming that their institution failed to provide them with equal treatment when providing certain benefits, like their training facilities, the locker rooms, their athletic fields. But this was the first time that we saw a new category, the NIL promotional benefits.

For example, in the case, the plaintiffs had said, "To cite the most egregious example, Oregon gives more than a third of its male student athletes and the men on its football team, unbelievably better treatment than it gives to any of its female student athletes. Including, nearly unlimited publicity, including to advance their name, image, and likeness, opportunities, and income. So, this case is still ongoing. It was filed at the end of last year. The parties recently

held a settlement conference in the middle of this month, July of 2024. But it's definitely one that we're going to continue to watch and see how it gets resolved through the courts.

**Cal Stein:**

Yes. Another court decision we will all be waiting on. So, as I mentioned, this *Schroeder* case, at least in my opinion, is in many ways, the most relevant to our current discussion. But I want to think beyond that case for just a moment. Dani, what are some of the other issues that are out there with NIL and Title IX that we think could be sources of future Title IX litigation?

**Dani Clifford:**

So, I think that this answer can be short and sweet, because I think *Schroeder* is really what we're focusing on here. *Schroeder* can have a massive impact on college athletics, simply because, as Mia mentioned, it would be the first major intersection between NIL regulation and a university's obligation to comply with Title IX. I think it has the power to impact collectives, boosters, and all other stakeholders in the arena, although the extent of which at this point is very difficult to predict. I think the implications of *Schroeder* are even greater in light of the recent *House* settlement, which I think we're going to lead into a discussion next.

**Cal Stein:**

Yes. I'm glad you mentioned the *House* settlement, Dani, because again, that segues perfectly into the discussion that we want to have about that. Because the settlement that has been now submitted to the court raises its own set of Title IX questions, and once again, very few answers. But let's take this step wise. Before we get into that, Dani, just do us a favor, and since you mentioned, give us a little bit of a refresher on what this *House* settlement is all about.

**Dani Clifford:**

Sure. The proposed details for how college athletes will likely be paid in the future was published last Friday, I believe, July 26, in the *House* settlement proposal. We addressed the proposed terms in the NCAA settlement episode of this podcast. So, for the sake of time, I will leave the details in that episode. But the proposed settlement has two main functions. First, former athletes dating back to 2016 are eligible to receive part of a \$2.78 billion pool of damages. Second, the terms lay out, the framework for paying players directly along with rules designed to keep the wealthiest schools from gaining an even larger competitive edge than they already have.

**Cal Stein:**

Okay. Thanks, Dani. I want to pick up on that second piece that you're just talking about. Let's talk about that money that's supposed to be paid out to student athletes going forward under the *House* settlement. Mia, the million-dollar question here. And literally it is a million-dollar question, is whether Title IX needs to be followed with respect to those payments? What's the answer there?

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**Mia Marko:**

Well, the short answer is a resounding yes. Title IX needs to be applied. I think the second question that I'm anticipating you would ask is sort of how will this be done, how can schools comply with Title IX when they're paying their student athletes directly? As I mentioned earlier, the Department of Education has confirmed Title IX applies, they're aware of this stuff. They're going to be potentially cracking down on this in the future. But the problem is, we haven't really received any guidance from the DOE on how to equitably distribute revenue dollars from the *House* settlement. So, that's going to leave it to schools and athletic departments to decide how to do this without running afoul of Title IX.

Unfortunately, the Title IX framework that we currently have does not provide clear guidance, until there's new regulations or there's guidance from the DOE, what we've been seeing is basically sort of two schools of thought from institutions on how to deal with the revenue share question. The first is to follow the Title IX regulations with respect to financial aid and to treat revenue sharing as if it is financial aid and distribute the funds proportionately to male and female student athletes based on their participation in athletics as Dani talked about, at the outset of the podcast.

The second school of thought is to follow more of a traditional market approach, where the funds would be distributed in proportion to the NIL earnings of the particular team or program. But there's sort of pros and cons to these two approaches. The first approach you could think of is potentially more of a conservative approach, where you're distributing the revenue share equally between male and female athletes, or close to equally. This is more conservative, because it might limit Title IX liability down the line, but it also could hurt, and you could anticipate it hurting an athletics program or a team. Particularly the high revenue generating teams like FBS football, because their players might end up getting less money than they otherwise would have under that approach.

The other approach might be schools that are more risk adverse with respect to litigation, and they might just say, "You know, we're going to give that FSP player the money that we think is appropriate based on the market, and what they bring in, and what their program brings in." But again, this could open up schools to Title IX liability down the line.

**Cal Stein:**

Yes, it's going to be interesting which schools adopt which approach, or whether schools, and their athletic departments and maybe their general counsel's office come up with other creative approaches, where they can justify the payments that they want to make as complying with Title IX, even if it is not kind of the equivalent payments to male and female athletes that one might expect from that first approach that you mentioned, Mia.

My personal view of this, is that, this *House* settlements simply cannot – it cannot be that the parties agreeing on this *House* settlement and looking into the future are contemplating a world where the revenue sharing will be distributed dollar for dollar equally between male and female athletes. That may ultimately be what happens, but it's my view that that's not what the parties are currently contemplating, which if nothing else, is going to lead to different decisions and disparate applications that, as you noted, are going to have to be worked out in court.



So, now that we have kind of the framework, let's ask what is also a million-dollar question here, which is, you know, what are the schools going to do about this? Dani, what do you think? I mean, other than kind of picking an approach, and trying to justify it, and defend it, what are schools going to do?

**Dani Clifford:**

Unfortunately, Cal, I think the general theme's going to persist here. It's difficult to predict what schools are going to do. There are two approaches, and as Mia discussed, it's really going to come down to how risk averse schools want to be. Administrators are going to have to choose between paying a higher portion to men, and risking potential lawsuits in the future, or equally sharing revenue with men and women, and risking falling behind competitors in these large revenue generating sports that ultimately fund some of their non-revenue generating sports.

To relate this back to *Schroeder*, I think that *Schroeder* may be somewhat of a test case in the age of *House*. One could imagine that *Schroeder* or even another similar case would naturally lead athletes to bring in claims based on the *House* settlement alleging discrimination against student athletes based on revenue sharing. If schools were to take the route that allows them to pay student athletes proportionately based on market share. Let's keep in mind that *Oregon* is a member of the Big 10. Although, the *House* settlement is far from final approval, if the *House* settlement is approved, college athletes will be getting paid by their schools by this time next year, a final ruling on that settlement is expected in March of 2025. So, schools really need to have compliance plans in place by then and need to really start seriously considering what they're going to do here.

**Cal Stein:**

Yes. The timing aspect to is really, really interesting, because as you know, we don't have a final *House* settlement yet. But we will, pretty soon, I think we will. There's a lot of work that schools need to do between now and then, including perhaps not only deciding on the path that they want to take with respect to Title IX compliance, but getting their ducks in a row to defend whatever that decision is. So, there is a lot to do between now and then to get ready for it. All right. So, we've covered a lot here today. I want to take a moment at the end here to recap what we think some of the biggest takeaways and most pressing questions that this discussion of Title IX NIL has raised. Let me start with a question that's kind of been gnawing at me for a little while here. We haven't talked about on the podcast yet, but it has to do with NIL enforcement.

The question is, does Title IX offer the NCAA an alternative path to enforcement? Because, as we know, recent court decisions have really effectively stripped the NCAA's ability to enforce its NIL rule. I'm thinking of, for example, the Tennessee Federal Courts striking down the NIL recruiting ban, things like that. Given that dynamic, might we see the NCAA try to use the threat of Title IX violations as kind of a de facto NIL enforcement mechanism, or at least a mechanism to affect the way schools operate with respect to NIL.

Now, the NCAA doesn't have Title IX enforcement power, per se, but the NCAA could certainly try to use the threat of reporting suspected Title IX violations as leverage against schools, and as a way to kind of control things in the absence of its own authority to enforce its NIL rule. So, that's an interesting dynamic that I've given a lot of thought to. But Dani, Mia, what about you

guys? What are some of the key takeaways and questions that you have thinking about Title IX and NIL?

**Mia Marko:**

I can go first, Cal. I think one of the questions that's been gnawing at me is sort of how will all of this impact non-revenue generating sports, and in particular, women's non-revenue generating sports. As I mentioned at the beginning, Title IX created the opportunity for women to have equal access to playing collegiate athletics. We're for over 50 years from its inception. I think, everyone by now recognizes the benefits to allowing women to play collegiate athletics. I've been a benefit of collegiate athletics. I know that Dani has as well.

So, I think the question I have that's sort of been gnawing at me in the back of my head is how will the enforcement of Title IX in this new NIL world end up hurting, if at all, female athletes. Are colleges going to be cutting some of these programs that don't generate revenue and maybe just keeping some of the female sports that are revenue generating, like women's basketball, as opposed to women's field hockey, which I played? So, that's, that's a question that I've really been focused on, because we don't want Title IX to end up sort of being the undoing of female athletics.

**Cal Stein:**

That's something we can certainly all agree on me. Dani, what about you? Any thoughts here?

**Dani Clifford:**

I completely agree with Mia. I am always an advocate for small schools, non-revenue generating sports, and of course, women's sports, having benefited from that experience greatly. I think schools really need to focus on joining together and getting a consistent application here, especially in light of *House*. If one school's taking a conservative approach and another is taking a liberal approach as Mia described them, there's going to be a large disparity, which threatens competitiveness, and ruins the product that people are paying for. I think, ultimately, that's going to trickle down as well into those non-generating sports, women's sports, and will hurt college athletics as a whole.

**Cal Stein:**

Great. Thank you, both. So, look, until we get clear guidance from the Department of Education, and maybe the courts, it's likely that these other issues are going to remain unaddressed or going to be addressed on a piecemeal basis by lawsuits. Institutions really need to be careful to ensure that they are complying with Title IX to avoid being really the sacrificial lamb for the wave of Title IX lawsuits that we all expect are coming. With that, we're out of time here today. So, I want to bring this discussion to a conclusion. I want to thank both, you Mia, and you Dani for joining me on this podcast. I also want to thank everyone for listening.

If anyone has any thoughts or any comments about this series about this episode, please contact me directly at [callan.stein@troutman.com](mailto:callan.stein@troutman.com). You can subscribe and listen to other Troutman Pepper podcasts wherever you listen to podcasts, including on Apple, Google, and Spotify. Thank you all for listening and stay safe.



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