***Highway to NIL* — DOE Guidance and DOJ Statement of Interest**
Hosts: Cal Stein and Chris Brolley
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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 one athletics, and 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'm a litigation partner at Troutman Pepper Locke, and I come to you today with the Highway to NIL OG himself, Chris Brolley.

Now, this is something of an emergency Highway to NIL podcast, that we have done from time to time when news in the NIL or college athletic space dictates. And this is one such occasion because very recently we have received a guidance document from the Department of Education related to NIL, as well as a statement of interest being filed by the United States of America through the Department of Justice in the *House* case. Both of which stand to have major impacts on the resolution of that case and college athletic NIL compliance going forward.

So today, Chris and I are going to discuss these two documents in some detail. We're going to offer our thoughts, and we're going to talk about how it impacts colleges, universities, and student-athletes and collectives all over the country. But before we get into it, Chris, I know everyone knows you, but why don't you introduce yourself?

Chris Brolley:

Good to be back, as always. My name is Chris Brolley, and I am a litigation associate in our firm's Philadelphia office. And my practice primarily focuses on products, liability, defense and investigations. And like you, I also advise colleges and universities on NIL, particularly regarding compliance with state laws, NCAA bylaws, and other NCAA policies regarding NIL activities.

Cal Stein:

All right, thanks Chris, I'm glad you're here with me today. So, let's start with the guidance document that was released recently from the United States Department of Education, the Office for Civil Rights, sometimes called OCR. And this document is titled, Fact Sheet: Ensuring Equal Opportunity based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness Activities. It's a pretty helpful title, all of the information is right there. And indeed, I would say this is the document and guidance that we have been waiting for for some time in which the Department of Education finally weighs in on how at least it views NIL in the context of sex discrimination and the all-important piece of legislation, Title IX. Now, this fact sheet is actually nine pages long, it's very robust. We're going to skip ahead and really focus on the important parts.

And where I want to start are with some quotes from this guidance that I think really, really show what it's all about. So, we're going to jump right to section three of the guidance, which is titled, Benefits Opportunities and Treatment provided by a School to Assist its Student-Athletes in Obtaining and Managing NIL Agreements. And then in parentheses it says with schools or third parties, this is really important because as we all know right now, NIL agreements are only between student-athletes and third parties, i.e. collectives for the most part. But as the *House* settlement moves towards being finalized, that will change, and schools will be able to enter NIL deals directly. So importantly, this DOE guidance documents applies to both.

And here's what the DOE OCR said. It said, and I quote, "Schools remain responsible for ensuring that they are offering equal athletic opportunities in their athletic programs, including in the NIL context. A school may violate Title IX if the school fails to provide equivalent benefits, opportunities, and treatment in the components of the school's athletic program that relate to NIL activities." It goes on to say that these obligations apply regardless of whether student-athletes ultimately secure NIL benefits through their school or with third parties. There's that all encompassing language again, to make sure that at least the guidance in this document from this DOE, and we'll talk about that a little bit later, applies no matter who is paying the NIL benefits.

The guidance document continues to talk about two particular types of benefits, benefits relating to publicity and benefits relating to support services. And I'm going to walk through those before we have a little bit of a discussion about them, because I think it's important context. So, in the context of the benefits related to publicity, this document reiterates the factors that OCR will examine and does examine when determining whether a school provides equivalence for male and female student-athletes. These factors are the availability and quality of sports information personnel, access to other publicity resources for men's and women's teams, and the quantity and quality of promotional devices that feature the men's and women's team. They also talk about a fourth factor that may be considered, which is coverage for men's and women's teams and student-athletes on a school website, in social media postings and in publicity materials like posters, press guides, things like that.

And here's what DOE OCR has said about this. It says, and I quote, "A school's obligation to provide equivalent publicity based on sex continues to apply in the context of NIL. For example, if a school is not providing equivalent coverage for women's teams and student-athletes on its websites, in its social media postings, or in its publicity materials, these student-athletes may be less likely to attract and secure NIL opportunities. In addition, if a school is publicizing student-athletes for the purpose of obtaining NIL opportunities, OCR would examine whether the school is providing equivalent publicity for male and female student-athletes, including by examining the quantity and quality of publications and other promotional devices that feature the men's and women's athletic teams."

Chris Brolley:

Cal, I think this is fascinating. Typically, when we think of Title IX, we think of the equal distribution of services or support to men's and women's teams, in the terms of finances going towards whichever team or athlete or program that we're addressing at the moment. But this goes to the social media, the publicity, what a school was putting out there in terms of getting eyeballs to read their posts and things like that. And I think that's something that many people

likely do not recognize or understand, that that is totally within the purview of Title IX federal regulation. So I thought that was interesting that the OCR is coming out and saying that NIL types of opportunities, social media posts and things like that, do fall under the Title IX obligations.

Cal Stein:

Yeah, I mean, you can't imagine that when Title IX was passed all those years ago that this was contemplated, but here we are. In the age of NIL, as you just said, Chris, and I think correctly, eyeballs equal dollars, right? Whether it's eyeballs on a poster, whether it's eyeballs on a social media post, whether it's eyeballs on a game that is being broadcast somewhere. Eyeballs equal dollars in the NIL arena and more eyeballs equals more NIL dollars, and I think that is the position that DOE OCR is taking here. And I will say, expanding Title IX. I know they're fitting it within something that was already there, but this is an expansion for the reasons you've just identified.

Chris Brolley:

And how does a school kind of go about implementing that? Are there certain posts that are required for a men's sport versus a women's sport? If a school posts five times about its basketball program, is it supposed to post five times about its women's program, or a specific student? Things like that, and how schools go about implementing this, to the extent, and we'll discuss this later on, if this guidance document actually becomes a part of Title IX federal regulations. How are schools supposed to know and understand and recognize the level of proportionality they're supposed to apply to the social media aspect of NIL?

Cal Stein:

Yeah, and are enforcement actions going to back into it? Are they going to look at a single school and look at their teams? For example, there are a lot of schools out there whose primary national coverage sport is men's and women's basketball. Their enforcement action is going to look at those. They're going to look at the NIL opportunities being given to the men, for example, over the women, and then back into an argument that the school isn't giving proportional publicity. I think we're going to see that; I really do. And your question of how schools address that and prevent it is a good one and one that they should be thinking of now.

You also mentioned, Chris, the second category that the DOE OCR mentions in this, which are support services. Here, what they're talking about are the support services that certain schools offer that assist their student-athletes in securing NIL opportunities. And once again, they're making the point that Title IX is going to now apply or has applied, whatever they're saying, their view is title IX does apply to these. And once again, OCR talks about the factors that they look at, the equivalence of the amount of administrative assistance provided to men and women's teams, for example.

And here's what DOE OCR said, I'll quote it again. "A school's obligation to provide equivalent support services continues to apply in the context of NIL activities, including any services that schools provide to assist student-athletes in securing or managing NIL opportunities." Securing or managing NIL opportunities, and they give an example. "For example, if a school provides

training sessions to its student-athletes on brand building, finances, reporting, entrepreneurship or similar topics, OCR would examine whether the school is providing the training equally to men's and women's teams. Likewise, if athletic department employees assist student-athletes by obtaining and negotiating NIL agreements, OCR would examine whether the school is providing this assistance equally to student-athletes on men's and women's teams."

And really, we've got two different sides to this here. First, they talk about training sessions. That's the type of internal stuff that schools are probably doing right now. We've talked at length about some of the NCAA guidance that encourages schools to provide that type of training and education, and I would imagine schools are largely applying that to anyone who would want it, men and women alike. The piece about obtaining and negotiating NIL agreements, I think is more forward-looking. DOE OCR is looking in a post *House* world where students are going to be more directly involved with their school personnel in obtaining, in negotiating, in managing and coordinating all of these NIL agreements. So once again, DOE is putting down a marker that all of this applies now, but more so post *House*.

Chris Brolley:

Yeah, I totally agree, and I think you hit the nail on the head. Kind of going back to the NCAA's guidance document specifically from October 26th, 2022, where the NCAA does list out some permissible activities under the then interim NIL policy, financial literacy, educational sessions on taxes, entrepreneurship, social media. So, it's about time that the Department of Education is looking towards Title IX and ensuring that there is some proportionality to it.

And I think on top of what you said about the Title IX forward-looking statements regarding the NCAA's amended bylaws that went into effect of August 2024, which allows a certain level of institutional assistance for the student-athletes. So, I think now it's about time that the Department of Education put forth some sort of statement, whether it's enforceable later on, we'll see. But it's about time that there is some kind of a bright line, if you will, to allow schools to understand their requirements going forward for when they do provide these support services to their student-athletes.

Cal Stein:

Let's talk now about the next section in this document, and this is really to me, the headline grabber. So let me read the title of this section. It's section four and it says, "NIL Agreements Between Schools and Their Student-Athletes as a Form of Athletic Financial Assistance." That says it all. That is a really important statement because as confirmed by what follows and what I will quote from in a moment, this is the Department of Education for the first time coming out and saying, you know all those *House* NIL payments that are going to come after that settlement? Title IX applies to all of them.

This is the first time; we have talked about this a lot on this podcast. What is going to happen with Title IX? Is it going to result in litigation? The answer to that remains, very likely it will, but at least right now we have the Department of Education's position, which is those $20 plus million in revenue sharing payments or whatever you want to call them, that schools are permitted to pay post *House*, assuming it gets approved. Those need to be subject to Title IX, at least according to the Department of Education. And they say this in no uncertain terms. The second

sentence of this section says, "Compensation provided by a school for the use of a student-athlete's NIL constitutes athletic financial assistance under Title IX." Could not be clearer.

They go on in section five of this document to talk about NIL agreements between student-athletes and third parties. So, you would think, okay, right now schools aren't able to pay NIL agreements, that can't happen until after the *House* settlement. Once it does, then Title IX will kick in. Well, not so fast, because in addition to saying that the direct school to student payments are subject to Title IX, DOE is also taking the position that collective NIL payments may also be subject to Title IX and may also trigger a school's obligation.

So, I'm going to read from this section because I think it's really important to focus on DOE's words. They say, "OCR does not view compensation provided by a third party, rather than a school, to a student-athlete for use of their NIL as constituting athletic financial assistance awarded by the school that must comply with Title IX regulations." Okay, that's good for schools, right? Making clear that if you're paying the money, it's Title IX, athletic financial assistance. But if it's a collective paying, okay, it's not, but they go on. "However, OCR has long recognized that a school has Title IX obligations when funding from private sources, including private donations and funds raised by booster clubs creates disparities based on sex in a school's athletic program or a program component. The fact that funds are provided by a private source does not relieve a school of its responsibility to treat all of its student-athletes in a non-discriminatory manner. It is possible that NIL agreements between student-athletes and third parties will create similar disparities and therefore, trigger a school's Title IX obligations, and therefore trigger a school's title nine obligations." That is the key language.

So to summarize, DOE is not considering collective payments to be athletic financial assistance. However, if those collective payments create disparities, DOE does believe the school could be exposed to Title IX liability if it doesn't satisfy its own obligations, which are of course not specified.

Chris Brolley:

I think section four and section five of the DOE's guidance, this is where they lose me. And I'll go back to the financial assistance definition. I think conceptually that definition and the payments for NIL does equate somewhat to financial assistance. However, if we think about NIL broadly, it is essentially compensating a student-athlete's right to publicity and the student-athlete's commercial use of their publicity, which now the DOE is saying that this is considered financial assistance. However, this really doesn't seem to make a lot of sense to me. There are some intellectual property issues. There's again, the right to publicity for student-athletes. Why is that money that a student-athlete, ostensibly making via NIL, why does that fall under the definition of financial assistance? While I think it's correct, Title IX should apply, I just can't square that right now with the definition that the DOE provides.

Turning to section five, the possibility that third-party collective payments to student-athletes would be subject to Title IX, also doesn't really make a lot of sense to me. If that goes forward, how does the school regulate that? How are they supposed to determine whether the supplemental NIL payment from a third-party collective does or does not comply with Title IX? I think obviously, and as we've been saying through much of our podcasts and CLEs and

guidance with clients, there's just going to be a lot more litigation that comes from this, if this guidance document is upheld.

Cal Stein:

I think that's all exactly right, Chris, and I had the same questions. I mean, think about it this way. What if instead of NIL payments, it was jobs, summer jobs, jobs at camps, jobs at car dealerships, jobs as waiters? Would it make as much sense then for DOE to be telling schools, look, if all of your male students get hired for jobs but none of your female student-athletes get hired for those jobs, that could trigger your obligation. It doesn't make a ton of sense, and I think what we're finding out and what we're kind of exploring are some of the arguments that are probably going to come in litigation if this guidance remains out there.

Chris Brolley:

And I was going to say, just financial assistance typically has been seen as tuition reimbursements or housing, support services, or some other metric standardized by the NCAA rules or school policy. So, to your point and to your example, are schools supposed to then interfere with a, we'll call them a student-athlete, but are they allowed to interfere with a person's right to contract? Are they supposed to tell their male athletes, no, they can't take that job because it may conflict, or it may run afoul of Title IX obligations? I think that remains to be seen, but it's I think a serious issue and a question that will likely need to be resolved before anything moves forward.

Cal Stein:

Yeah, and let's talk about that, because you mentioned it, Chris, and I think I alluded to it as well. Do we think this guidance document is long for this world? And here's what I mean by that. This guidance document was issued, I don't know if it was at the 11th hour, but it was pretty darn close. It is being issued by a Department of Education that is now outgoing. We've got a new presidential administration in place, and I think the Department of Education is going to look a little bit different under President Trump than it did under President Biden. Yet we've got this document that's kind of dropped on everyone on the way out. Do we think that the new Trump Department of Education is going to rescind this document, is going to tweak it or revise it, or just kind of leave it where it is?

Chris Brolley:

I think a combination of those. I think they could rescind it, which would be the easiest thing to do, or they could rework it. I think the likelihood is probably quick and easy just to rescind it so it's not technically "on the books." However, I think it's important to let our listeners know that this guidance document is not binding, and the authors even know that it does not have the force and effect of law. There was no public notice, no opportunity to comment, and does not reflect multiple channels of input. So, this is merely just a document with suggestions and recommendations and may not even hold up in any court. So, I think that's important context to let our listeners know. But to answer your question, I do think this document, or these rules will look a lot different in a couple of weeks or even a couple months.

Cal Stein:

Yeah, that's all fair. I will say, yeah, I mean it's not a law, it's not a regulation, it's not posted in the Federal Register. But I think it's a pretty clear, I know it's pretty clear, it's a very clear statement of what this DOE's position is and would be going forward. I don't think it means that they're definitely right, but I do think if schools don't comply with this, unless and until it is rescinded or revised or we get some indication that it has been effectively rescinded or revised, I think we have to take it at face value as the policy of the Department of Education. And that means this is the basis on which they're going to either conduct enforcement actions or not, depending on what happens with the new administration.

Chris Brolley:

And we even wrote about this last year when the *House* settlement was preliminarily approved by Judge Wilken, that any discussion of Title IX was curiously absent from the settlement document. And I know we'll get into this maybe right now, but we even discussed that there was no discussion of Title IX, which was one of the lingering questions hanging over the head of the actual document. So, I think you're right, this at least is something on the books now that we have what that Department of Education thinking was, in terms of Title IX and NIL payments likely falling under *House*.

Cal Stein:

Well, let me ask you the question, Chris. What do you think Judge Wilken, is going to do with this, if anything? Because I'll tell you, I think she very well could take a look at this guidance document and go back to the parties in *House* and say, "Hey, y'all haven't addressed Title IX. Now you've got a government document saying what their position is. Don't you think you ought to?" And send them back to further negotiations?

Chris Brolley:

I think that's entirely possible. There has been some discussion that this document should not even impact the *House* settlement because the settlement does not require the schools to spend the money. Does not even tell them they have to spend the money, just allows them to, and essentially leave the decision to spend the money likely in compliance with Title IX, up to the schools.

One possible solution could be that, like you said, Judge Wilken sends the parties back to negotiate and maybe the parties restructure the settlements so that instead of the schools paying the players, which would subject the schools to Title IX regulation and compliance, the conferences or the NCAA would pay the players, which as several courts have held, neither of which are governed by Title IX. That would of course require a major haul of the already settled upon terms, which are set to be approved in the April 2025 hearing.

Cal Stein:

Approved, perhaps, and I'm going to talk about that in a minute. But you raised a good point, and if that happens, the impact would probably be far-reaching, especially to schools. And we know there are some out there who have already posted things on their website indicating that they're collecting donations in anticipation of paying NIL agreements after the *House* settlement is approved. I wonder what would happen with those dollars if the post *House* payments all of a sudden are not coming from the schools but are coming from the NCAA or a conference? But Chris mentioned *House* and how we expect it to be approved. We have expected it to be approved and maybe still do.

But once again, I want to flip to the second topic that we're going to cover here today, which is a statement of interest that the once again outgoing Department of Justice from the old Biden Administration filed on January 17th, so just last week. Once again, you want to call it 11th hour, I'm not quite sure, but it is definitely a parting gift from the Biden Department of Justice. And really, really putting aside the, what I'll call curious timing, most basically and most summarily, what this statement of interest says is that the DOJ has major concerns with the central component of the *House* settlement, which is that revenue sharing cap. Basically, the DOJ has filed the statement of interest saying they think that cap is a salary cap that violates antitrust laws and that really, the NCAA is just trading one cap for another.

If all of this sounds familiar to Highway to NIL listeners, it's because Chris and I have been talking about this for months, for months. We expected that this would be something that individual parties who are objectors to the *House* settlement seized on. Well, lo and behold, to my surprise, the Department of Justice, the United States Department of Justice seized on it. And I'm going to again read some quotes from this that I think really are important. Right off of the bat, DOJ says their section one is titled, "The Proposed Settlement Provides Limited Compensation for College Athletes, and they write, "The proposed settlement does not fully unfetter the market from anti-competitive conduct as a comprehensive antitrust remedy would do." They come right out, right out swinging.

Section one A is titled A Salary Cap Among Horizontal Competitors Raises Serious Antitrust Concerns. Now, this is significant because while we've called the revenue sharing cap a de facto salary cap, that's nice for us to do, but it means more coming from the Department of Justice and here's what they wrote. "The proposed settlement replaces an agreement among competitors to cap compensation for use of college athletes NIL at $0, with an agreement among competitors to cap compensation at 22% of average revenue." Interesting. They go on, "A member institution is not permitted to spend what it wants or what the market would dictate." Again, these are the concerns that we have raised from the beginning and here they are in black and white from the Department of Justice.

Chris Brolley:

Yeah, and to expand upon that, the Department of Justice, like you said, they come out swinging right off the bat. Their concern is that that salary cap of 21 or 22 million, while it seems great for all parties involved, it's essentially an agreement between the NCAA and the Power Five conferences to fix or restrain trade, is what they say is, "A fixed agreement between competing businesses." And that is what they're saying, is a direct violation of antitrust laws. So,

what they're asking Judge Wilken to do is twofold, and I'm not sure if you got it to the second part, but they want Judge Wilken to either cut the salary cap out of the settlement or allow for the cap to be subject of future litigation. In other words, allowing the Department of Justice to sue the NCAA for the cap being an antitrust violation.

So, I do think this is a little bit more, I'm not going to say concerning for the life of the settlement, but I do think it may pique Judge Wilken's interest, in terms of what they're arguing because that is something that is a major concern. And as I've discussed on many podcasts, the inability for the players who are the recipients of this money to even collectively bargain their position in this case, leads to antitrust issues and violations. And I've said it before, again, the ability for the NCAA to get that antitrust exemption it so desperately needs and wants, requires some sort of collective bargaining by the players. And as we know, that has not happened, and that likely will not happen in this current iteration of the *House* settlement.

Cal Stein:

Well, look, you may not want to call it concerning, but I sure will. The last section of the DOJ statement of interest, here's the title, The Court Should Not Enter a Settlement Approval that NCAA Could Use to Defend the Salary Cap Rule. I mean, they are telling Judge Wilken that they do not believe that she should enter the settlement as written. And yes, maybe they do give her an opening to say, look, I'm going to approve this settlement, however, this approval should not be construed as an endorsement of this salary cap, this de facto salary cap being consistent with antitrust laws. But man, that's asking a judge to really thread a needle. And what are the parties then really getting out of this?

I mean, if you're the NCAA, if you're a Power Five, Power Four conference, now you really are explicitly buying more antitrust litigation, not only because it would be under that theory, exclusively permitted notwithstanding the settlement, but you've got a DOJ statement of interest to wave around in support of your position. And I think that's something that is really going to be a lasting impact of this. This is not something that can just be rescinded by a new administration, the way that the previous document we talked about could be. Even if Trump's Department of Justice comes out and says, "Yeah, we don't view the salary cap as violating antitrust laws," I think you're still going to have individuals suing the NCAA to invalidate this cap and waving this statement of interest around and all of the law and cases cited in it.

Chris Brolley:

Yeah, I think the DOJ is also concerned that the terms of the settlement will be used as a defense in other antitrust litigation. However, Jeffrey Kessler, the lead attorney for plaintiffs in this case, emphasized that the settlement is not a release of future antitrust claims, and there is no antitrust immunity or exception. So, while the parties may be able to wave around this document, the settlement document as a defense, it's merely a defense that could be used in subsequent litigation, but it's only as persuasive as the court finds.

For those that have actually read the document, there is an email attachment that I think was sent a couple days before the DOJ filed this document, where the NCAA and the Power Five conferences acknowledged that the settlement does not stop the DOJ from filing an antitrust lawsuit against the NCAA or the conferences. However, the NCAA and the conferences believe

that they can use the settlement as a defense in any such lawsuit. I think the email communication and the arguments raised by the Department of Justice in their statement shows that they're likely going to continue coming after the NCAA and the Power Five conferences for antitrust violations. Again, this was maybe the previous administration's Department of Justice, this could change going forward, but that's essentially what to me, these documents look like and the arguments made in favor and against going forward.

Cal Stein:

Yeah, I think that's exactly right. Now, one thing you mentioned, Chris, was the antitrust exemption. And when I hear that, I think of professional sports. The DOJ addressed that as well, and I think they tried to anticipate an argument that the NCAA would make by comparing the cap, for lack of a better word, generated by the *House* settlement to the salary caps that exist in professional sports. And what the DOJ said is exactly what you said, Chris, they basically said, "Look, that salary caps exist in pro sports is not relevant here, and the reason is because of collective bargaining or the lack of collective bargaining at the college level." And this is a quote, "While professional athletes can rely on their unions to bargain on their behalf, college athletes have no such union representation."

And what sounded most interesting to me when I heard about that is that it almost, almost sounds like the DOJ is suggesting that college athletes should unionize and collectively bargain the way that pro sports athletes do, with one major issue there being pro sports athletes are employees and college sports athletes are not. And while there are some cases that are working their way through various courts and administrative bodies, that doesn't seem to be something that is imminent. So, I wonder what the DOJ's thinking was there.

Chris Brolley:

I agree. I think that the only real path forward to have a proper resolution and have the NCAA stop being sued for antitrust violations, would be to allow the players to collectively bargain. However, that requires some sort of consideration of employment status, which is, as we've seen with many NLRB cases that have been withdrawn within the last month, that's not likely to happen anytime soon. So, it is curious, maybe it's a signal, it's a shot. It's a way for those involved to start considering the aspect of collective bargaining to get something done and maybe a shot to the NCAA to kind of allow players to start collectively bargaining, so they can stop being sued for antitrust violations. But yeah, this is really not ending anytime soon and not likely to happen.

Cal Stein:

Well, schools and conferences and student-athletes can thank the outgoing Departments of Education and Department of Justice for dropping these bombs right before they exited stage left. And it will be fascinating to see what, if anything, the new administration does. For all we know, the new administration could agree with both of these, though I think there has been some suggestion to the contrary. We will have to wait and see.

And with that, we are out of time here today, so I want to bring this discussion and this emergency Highway to NIL podcast episode to a conclusion. I want to thank Chris for joining me

here today, and I want to thank everyone for listening. If you have any thoughts or any comments about this series or about this episode, I invite you to contact me at callan.stein@troutman.com. You can subscribe and listen to other Troutman Pepper Locke podcasts wherever you listen to your podcasts, including on Apple, Google, and Spotify. Thank you all for listening.