

Highway to NIL — Rescission of DOE Guidance**Host: Cal Stein****Guest: Mike Lowe****Recorded: February 13, 2025****Aired: February 20, 2025****[0:00:07] 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 Locke. I come to you today with my partner, Mike Lowe in yet another emergency *Highway to NIL* podcast episode. As listeners will recall, not two weeks ago, we did another emergency episode that address two items that came out of the very tail end of the Biden administration. One being, a Department of Education guidance document addressing Title IX, an NIL. The second being, a Department of Justice statement of interest in the *House* litigation.

Today, we are back to talk about the first topic yet again. Because very recently, the new, incoming Trump administration took this significant step of formally rescinding that DOE guidance document. So, today, we're going to talk about that rescission, what it means, and what we can glean from the comments coming out of the Trump administration about what its view of Title IX and NIL may be.

But before that, I know everyone already knows Mike from his many prior episodes on *Highway to NIL*. But Mike, why don't you introduce yourself to anyone who may be new.

[0:01:42] Mike Lowe:

Thanks, Cal. As always, pleasure to join the program. I got to say, practicing in this area, there are a lot of emergency needs for podcasts because the space is constantly active, and that's one of the things that makes it fun. But in any event, for those who don't know me, my name is Mike Lowe, and I'm a partner at Troutman Pepper Locke in the litigation practice. My practice includes not only internal investigations for corporations, government investigations, but it also includes NIL and representation of universities, and division one conferences in connection with NIL. So, Cal, you and I have spoken quite a bit about this topic, in particular, both on podcasts, and also so to individuals and schools when we've given presentations. So, I found it particularly timely that this happened just yesterday, and we get to talk about it today.

[0:02:42] Cal Stein:

Yes. I mean, Mike, we'll get into a little bit of the background of the DOE guidance document that was issued and then rescinded. But before we get to that, I mean, really, I think we kind of knew this was where we were going to up. Once we saw that, we had a feeling that the incoming administration would do something. We didn't know exactly what, but here we have it.

Let's start with just a little bit of background on the Department of Education guidance document. For a more detailed summary of it, I would refer everyone to the last podcast we did. But very briefly, that document was entitled Fact Sheet: Ensuring Equal Opportunity Based on Sex in School, Athletic Programs in the Context of Name, Image, and Likeness Activities. On a high level, there were two main points that the Department of Education, again, under the outgoing Biden administration, there were two main points that the Department of Education made in that document.

Number one is that, compensation provided by a school for the use of a student athlete's NIL, constituted athletic financial assistance under Title IX. Thus, when a school did it, it would have to be done proportionately to male and female athletes pursuant to Title IX. The second point that came out of that document, the second main point is that, putting aside the payments from schools to student athletes, and focusing on payments from third parties to student athletes. The DOE explained its position that it would be possible, even in that scenario, for gender-based disparities to exist, and therefore, that those payments would trigger a school's Title IX obligations, though it didn't expand on that any further.

I mean, Mike, to be clear, these were pretty major position points that this outgoing Department of Education was taking and announcing literally on their way out the door. Most people, including us on *Highway to NIL* believed that these issues would be resolved by federal courts and litigation, which may still happen, and may be likelier to happen now. But these were major positions that the Department of Education took at that time.

[0:04:58] Mike Lowe:

They certainly work out. I got to say, it was astonishing to me that literally, four days, four days before President Trump is inaugurated, the Department of Education comes out with this major guidance document which allegedly was designed to provide some clarity, and it did not provide clarity, because anybody who saw it, who knows this space realized, it's likely this is not going to actually followed through when the Trump administration takes over. And with respect to the second part that you discussed, the issue of whether or not the payments by the collectives would be subject to Title IX considerations. The department didn't even really clarify that.

[0:06:04] Cal Stein:

Yes. I mean, there were a lot of questions, I think, at the time the guidance document came out from schools about what does this mean, what do we do with it, how do we account for these supposed Title IX implications. I think, our belief, at least initially was, well, let's take a wait and see approach. We thought something like this rescission could happen and it has. And let's talk about that, because as you mentioned, just yesterday, we're recording this on February 13th. On February 12th, the Department of Education Office of Civil Rights under the new Trump

administration issued an announcement rescinding the guidance document, and it was done through the Assistant Secretary for Civil Rights, a gentleman named Craig Trainor.

There was a very short press release that accompanied that unequivocal rescission and included a short statement of why the department was in fact rescinding it. I think, given the limited information we have, because as of now at least, the new Trump Department of Education has not issued a replacement guidance document. All we have to go on is the rescission itself and the press release. Why don't we walk through those two things and see what we can glean? Let's start with the act of rescission itself. What does that tell us about this administration's review of things?

I'll say the obvious part out loud. Obviously, very obviously, I think this administration disagrees with the two main points that I just made. If it had agreed with one of them, it could have partially rescinded it. If it had partially agreed with either of it, it could have revised it, didn't do that. It rescinded the whole thing, and it rescinded it very quickly and very thoroughly.

[0:07:49] Mike Lowe:

I agree, Cal. One thing that always struck me, well, in the month or so since this fact sheet came out, you're talking about, and you, being the Department of Education, is talking about NIL payments from schools in part of the guidance document. That is not yet effectuated. The *House* settlement hasn't been finalized. So, it really was sort of a jumping the gun, I felt. They know they're on their way out the door, and we're going to throw something out there literally on the way out the door.

Now, we've been speaking on this topic extensively for the past several years, and we always get questions. What is the impact of Title IX on the payments that collectives make? What we've always told people, "Look, we're not giving you legal advice, we're telling you our opinion."

But it seemed to us that Title IX didn't cover collectives because they were not part of the institutions. It was a way that these collectives could operate on a free-market system where the most, if you want to say, the most valuable players could be the ones that were compensated the most of free-market principles. I think what the Trump administration here is saying is, that that's how they view this. This is a free market-based viewpoint. When you're saying we're going to leave the current system in place, which is that collectives can pay money to student athletes for their NIL based on how valuable they assess that NIL.

Then, I think you extrapolated going backwards to the payments directly from schools, assuming the *House* settlement gets finalized, and those become permissible by NCAA rules. I think the administration is saying the same thing, that they view that as something that should operate on a free-market principle. That it's not just something that you need to divide up the money evenly.

That was a big question mark that has been sort of hovering over the *House* settlement for the entirety of the litigation once the actual settlement agreement framework was agreed upon, and when it was proposed, was, how is this going to play out if the schools that opt into the *House* methodology begin to make direct payments to student athletes for the NIL. Do they have to pay male and female athletes collectively an equal amount? We don't know, that's not something

that's addressed in the *House* settlement. Sort of, I think the implication was that, probably, schools would have to do that, but it was unclear. I think we're getting, by this action, some level of clarity as to how this administration is going to treat that.

[0:10:57] Cal Stein:

Yes, so we'll definitely talk about what is likely to come next in a little bit. With respect to your other comments, I mean, I think it's hard to disagree with anything you just said in interpreting what this administration has done and is likely to do. I think the reason it's hard to disagree is because everything you said is consistent with the press release that came out with this rescission. What I want to do now is I want to kind of go through that press release a little bit. So, I'm going to read a quote, and then, we'll talk about it, and then we'll do that again.

This is how the press release began, and or I have never seen a press release from the Department of Education really any government agency start this way. Here's what it started with, "The NIL guidance rammed through by the Biden administration in its final days is overly burdensome, profoundly unfair, and it goes well beyond what agency guidance is intended to achieve." So, there's some pretty strong language by the new Trump administration against the outgoing Biden administration. But what I found to be really interesting was the framing of this as a fairness issue. You know, it doesn't say fairness to who. Is it to schools? Is it to student athletes? Is it to everyone?

But I think that goes directly to the point you were making, Mike, about the, for lack of a better term, the free market, and making sure that collectives at least, and to some degree schools, if and when the *House* settlement is finalized, are able to operate freely and pay student athletes fairly as they determine it.

[0:12:33] Mike Lowe:

Yes, I think that's right. If you look behind the *House* settlement to try to understand what the goals of that settlement are, it seems that to me, at least, an overriding goal could be characterized as compensating students for the fair market value of their NIL. If you approach it from that perspective, then, I think that informs how the money gets divided up, because that would mean it's not just an equal distribution. The distribution would be based on the value of the NIL.

So, with that in mind, I think certainly the Trump administration is much more likely to view it that way than the Biden administration was.

[0:14:11] Cal Stein:

Yes, I would definitely agree with that. The other interesting component of that quote I just read is the end part, where it talks and criticizes the DOE guidance document for going, "Well beyond what agency guidance is intended to achieve." That got me thinking, well, what is agency guidance really intended to achieve? Is the Trump Department of Education accusing the outgoing DOE of effectively making law? Which is of course the province of the legislature, not

the executive branch. Is it accusing them of improperly interpreting the law, which again is the province of the judicial branch.

I think that segues nicely into the very next sentence in the press release, which said this, without a credible legal justification, the Biden administration claimed that NIL agreements between schools and student athletes are akin to financial aid, and must therefore be proportionately distributed between male and female athletes under Title IX. So, let's start with the beginning, without credible legal justification. I mean, does such justification exist? I'm not sure it does, because I think what this is, is just a statement of interpretation. A statement of one DOE's position on the words in Title IX. And maybe that's what this press release is really getting at, that it should be the courts, it should be the judicial branch that are doing that, that are interpreting the law, in this case, Title IX.

[0:15:43] Mike Lowe:

You're right about that. There is no law on this issue, and that's always been part of the problem when we're asked to give advice to clients on this particular topic. The advice is necessarily hampered by the fact that there's no law on this. So, we're left to sort of try to gauge an administration's intent, what's the likelihood of something happening. But the reality is that, what we're talking about here are two different ways of interpreting it. Is NIL money compensation or is it financial aid?

The Trump administration is saying, the Biden administration tried to determine that this is financial aid without any basis in law for making that determination. Moreover, this wasn't something that followed the normal rulemaking process that you would see for agencies where they post something for public comment, they received comment, you get interested parties submitting essentially their position papers, white papers. This was on the way out the door, we're going to tell you what we think.

If the idea was to create some level of certainty, it failed. It did the opposite. It didn't create any certainty. So, I understand the basis for this statement in the press release. I agree with you, that ultimately, this is going to have to get decided by the courts.

[0:18:14] Cal Stein:

Yes, I think that's exactly right. I think the press release signals exactly that. I mean, the very next line in the press release is, "Enacted over 50 years ago, Title IX says nothing about how revenue generating athletic programs should allocate compensation among student athletes." That is a very non-controversial statement, because as you noted, even as we sit here right now, college programs and schools cannot compensate student athletes, all of this is with an eye towards a post-*House* settlement world when they can. So, of course, there's no history, judicial, legislative, or otherwise, addressing this specific issue.

Then, here's how the press release ends, which I think is very interesting as well. "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 clear legal authority to support it, that does not exist. That does not exist." What a final statement in this press release, making what I believe to be a very determinative and conclusory statement about what legal

authority is out there. Now, I note, of course, that the Department of Education stating that does not come with the same authority as perhaps a federal court saying it. But it does seem to me, ultimately to your point, Mike, that if this is going to go to litigation, which it almost certainly will, that that is the position the Department of Education is going to take, and at least try to persuade perhaps, or be consistent with a court taking that that position as well.

[0:20:01] Mike Lowe:

That's right. One thing that you can't escape is the inclusion of the word equity in this sentence. We know from, everything we've read, this is a major policy position of the Trump administration is that diversity, equity, inclusion have no business in either higher education, or private employment, or government. It's no coincidence that the phrase "gender equity" is essentially the last substantive sentence of this press release.

[0:21:20] Cal Stein:

Interesting. Interesting. Well, look, we've spent a lot of time talking about what we think this administration, what their positions are going to be. I think we're right on that. I think it's all clear here. Let me ask another question. This was just a rescission of a guidance document. Do we think that the Trump Department of Education, as you noted, as long as it continues to exist, or perhaps, while it continues to exist, do we think they're going to issue something else, their own guidance document? Or, do you think that they're going to kind of stand down a little bit, let this work its way through the courts, and perhaps, file the amicus brief that you mentioned?

[0:21:57] Mike Lowe:

That's a really good question, and I've thought about it. It's one of those questions where that's so hard to answer that. Because I could definitely see them not issuing any further guidance. They pulled back the guidance in this press release. It certainly suggests that that's how they're going to approach this. It would also be certainly disingenuous to a certain extent to come out with your own guidance. So, I think if I had to wager, I would say, no further guidance on this topic. However, I wouldn't feel confident putting a lot of money on that.

[0:22:34] Cal Stein:

Fair enough. I think I come down exactly the same way. I think in a way, that's why they did it the way they did. So kind of overwhelming in its rescission and its indictment of the way that initial guidance document was issued as a way of signaling to the world what the position is without actually having to go ahead and push through their own guidance document. I also think that, perhaps, one area here is a legislative solution. There's a lot of suggestion, I think, if you read between the lines, and we've done a lot of talking about that. In this press release, that these dueling guidance documents, that's not the way that should be done. Perhaps, just perhaps, there's going to be a push for a legislative solution in Congress, though, I do remain somewhat skeptical about that happening anytime soon.

[0:23:30] Mike Lowe:

Well, I continue to agree with you that legislation is needed. I mean, we've been talking about the need for legislation in this space for years. The only way we're going to get resolution is if Congress can actually get their act together, and pass some kind of legislation to address all of these issues. There's so many issues that universities and their athletics programs are facing today because of the uncertainty over NIL, because of the antitrust issues, because of the issue whether or not student athletes are employees. Now, you've got whether or not NIL payments are compensation versus financial aid.

Unless there's legislation, this is going to be an area where we are just going to continue to see lawsuit after lawsuit, and the NCAA is going to be playing reactive ball instead of being able to sort of predict with any certainty. The same thing goes for the institutions, there's no certainty right now. The only way you're going to get certainty is if some laws are passed.

[0:24:40] Cal Stein:

Yes, I think that's exactly right, and I think the press releases strong criticism of using the rubric of agency guidance to either make law or interpret law leads only to those two outcomes. Federal lawsuits and judicial intervention, which may or may not be consistent across the whole country and/or legislation at the federal level, which I think we all recognize is needed and would go a long way towards making this uniform and giving everybody involved something that they could rely on.

[0:25:16] Mike Lowe:

Agreed, Cal, agreed.

[0:25:16] Cal Stein:

And with that, we are out of time here today, so I do want to bring this discussion to a conclusion. Mike, thanks very much for joining here today. I want to thank everyone for listening. If anyone has any thoughts or any comments about this series or about this episode, I invite you to contact me or contact Mike. 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.

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