

2024 Title IX Education Series: Translating the New Regulations into Your Title IX Policies and Procedures

Session 5: Athletics and Final Q&A

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Meet Your Speaker Panel



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**Learning
OUTCOME**


Learn how your student athletes and athletic programs will need to adapt to comply with the requirements under the law—particularly as related to sex-based discrimination and sport participation.

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Disclaimer

The information provided in this training does not, and is not intended to, constitute legal advice. Instead, all information, content, and materials available during this training are for training and general informational purposes only.

 **ACADEMIC
IMPRESSIONS**

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AGENDA |

1. Title IX & Athletics
2. Jurisdictional Expansion
3. Questions & Answers (from survey and live)

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ai ACADEMIC IMPRESSIONS

#1

Title IX & Athletics

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■ Background: Title IX and Athletics

"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."

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■ Title IX and Athletics Regulations Changes?

- February 2023 - The Department of Education released a new resource to help athletic programs assess their Title IX Compliance titled, “ **Title IX and Athletic Opportunities in Colleges and Universities: A Resource for Students, Coaches, Athletic Directors, and School Communities**”
- April 2023 - The Department of Education Proposed New Rules affirming that Title IX secures the rights of transgender , non-binary and intersex student athletes. 106.41. This is the first time that the Title IX rules would address trans students’ eligibility to participate on sex-separated athletic team

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■ Postponed: The Proposed New Athletic Rules

The 2024 Final Rule was released, but it did not include the proposed new rules affirming that Title IX secures the rights of transgender, non-binary, and intersex student athletes.

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■ How is Title IX applied to athletics?

- 1) **Participation:** Title IX requires that women and men be provided equitable opportunities to participate in sports;
- 2) **Scholarships:** Title IX requires that female and male student-athletes receive athletics scholarship dollars proportional to their participation; and
- 3) **Other benefits:** Title IX requires the equal treatment of female and male student-athletes in the provisions of eleven categories.

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■ Compliance Test

An institution **must meet all** the following requirements to comply with Title IX:

1. Participation requirements- institutions must meet **one** of the following three tests. An institution may:
 1. **Provide participation opportunities for women and men that are substantially proportionate to their respective rates of enrollment of full-time undergraduate students;**
 2. Demonstrate a history and continuing practice of program expansion for the underrepresented sex;
 3. Fully and effectively accommodate the interests and abilities of the underrepresented sex; and,
2. Female and male student-athletes must receive athletics scholarship dollars proportional to their participation; and,
3. Equal treatment of female and male student-athletes in the eleven provisions mentioned above.

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■ How do I know if my institution is in compliance with Title IX?

In 1994, the U.S. Congress passed the **Equity in Athletics Disclosure Act**, which requires all colleges and universities to report each year on athletics participation numbers, scholarships, program budgets and expenditures, and coaching salaries by gender.

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■ NIL and Revenue Sharing

- How have they impacted Title IX compliance?
- How might they impact Title IX Compliance in the future?

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■ What is NIL?

Name, image and likeness (or NIL) are the three elements that make up “right of publicity”, a legal concept used to prevent or allow the use of an individual to promote a product or service.

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■ NCAA's NIL Policy

The NCAA's interim policy, which was passed in June 2021, has three main parts:

1. Athletes can engage in NIL activities if they follow their state's laws where their school is located. Schools must ensure these activities comply with state law.
2. Athletes in states without NIL laws can still participate in NIL activities without breaking NCAA rules.
3. Athletes are allowed to seek professional service providers for their NIL activities.

**Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.*

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■ NIL Opportunities for Student Athletes

- Autographs and memorabilia
- Camps and clinics
- Personal appearances
- Merchandise
- Affiliate/ambassador roles
- Blogging
- Podcasting
- Public Speaking
- Music, art, etc.

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■ What does NIL have to do with Title IX?

1. **Participation:** Title IX requires that women and men be provided equitable opportunities to participate in sports;
2. **Scholarships:** Title IX requires that female and male student-athletes receive athletics scholarship dollars proportional to their participation; and
3. **Other benefits:** Title IX requires the equal treatment of female and male student-athletes in the provisions of eleven categories.

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■ How might this impact Title IX Compliance?

NIL and Title IX Intersection: The principle of equitable treatment

Examples of potential infractions:

1. Providing different levels of brand training and resources to male and female student-athletes.
2. Allowing a football player to use the university's trademark logo in an ad but denying the same opportunity to a female student-athlete.
3. A collective that makes decisions that have been influenced by a university employee (i.e., coach, athletic director, etc.) and do not provide equal opportunities for male and female student-athletes may be exposing the university to Title IX liability.
4. Limiting exposure for women's teams due to unequal marketing efforts.

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NIL Changes

- Permit institutions to provide assistance and services for student-athletes pursuing NIL opportunities ([Proposal 2024-3](#))
- Conditioned the ability for an institution to provide “assistance and services” discussed above on a student-athlete disclosing NIL activities (See [Proposal 2024-4](#)).
- Eliminate the risk to a student-athlete’s eligibility for failure to disclose their NIL activities (See [Proposal 2024-4](#)).

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What remains . . .

- A voluntary registration process for NIL professional service providers
- A Comprehensive NIL Education plan for prospective student athletes
- Threshold for the disclosure of NIL agreements is \$600. (See [Proposal 2023-58](#) and [Proposal 2024-4](#)).
- Compensation: It remains impermissible for colleges and universities to:
 - Compensate student-athletes for use of their NIL or
 - Use NIL as a recruiting inducement
- Permissible “assistance and services”
 - **Does not extend** to compensation or inducements
 - Is limited to student-athletes, not prospective students

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■ How might this impact Title IX Compliance?

Direct Involvement = Increased Scrutiny

- Creating more opportunity for male student athletes versus female student athletes
- Lack of staffing for female student athlete opportunities

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■ House vs. NCAA: Revenue Sharing

- Paying damages to thousands of former and current college athletes who say now-defunct NCAA rules prevented them from earning endorsement money.
 - 2.77 billion over a 10-year period
 - Approximately 14,000 claims
- Setting up a first-of-its-kind revenue-sharing system for college athletes, which will impact hundreds of schools across the country as early as fall 2025.
 - Big Ten, Big 12, ACC and SEC to commit up to \$21 million per year to be paid directly to athletes. The overall commitment, including damages, is expected to be about \$300 million per school (there are 69 in all) over 10 years.
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■ How might this impact Title IX Compliance?

- Settlement Payments: How will each institution decide on the amount of money to give each player?
- Revenue Sharing: How will they determine how much each team or person will receive?
- Where will the money come from? Will programs be cut?

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RESOURCE

- [Title IX Frequently Asked Questions - NCAA.org](https://www.ncaa.org/faq)
- [NIL InterimPolicy.pdf \(ncaaorg.s3.amazonaws.com\)](https://ncaaorg.s3.amazonaws.com)
- [Legal Update | NCAA Adopts Changes to Transfer Rules and NIL Rules | Husch Blackwell](#)
- [NCAA sets the stage for paying college athletes | AP News](#)

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#2

Jurisdictional Expansion

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Jurisdictional Application (106.11)

The 2024 regulations apply to:

- All sex discrimination occurring under a recipient's education program or activity in the United States.

However...

- A recipient (also) has an obligation to address a sex based hostile environment under its education program or activity, *even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.*

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“Downstream Effects”

Jurisdiction exists... *“even when some of the conduct alleged to contribute to a hostile environment within a program or activity occurred outside the University’s program or activity.”*

Sex Discrimination
outside a Program
or Activity

Contributes to...

Hostile Environment
inside a Program or
Activity

No need to adjudicate the underlying sex discrimination that occurred outside your program or activity unless...

- The recipient addresses other student misconduct or other interactions between students that occur off campus.

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Questions & Answers

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■ Q. #1: Retroactivity

Retroactivity - mainly if we get a report of harassment after the new regulations come into effect where some of the alleged conduct supporting the harassment claim allegedly occurred before and some of the conduct occurred after the regulations went into effect, which process would control, the 2020 or the 2024?

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■ Q. #2: Federal Injunction

- The **federal injunction** of the 2024 regulations in Ohio, Indiana, Kentucky, Tennessee, etc.
- **Judicial impacts** on the implementation of Title IX.
- What do we do if we are in a **state** in which the TIX Final Rule has been **enjoined** (or expect to be enjoined soon)?

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Injunctions

Preliminary Injunctions Issued:

- State of Louisiana v. US Department of Education
 - June 13, 2024: Louisiana, Mississippi, Montana, Idaho

- State of Tennessee v. US Department of Education
 - June 17, 2024: Ohio, Kentucky, Indiana, Virginia, West Virginia
 - Restrains DOE from “implementing, enacting, enforcing, or taking action in any manner to enforce” the 2024 Rule.

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Injunctions continued

Pending (not yet ruled upon):

- State of Kansas v. US Department of Education
 - Oral arguments June 20, 2024. Plaintiffs: Kansas, Alaska, Utah, Wyoming.

- State of Alabama v. Cardona
 - Oral arguments July 1, 2024. Plaintiffs: Alabama, Florida, Georgia, South Carolina.
 - Other states filed/joined: Texas, Oklahoma, Arkansas, Missouri, Iowa, Nebraska, North Dakota, South Dakota, Kansas, Alaska, Utah, Wyoming.

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■ Q. #3: Credibility Assessment

A short training on **credibility assessment** for investigators/decision makers.

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■ Credibility

2020 Regs:

- “Credibility determinations may not be based on a person’s status as a complainant, respondent, or witness”
- At the live hearing, decision-maker must permit all relevant and follow-up questions including those challenging credibility

2024 Regs:

- “Credibility determinations must not be based on a person’s status as a complainant, respondent, or witness”
- Recipient must provide a process which enables decision-maker to question parties and witnesses to adequately assess credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination

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■ Credibility Assessment

- **Components:**
 - Honesty
 - Reliability
 - Verifiability
- **Questioning Strategies:** leverage the value of verifiable details

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■ Q. #4: Major Changes

To wrap everything up, it might be helpful to have a visual (or clear closing statement) regarding changes for the 2024 regulations. I realize there are ****numerous**** changes (however, I feel it would be useful to see the “big picture” from the presenters’ perspectives).

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■ 2024 Regulations: Major Changes

- Expanded definitions of sex discrimination.
- Expanded standard for hostile environment sexual harassment.
- Broader jurisdictional scope.
- Flexibility in the grievance procedure designed to respond to allegations of sex discrimination.
- Increased privacy.
- Heightened obligation to monitor for sex discrimination

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■ Major Changes Continued...

- Expanded reporting requirements for employees
- Increased emphasis on supportive measures
- Increased obligation to and clarity about pregnant and parenting students.
- Broader retaliation provision to include “peer retaliation”
- Informal resolution can occur anytime before a determination of responsibility (even before a complaint is filed).
- Appeal bases are slightly different (“would change the outcome”)

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2024 Title IX Regulation Success Program for Coordinators and Investigators
Space is Limited. Sign up by July 10, 2024

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How it Works

- 1. Get a Comprehensive Overview of the New Title IX Regulations in a 5-part live webcast series**
May 28 - June 25, 2024
Recordings of sessions will be available to watch on-demand
- 2. Certify Your Investigator(s) Online**
Choose either:
 - Foundations: July 11 - 12, 2024
 - Advanced: July 15 - 16, 2024
- 3. Participate in 4 Title IX Coordinator Discussion Circles**
Every Thursday, August 29 - September 19, 2024
- 4. Attend an in-person 3-day Coordinator Training and earn a certificate**
October 16 - 18, 2024 | Baltimore, MD

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Your comments will help us continually improve the
quality of our programs.