Steptoe

INAUGURAL EDITION

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Introduction

We are pleased to send you Steptoe's inaugural higher education industry newsletter. In this and future newsletters, we will highlight major legal events, discuss interesting developments you may have missed, and offer our thoughts on pressing concerns facing the sector. In future newsletters, we look forward to profiling general counsel and other in-house counsel at colleges and universities.

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Biden Administration Issues New Title IX Regulations

On April 19, 2024, after an extensive notice-and-comment period, the Department of Education's Office of Civil Rights ("OCR") issued its long-anticipated amendments to the Final Rule under Title IX of the Education Amendments of 1972, providing guidance concerning the definition, investigation, and redress of sexual discrimination and related offenses in federally-funded educational settings ("2024 Final Rule"). Some key provisions in the new regulations are summarized below:

- **Expanded Geographic Scope**: The new regulations expand the geographical scope of Title IX to cover conduct that impacts an institution's programs or activities regardless of where it occurs, even if it is online and/or outside the United States. Institutions are not required to respond to conduct that occurred outside their educational programs or activities.
- **New Standards for Sexual Harassment and Retaliation**: The current standard for sexual harassment requires conduct to be "severe, pervasive, and objectively offensive," but the new rules lower the standard to "sufficiently severe or pervasive." Moreover, the new regulations clarify that retaliation includes peer retaliation by other students and does not prohibit institutions from requiring employees to participate as a witness in, or otherwise assist with, a Title IX investigation, proceeding, or hearing.
- **New Protections for Discrimination Based on Sexual Orientation, Gender Identity, Pregnancy, or Parental Status**: Under the new regulations, sex discrimination now includes discrimination based on sexual orientation, gender identity, and sex characteristics. Discrimination based on pregnancy, childbirth, termination of pregnancy, lactation, related medical conditions, or recovery from such conditions is also prohibited. The new regulations also require colleges and universities to act to ensure equal access, including reasonable modifications for students, reasonable break time for lactation for employees, and lactation space for students and employees.
- **Actual Knowledge No Longer Required to Trigger Reporting Obligations**: A recipient with knowledge of conduct "that reasonably may constitute sex discrimination" must respond "promptly and effectively," and actual knowledge is no longer required. The Title IX Coordinator, however, may only file a complaint if there is an imminent and

serious threat to someone's health or safety or if the failure to file the complaint would prevent the school from ensuring equal access.

- **Greater Flexibility in Investigations and Adjudication**: The new regulations no longer mandate live hearings or cross-examination, and allow schools to return to the single-investigator model, in which the decisionmaker is the same person as the investigator. Moreover, schools may now offer informal resolution, not only when they receive formal complaints of sex discrimination, but also when they have information about conduct that may reasonably constitute sex discrimination.
- **New Training Requirements**: The new regulations contain a more expansive list of topics on which Title IX personnel must be trained based on their position. They also require training to occur promptly upon hiring, or a change of position that alters an employee's duties under Title IX and annually thereafter.

Colleges and universities should review and revise their 2020-era Title IX policies in advance of the August 1, 2024 compliance deadline, and update their trainings accordingly. The Department of Education published a **resource** for drafting policies, notices of investigation, and grievance procedures to assist schools with this process. Note: The Department of Education is expected to publish a separate rule on athletics later this year, which will address the participation of transgender student athletes in athletics. For now, the new regulations are expected to apply to all students, including student athletes.

NCAA Settlement Will Allow Direct Payment to Athletes

On Thursday, May 23, 2024, the NCAA and the Power Five conferences (ACC, Big Ten, Big 12, PAC-12, and SEC) announced a settlement of three class-action antitrust lawsuits pending in the Northern District of California. The historic settlement – if approved by the judge overseeing the case – will have major implications for college and university athletic programs, athletes, boosters, and fans.

The terms of the settlement are not yet public, but have been described by counsel for the Plaintiffs. Under its terms, the NCAA and conferences will pay $2.75 billion over 10 years to compensate Division 1 athletes who were unable to benefit from the current rules allowing players to profit from their name, image, and likeness, or "NIL." The NCAA will fund almost $1 billion of the settlement by reducing future disbursements to smaller conferences.

The historic settlement also allows colleges and universities to share revenue with players going forward, eliminating NCAA rules that prohibited such payments. The portion of revenue paid to students that each school can share is capped at 22% of the average Power Five school's revenue, which in the first year will be about $20 million. For now, schools can decide how they want to distribute their portion of the money, if at all.

The settlement doesn't resolve all the pending antitrust lawsuits against the NCAA. One remaining suit, *Fontenot v. NCAA*, is moving forward in the federal district court in Colorado after the judge denied a request to consolidate it with the three cases the NCAA settled.

Th settlement follows on the heels of the Supreme Court's 2021 decision in *NCAA v. Alston*, which held that the NCAA violated the Sherman Act in restricting education-related benefits for athletes, such as post-eligibility scholarships at graduate or vocational schools. While narrow in scope, the opinion signaled the death of the amateurism model of college athletics.

Given this recent history, the NCAA likely avoided a much larger judgment by settling. Now, with a potential show of good faith, the NCAA has turned to Congress, where it hopes to obtain an antitrust exemption similar to those enjoyed by professional sports leagues.

This settlement raises many questions. One such question is whether Title IX governs revenue-sharing schemes and puts any limits on how payments can be distributed between men's and women's programs. Another is whether athletes are considered employees, and if so, whether they can engage in collective bargaining and other legal protections afforded employees under state law. There will also be significant practical questions for each school as it determines how to navigate this new world.

This settlement also should be considered in the context of the NCAA's other recent antitrust settlement in *Ohio v. NCAA*, in which the NCAA agreed to stop enforcing all rules regulating student athletes transferring from one school to another. In December, the court in that case granted a temporary injunction against a rule that required athletes to wait a year before competing after transferring to a new school. This settlement would make that rule change permanent, as well as preventing any retaliation against schools or athletes engaging in a transfer. It could be that the NCAA has decided to clear the docket of antitrust enforcement actions by beginning to accept settlements regarding its alleged anticompetitive rules.

US Department of Education Imposes $14 Million Fine for Clery Act Violations

On March 5, 2024, the Department of Education ("DOE") announced that its office of Federal Student Aid ("FSA") was imposing a $14 million fine following its settlement agreement with Liberty University for violations of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the "Clery Act").[1] This is the largest fine ever imposed for violating the Clery Act.

The Clery Act is a federal statute requiring colleges and universities participating in federal financial aid programs to maintain and disclose campus crime statistics and security information.[2] The Act was passed in 1990 and is named after a Lehigh University student who was raped and murdered by another student while in her dorm room in 1986. The attack was one of 38 violent crimes recorded at the university in three years—her parents argued in a lawsuit against the university that had they been aware of the university's crime record, their daughter would not have enrolled there. [3]

The DOE conducts reviews to evaluate compliance with the Clery Act when complaints are received, when a media event raises concerns, when the school independently reports noncompliance, or through the DOE's own auditing process.

In Liberty's case, the FSA conducted a review of the school's compliance following receipt of several complaints. The review was conducted between February 2022 and May 2023, when the FSA issued its initial program review report. The final report released on March 5, 2024 cites 11 findings in total. At a high level, Liberty failed to:

- Implement an adequate Clery Act compliance program between 2016 and 2023;
- Include accurate and complete informational disclosures in its annual security reports;
- Provide victims of sexual violence with appropriate notice of their rights and options, and to correct deficiencies in the investigatory and adjudicative process;

[1] https://www.ed.gov/news/press-releases/us-department-education-imposes-14-million-fine-against-liberty-university-clery-act-violations.
[2] https://studentaid.gov/data-center/school/clery-act-reports.
[3] https://www.latimes.com/archives/la-xpm-2008-jan-12-me-clery12-story.html.

- Identify and notify campus security authorities and establish an adequate system for collecting crime statistics from all required sources;
- Properly classify and disclose crime statistics from 2016 to 2021, by failing to include crimes, improperly classifying crimes, or failing to make required disclosures;
- Issue emergency notifications to the campus community in accordance with federal regulations;
- Issue timely warnings to the campus community about Clery-reportable crimes that pose an ongoing threat to students and employees;
- Maintain an accurate and complete daily crime log;
- Properly define Clery geography, leading to a failure to properly compile and report accurate crime statistics to the campus community and the DOE;
- Comply with Title IV record retention, which compromised the DOE's ability to conduct required oversight and monitoring; and
- Publish and distribute its Annual Security Report in accordance with federal regulations, from 2018 through 2021.

Liberty agreed to spend $2 million over the next two years for on-campus safety improvements and compliance enhancements. The settlement agreement requires Liberty to bring its programs and operations into compliance with the Clery Act in a manner that will provide reasonable assurance that these violations will not recur. In its announcement, the DOE recognized Liberty administration's prompt acknowledgment of nearly all violations identified in the DOE's initial report and its demonstrated commitment to remedying them.

The Liberty case is a timely reminder about the importance of Clery Act compliance. Colleges and universities should ensure that they have designated appropriate offices to handle Clery Act compliance and provided necessary training and support.

First-of-Its-Kind Name, Image, and Likeness Litigation

On May 21, 2024, Jaden Rashada, a former University of Florida (UF) football recruit, sued UF head football coach Billy Napier, wealthy booster Hugh Hathcock, and others, alleging that they conspired to lure him to UF with the promise of a $13.85 million name, image, and likeness (NIL) deal, but had no intention of ever fulfilling the deal. In the suit, which was filed in the U.S. District Court for the Northern District of Florida, Rashada claims that he turned down a $9.5 million NIL offer from the University of Miami in favor of UF's more lucrative offer. Rashada claims further that UF promised him a $500,000 signing bonus and a $1 million "partial payment" of the $9.5 million NIL deal upon signing, but he never received any of the funds.

For decades, celebrities such as actors, musicians, and professional athletes have had the benefit of NIL rights, including the ability to monetize the use of their identity for commercial purposes through product endorsements and other activities. More than 30 states, including Florida, have passed NIL laws, most of which are modeled after California's "Fair Pay to Play Act," which was the first NIL law enacted. Because of the growing patchwork of state laws with varying requirements, several bills have been introduced in the U.S. House or Senate to establish a uniform federal NIL law, but none have yet passed.

The National College Athletics Association (NCAA) prohibited extending NIL rights to college athletes until the Supreme Court ruled in *NCAA v. Alston et al.*, 594 U.S. 69 (2021), that the NCAA's rules on the compensation of athletes violated federal antitrust law. Since then, the NCAA has issued **guidance** for college athletes, recruits, their families, and member schools regarding NIL activities.

Rashada is the first college athlete to sue his coach or a booster (a representative of the institution's athletic interests, as defined by the NCAA), but he is unlikely to be the last. Colleges and universities must remain vigilant of new litigation developments regarding NILs, particularly courts' assessments of the liability of athletics personnel, as individuals or agents of their educational institution, and applicable damages. Such litigation also runs the risk of entangling major donors, who could be personally liable depending on the circumstances. Institutions should train their athletics personnel on these risks, develop best practices, and try to avoid the types of missteps and miscommunications that led to the Rashada case.

Gender-Neutral Bathroom Prohibitions

The new Title IX regulations—which include greater protections against discrimination based on sexual orientation, gender identity, and sex characteristics—arrived among legislative action in several states to prohibit multi-person, gender neutral bathrooms on college campuses ("bathroom laws"). Most recently, Mississippi enacted S.B. 2753, which prohibits individuals from using restrooms or changing rooms that do not align with the sex they were assigned at birth, and establishes a private right of action for violations of the law. The bill applies to public colleges as well as fraternities and sororities operating on public land and requires covered entities to have separate restrooms for "males" and "females" or "single-sex"/ "family-use" restrooms.

Over the last year, similar laws regulating or prohibiting multi-person, gender-neutral bathrooms have been enacted following Florida's bathroom law, which was passed in July 2023 and remains the harshest in the nation with criminal penalties of up to one year in jail. Kansas, North Dakota, and Utah also have bathroom laws, but the laws in Kansas and North Dakota do not contain an enforcement mechanism. Other states, such as Ohio, are considering bathroom laws like Mississippi's law.

There is a clear conflict between the increasing number of bathroom laws and the latest Title IX regulations. Moreover, as a condition of receiving federal funds, all federally-funded schools are obligated to comply with the final regulations. Generally, however, the states with bathroom laws are among the over 25 states suing the federal government over the latest round of Title IX amendments, arguing that the new rules violate the First Amendment, in addition to other claims. Accordingly, colleges and universities must prioritize compliance with Title IX while closely tracking and analyzing related legislative developments in their state.

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