

Education

Challenges and Opportunities: The NCAA Suspends Its Name, Image, and Likeness Amateurism Rules

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Introduction

The NCAA voted to suspend its name, image, and likeness (NIL) amateurism rules to avoid conflict with the growing number of state laws authorizing student athletes to profit from their publicity rights.^[1] Although the amateurism rules forbidding institutions from compensating student-athletes directly for their athletic performances or as a recruiting inducement remain in force, this decision opens the door for athletes to sign endorsement deals, monetize their social media presences, teach camps and lessons, and hire agents to manage their business ventures.^[2] Because of the dynamic nature of this issue, the patchwork of state laws regarding student NIL, and the absence of a federal law that provides uniform guidance, the NCAA chose to leave it to the schools to determine and implement their own NIL policies consistent with their state laws. Schools in states without NIL laws must draw policies for themselves.^[3] The NCAA expects schools to police their athletes for violations of the remaining amateurism rules and report their ineligibility to the association.^[4] This self-regulation, within the context of vague and indeterminate rules, will create a difficult but high-stakes set of challenges for institutions.

Background

The road to NIL reform began in earnest with a combination of antitrust litigation challenging the NCAA's amateurism rules,^[5] and the passage of California's Fair Pay to Play Act, which, when it comes into effect in 2023, will prohibit preventing an athlete from profiting from the sale of their publicity rights.^[6] When signed into law in 2019, the California law directly conflicted with one of the core tenets of the NCAA's amateurism policy, which forbade students from receiving any payments connected to their status as college athletes. The NCAA responded by signaling its intention to add more flexibility to its NIL policy, but as more states passed similar legislation with earlier effective dates, the NCAA found itself with increasingly less time to advocate for an overarching federal law that could set across-the-board standards.^[7] A number of states, led by Florida, passed laws set to go into effect July 1, 2021, setting a deadline for a decision for the NCAA.^[8]

As the NCAA struggled to get bipartisan agreement for a federal NIL law in Congress, a dispute over the compensation of student athletes made its way to the Supreme Court in the form of *NCAA v. Alston*. In *Alston*, the lower court held that although the NCAA could restrict direct payments to athletes in the name of preserving amateur competition, its ban on non-cash educational benefits—like laptops or study-abroad stipends—violated antitrust law.^[9] The Supreme Court heard arguments in *Alston* in March 2021, and affirmed that the ban on “educational” benefits violated the “rule of reason” antitrust test, as the benefits bore no relation to consumer demand for amateur sports.^[10] Although the Court did not squarely determine whether the ban on student athlete compensation violates the Sherman Act, it found that the NCAA is not exempt from federal antitrust law, that the NCAA has monopoly power over the market, and that its prohibition on education-related benefits is anti-competitive notwithstanding any benefits that amateurism provides.^[11] The *Alston* decision cast more doubt on the NCAA's traditional business model, predicated on the idea of uncompensated amateurism.^[12]

The New Rules

With the Supreme Court raising serious questions about the fairness of the NCAA's business model, Congress failing to agree on any national-level guidance, and new state NIL laws about to come into force, the NCAA needed to act quickly. Although the NCAA had intended to release a comprehensive update to its NIL policy, the questions raised by *Alston* led the Board to simply suspend the penalties for profiting from NIL, rather than attempt to create a system that addressed the differing state legislation piecemeal.^[13]

The principal changes to the NCAA's policies are that student-athletes may now engage in NIL activities that are consistent with the law of their respective states, and that students in states without a NIL law may enter NIL deals without violating NCAA rules.^[14] Additionally, students may now hire an agent for NIL activities.^[15] Students should report their NIL activities consistent with school and conference rules.^[16] This interim policy will remain in effect until Congress passes new federal legislation or the NCAA adopts new rules.^[17]

Although the NCAA's NIL rules have been relaxed, the NCAA made clear that the ban on pay-for-play and improper recruiting inducements still stands.^[18] This means that compensating athletes for athletic achievements or benchmarks, whether on the part of an institution or booster organization, would still disqualify an athlete from amateur competition. However, athletes may enter into NIL agreements with boosters as long as the organizations do not compensate students for their athletic performance.^[19] The NCAA also clarified that several other activities remain prohibited, including institutions paying their own students in order to use their NIL, NIL compensation that is contingent upon enrollment, and NIL compensation that is paid without a quid-pro-quo (compensation for work not performed).^[20]

Otherwise, the NCAA has placed the burden of creating and enforcing NIL policies on the educational institutions. The national office will not police athletes regarding schools' and states' NIL rules, yet the NCAA is requiring schools to monitor for, and report violations of, the NCAA amateurism policies still in force.^[21] Ultimately, schools have the responsibility for certifying athlete eligibility.^[22] Institutions are scrambling to create NIL policies that are consistent with state laws, many of which contain sizable gray areas, while remaining attractive to potential athletic stars.^[23] Schools in states without NIL laws are guessing at what their own state or federal legislation eventually may include, as well as considering requiring compliance with NIL laws when students are competing in states that have enacted such laws.^[24]

Requiring schools to promulgate NIL policies may also have Title IX implications. To the extent that schools must approve student-athletes' NIL activities, they must ensure that this review process is undertaken in an equal fashion for male and female students.^[25] Sponsorships on behalf of an entity where an institutional employee or trustee of the school is also involved with the sponsor could raise issues of needing to provide similar opportunities under Title IX.^[26] The quality of promotion the school undertakes for its teams could affect athlete's NIL earnings. Because schools often spend more time and money promoting their highest-earning sports—football and men's basketball—this creates a potentially uneven playing field for female athletes.^[27] Where the institution is involved in facilitating NIL opportunities, they must ensure athletes of each gender have equal access.^[28]

Takeaways

Student athletes are free to market their NIL rights consistent with state law (if it exists in their jurisdiction) and the policies of their university, but the NCAA's vague guidance in this area leaves schools struggling to interpret the ambiguities of state laws while attempting to make themselves attractive to potential recruits. The uncertainty will undoubtedly lead to challenges in the high-stakes world of college sports, where institutions and conferences are understandably eager to attract the best talent and the many advantages that come from having a championship-winning sports program.^[29] Potential issues include:

- Whether and how institutions may arrange or facilitate NIL opportunities for students. Legislation differs by state on how much a school may be involved in their athletes' procurement of NIL deals. Some schools are already collaborating with digital marketplaces designed to connect sponsors with athletes.^[30] There is also the question of a school's usage of the NIL of its own athletes, as institutions cannot compensate students for NIL.^[31]
- How institutions will police the NIL agreements of their athletes to determine whether they are truly NIL or violate the NCAA's continuing ban on pay-for-play.
- Whether students may enter sponsorship deals with companies that do not sponsor their school team, including how and when they make deals from competitors. So far, most states and schools forbid taking sponsorships from competitors.^[32]
- Whether student athletes may make use of their school's logo and other trademarks. Some schools forbid this, while others, perhaps hoping to incentivize recruitment, allow it.^[33]
- What obligations schools have under Title IX to ensure that they facilitate NIL opportunities on a gender-equal basis.

As this new era of college sports dawns, institutions must act carefully to ensure they attract and retain sports talent while developing policies that are consistent with the new regulatory landscape.

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[1] Dan Murphy, *NCAA Clears Student-Athletes to Pursue Name, Image, and Likeness Deals*, ESPN (June 30, 2021), https://www.espn.com/college-sports/story/_/id/31737039/ncaa-clears-student-athletes-pursue-name-image-likeness-deals; Press Release, Nat'l Collegiate Athletic Ass'n, NCAA Adopts Interim Name, Image, and Likeness Policy (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>.

[2] *Id.*

[3] Dan Murphy, *NIL Prep for Schools "Like Building an Airplane when You're Flying,"* ESPN (June 28, 2021), https://www.espn.com/college-sports/story/_/id/31719581/ncaa-making-nil-prep-difficult.

[4] *New Interim Policy Key Takeaways*, Nat'l Collegiate Athletic Ass'n, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_PolicyKeyTakeaways.pdf (last visited July 12, 2021).

[5] *E.g.*, *O'Bannon v. Natl. Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015); *In re Natl. Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1242 (9th Cir. 2020), *cert. granted sub nom.* *Natl. Collegiate Athletic Assn. v. Alston*, 141 S. Ct. 1231 (2020), *and cert. granted sub nom.* *Am. Athletic Conf. v. Alston*, 141 S. Ct. 972 (2020), *and aff'd sub nom.* *Natl. Collegiate Athletic Assn. v. Alston*, 141 S. Ct. 2141 (2021).

[6] Cal. Educ. Code § 67456 (effective Jan. 1, 2023).

[7] Dan Murphy, *Everything You Need to Know about the NCAA's NIL Debate*, ESPN (July 14, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

[8] *Id.* (listing states with NIL laws and their effective dates); *see also* Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, Opendorse (Apr. 21, 2021), <https://opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/> (detailing various states' statutory NIL provisions).

[9] *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1263 (9th Cir. 2020), *aff'd sub nom.* *Nat'l Collegiate Athletic Ass'n v. Alston*, No. 20-512, slip op. (U.S. June 21, 2021).

[10] *Nat'l Collegiate Athletic Ass'n v. Alston*, No. 20-512, slip op. at 29 (U.S. June 21, 2021).

[11] *Id.* at 14.

[12] For a deeper analysis of *Alston*, see Ishan K. Bhabha & Katherine Hamilton, *NCAA v. Alston: The Dawn of a New Era for US College Sports?* Jenner & Block (June 23, 2021), https://jenner.com/system/assets/publications/21049/original/NCAA_v._Alston_The_Dawn_of_a_New_Era_for_US_College.pdf?1624463108.

[13] Dan Murphy, *NCAA Name, Image and Likeness FAQ*, ESPN (June 30, 2021), https://www.espn.com/college-sports/story/_/id/31740112/rule-changes-mean-athletes-schools-more.

[14] NCAA NIL Press Release, *supra* note 1.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Name, Image, and Likeness Policy Question and Answer, Nat'l Collegiate Athletic Ass'n, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf (last visited July 12, 2021).

[20] *Id.*

[21] NCAA Interim Policy Key Takeaways, *supra* note 4.

[22] *Id.*

[23] Murphy, *NIL Prep for Schools "Like Building an Airplane when You're Flying," supra* note 3.

[24] *Id.*; See Ross Dellenger, *With Recruiting in Mind, States Jockey to One-Up Each Other in Chaotic Race for NIL Laws*, Sports Illustrated (Mar. 4, 2021), <https://www.si.com/college/2021/03/04/name-image-likeness-state-laws-congress-ncaa>.

[25] Kristi Dosh, *Name, Image and Likeness Legislation May Cause Significant Title IX Turmoil*, Forbes (Jan. 21, 2020), <https://www.forbes.com/sites/kristidosh/2020/01/21/name-image-and-likeness-legislation-may-cause-significant-title-ix-turmoil/?sh=c6736467625b>

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Dellenger, *supra* note 23.

[30] See e.g. Press Release, Neb. U., Nebraska to Launch Industry-Leading NIL Program: (June 3, 2021), <https://huskers.com/news/2021/6/3/athletics-nebraska-to-launch-industry-leading-nil-program-nilbraska.aspx>.

[31] NCAA NIL Q&A, *supra* note 18.

[32] Murphy, *NCAA Name, Image and Likeness FAQ, supra* note 12.

[33] Terence Moore, *NCAA Had No Choice, but NIL Rule Will Damage College Football and Basketball*, Forbes (July 6, 2021), <https://www.forbes.com/sites/terencemoore/2021/07/06/the-ncaa-hadnt-a-choice-but-nil-rule-will-damage-college-football-and-basketball/?sh=56ca152f2c0d>