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The Issues Surrounding the National Collegiate Athletics Association's Decision to Allow Collegiate Athletes to Profit from their Name, Image, and Likeness

Introduction

The purpose of this research is to examine possible issues that need to be addressed in the National Collegiate Athletics Association's (the "NCAA") new name, image, and likeness ("NIL") legislation. This research will examine the Fair Pay to Play Act (the "FPPA") that has been enacted by several states by discussing what aspects of the FPPA should be included in the NCAA's new legislation and elaborating on contractual issues that have yet to be addressed.

Before the New NCAA Name, Image and Likeness Policy was Enacted

Today, many college students enjoy engaging with a variety of social media platforms in different ways. Some students enjoy watching thirty second TikTok videos or scrolling through Twitter reading the latest update of The Bachelorette. Other students enjoy making content on these social media platforms that attract thousands to millions of viewers and can make a lot of money. This social media engagement is a form of an NIL activity. An NIL activity is where an individual utilizes their name, image, or likeness for "commercial or promotional purposes".¹ Students who engage in these NIL activities are often able to profit from active engagement on these social media platforms.

Famous TikTok star Addison Rae attended college and began producing a lot of content on her social media.² Not long after she began creating content on TikTok, she was able to gain millions of followers and could stop her education to pursue her social media career as a full-time job.³ Pursuing her social media career allowed her to branch off into different spheres of business

including music, cosmetics, the movie industry, and several other opportunities.⁴ Since she could benefit from her NIL activities, she was able to create a life for herself and her family that she could only dream of previously. As seen by the hard work of Addison Rae, being able to benefit from your NIL activities creates opportunities for students to make life-changing money. However, thousands of collegiate athletes miss out on these opportunities to market themselves because of the NIL policies created by the NCAA.⁵ The NCAA's policy, prior to the FPPA, restricted athletes from being able to profit from marketing themselves and engaging in NIL activities, unlike many of their non-NCAA athlete peers who can do so without any backlash from their school.

The NCAA wanted to be the “guardian for amateurism” by preventing any compensation for their athletes beyond a scholarship for any educational expenses.⁶ This policy was to encourage amateur athletes to compete at a higher level without any pressure of engaging in business-like conduct. Ideally for the NCAA, the original spirit and competitiveness of sports would be maintained throughout the collegiate level without the influence of business and social media.

However, this policy caused more friction between student athletes and their schools when they could see their fellow colleagues benefiting from their NIL activities. Although not all student athletes would be the next Addison Rae, engaging in these NIL activities could help supplement student athletes' current income to better support themselves during their education. The NCAA was preventing their student-athletes from getting the same benefit as their peers by engaging in these activities.

The Push for New Law by the States

Not only were student athletes asking for this compensation, but state legislatures also began to push against the NCAA for preventing athletes from profiting from NIL activities.⁷ This shift was led by California's Governor, Gavin Newsom.⁸ Governor Newsom signed the Fair Pay

to Play Act which allowed collegiate athletes playing a sport at a California college that makes more than \$10 million to profit from their NIL activities.⁹ Other states, like New York, began to push for this new legislation as well.¹⁰ Following California's lead, eighteen other states have enacted or are planning to enact similar rules allowing collegiate athletes to earn money by engaging in these activities.¹¹ Currently, Colorado, Florida, Illinois, Kentucky, Minnesota, Nevada, Pennsylvania, South Carolina, Washington, along with several others are taking action to enact these laws.¹² This new NIL legislation passed by several states placed significant pressure on the NCAA to change the current policy.

The NCAA Name, Image, and Likeness Policy

With many new changes in state policy, the NCAA finally decided to change its policy in June of 2022.¹³ Now, NCAA athletes are allowed to benefit from NIL activities.¹⁴ This new policy states that "if an individual elects to engage in NIL activity, the individual's eligibility for intercollegiate athletics will not be impacted," indicative of the shift made by the NCAA in allowing these student athletes to profit from their NIL activities without any penalty from the school.¹⁵

All NCAA collegiate divisions (division I, II, and III) will adopt this NIL policy.¹⁶ Athletes within these divisions can now engage in NIL activities that are consistent with the law of the state where the school is located and can be aided in these NIL activities with the use of professional service providers.¹⁷ Professional service providers are individuals or third parties that provide services to a student for any of their NIL activities including being an agent, tax advisor, marketing consultant, attorney, brand manager, and other various services.¹⁸ The NCAA president, Mark Emmert stated that, "with a variety of state laws adopted across the country, we will continue to work with Congress to develop a solution that will provide clarity on a national level," indicating

that more needs to be detailed in the legislation to properly protect these student athletes, universities, and NIL professional service providers when engaging in these activities.¹⁹ Creating a policy to allow student athletes to benefit from their NIL activities is a step in the right direction, but more legislation needs to be created to protect athletes, universities, and these NIL professional service providers from any harmful legal action.

What Legislation Should be Detailed to Support these Student Athletes

There are several directions that the NCAA can go to create legislation to support the NIL activities of student athletes. Generally, the legislation that should be passed by the NCAA should mirror the FPPA legislation that has been passed in California.

What Should Be Included from the Fair Pay to Play Act

In California, “A postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the student’s name, image, likeness, or athletic reputation.”²⁰ This provision should be included in the NIL legislation that will be passed by the NCAA.

Compliance with Current Laws and Regulations

Further, it is important for the NIL professionals to comply with the FPPA regarding NIL professional service provider conduct in order to also properly protect these professionals that are working with these athletes.²¹ Also, it would be important for the new legislation enacted by the NCAA to include language that does not allow scholarships awarded by the university itself to be threatened by any NIL activities.²² Similar to non-student athletes who receive academic or need based scholarships and engage in these activities, student athletes who engage in these activities should not feel threatened that their scholarships would be revoked. Many athletes greatly depend

on these scholarships, and it would be unfair to revoke these scholarships as a result of their NIL activities. Therefore, the new legislation should also detail the current laws and regulations that athletes, universities, and NIL professional service providers will need to follow.

Disclosure of NIL Activities

It is important that an athlete discloses their NIL activities to their college or university in order to be transparent about their activities. Although many students may not have to disclose their activities, the NIL activities of student athletes would impact the NIL activities of the school. Therefore, analogous to the FPPA, the NCAA should include a clause that requires the student athlete to disclose their decision to engage in NIL activities.

With all of that said, the FPPA is a good start for the NCAA to outline its own legislation to help guide athletes, universities, and NIL professional service providers, but more needs to be specifically detailed for this legislation to be successful.

What Needs to be Expanded Upon from the Fair Pay to Play Act

Regulation and Enforcement of the New NCAA Legislation

Currently there are several issues with the FPPA that should be addressed and expanded upon in new legislation. First, there needs to be some form of regulation of this process.²³ Compliance officers should be hired in order to enforce regulation of the process.²⁴ This would help protect athletes from any suspicious representation and help with contract negotiations. This would be an outside source for these athletes to rely on for help that is not directly involved or profiting from this engagement. Because student athletes have not had the opportunity to engage and profit from NIL activities, they do not have any experience with the business aspects that would take place. Having some sort of regulation and enforcement of this process is crucial to protect these athletes from abuse.

Contractual Issues that Should be Examined in the New Legislation

Alongside these general regulations to try to properly enforce the new legislation, there are many issues that need to be addressed contractually. This field is accelerating at a rapid pace, where a lot of collegiate athletes want to engage in these activities.²⁵ Ever since the NCAA has allowed student athletes to benefit from their NIL activities, more student athletes enjoy engaging on social media platforms and making sponsorship deals. With this rapid increase of contractual relationships, there needs to be provisions in legislation to prevent any party from taking advantage of any underdeveloped rules. With that said, there is a need for more explicit rules for the FPPA to be successful and not create more issues and tension within the athletic community.

Contract law applies to this relationship between a student athlete, an NIL agent, and the four-year college or university.²⁶ There are a variety of clauses that should be included in the contract between these different parties. The clauses that will be discussed in this research will detail some of the contractual terms that should be included in the NCAA's requirements of a contract between the four-year college or university and the student athlete who wishes to engage in these NIL activities. These include: (1) degree of college or university involvement, (2) use of college or university logos, and (3) use of college or university facilities.²⁷ There are several other issues of the contract with the student athlete, the four-year college or university, and the NIL professional service provider that would need to be addressed with further research.

Degree of College or University Involvement

The degree of college or university involvement would be important to detail in the student athlete's contract because this would greatly affect their NIL activities.²⁸ At larger schools like the University of Alabama, University of California-Los Angeles, University of Oregon, and many other schools, their sports teams can attract substantial revenue purely from the name of the school.

Allowing these college or universities to help with their student athletes' NIL activities could be a great benefit to them, but it would be important to outline the amount and type of involvement that colleges or universities can engage in with their student athletes. The NCAA should require that in the contract between the college or university and the student athlete establish the extent of oversight that the college or university may have over these activities. This would include terms of how many hours the college or university can interact with an athlete to help with their NIL activities, what facilities are available to the student athletes to conduct their NIL activities in, whether school staff can be involved in these NIL activities, amongst several other considerations.

It would also be important to include in the NCAA's new legislation policies to ensure that school involvement is not biased towards any of the student athletes and to ensure that the student athletes are not being controlled by their colleges universities as if they were employees of the school.²⁹ Therefore, it would be important for the NCAA to detail this concern of the degree of college or university involvement to ensure that such policy is included in the student athletes', college/universities', and NIL professional service providers' contracts.

Use of College or University Logos

Similarly, to how larger schools who have prevalent sports programs that can help increase the amount of NIL activities a student athlete engages in, the use of college or university logos should be detailed in the student athlete's contract as well.³⁰ It is important for schools to set a boundary for students as to where they would be able to utilize their college or university logo and ensure that there is compliance with current trademark laws that are in place regarding the school's logo. Utilizing a college or university's logo can be critical to a student athlete's ability to engage in NIL activities, so detailing the bounds as to how these athletes can utilize them is important to include in the student athlete's contract.³¹ Therefore, the NCAA should require that contracts

between the student athlete and the college or university should detail how the student athlete can use the school's logo.

Use of School Facilities

Not only is it important to detail the terms for the college or university's involvement, but it is also important for the NCAA to outline how the athlete may utilize school facilities.³² This is important as NIL activities may not always coincide with the objectives of athletic teams. Sometimes an athlete may want to use a space for filming content, but another team may need the space for practices or workouts. In this section of the contract, it would be helpful to outline the procedures student athletes need to follow in order to accomplish their goals using these facilities for their NIL activities without conflicting with normal athletic teams' practices or workouts. This could come in the form of having to request or reserve the space for NIL activities to take place ahead of time.

Along with creating a procedure to allow NIL activities and sports practices to coexist in harmony it would be important to detail standard rental agreements, liability waivers, and any payment fees for the use of the facilities. This would help protect the school from any injury claims during these activities, but also notify the athlete of what could happen if something were to go wrong when they are using these facilities. It is incredibly important for the NCAA to require that the student athlete's contract to include in detail the extent to which they can use the school's facilities for their NIL activities.

Conclusion

There is a lot of work that needs to be done for this legislation to be successful. What was detailed previously should be incorporated into the NCAA's new legislation in order to help guide

student-athletes, colleges/universities, and NIL professional service providers in this uncharted territory of allowing student athletes to profit from their name, image, and likeness.

Although these pieces need to be included there are still other problems that can begin to arise from the change in policy that could be addressed in future research. These questions for future research include: Who regulates this NIL activities system? Does allowing athletes to benefit from their NIL activities create opportunities for other ways in which student athletes can get paid? What should go into a contract with the student athlete and the NIL professional service provider? These are questions that could be examined in future research. Overall, allowing these student athletes to profit from their name, image, and likeness is a great opportunity for these young adults, but for this to be successful, the NCAA needs to carefully craft their rules to properly protect these student athletes.

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- ¹⁵ *Id.* at note 9.
- ¹⁶ *Id.* at note 9.
- ¹⁷ *Id.* at note 9.
- ¹⁸ *Id.* at note 1.
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- ²⁰ Cal. Educ. Code §6758 (West, 2021).
- ²¹ Cal. Educ. Code § 67456 (West, 2021).
- ²² *Id.* at note 15.
- ²³ Carrol, *supra* note 6.
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