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Maximizing Your Worth: Name, Image and Likeness (NIL) Rights in Amateur Athletics

Legal Update

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A Brief History of Name, Image and Likeness (NIL)

The National Collegiate Athletic Association (NCAA) is a “non-profit” organization which regulates the conduct of student-athletes, coaches, staff, administrators and other interested parties involved with more than 1,000 North American colleges and 100 conferences. The NCAA has long policed activities relating to amateur status for student-athletes. The NCAA obsessed over the idea of amateurism (i.e. that student athletes representing member schools were not professionals and therefore could not be financially compensated), arguing before the Supreme Court that people would no longer watch college sports if the athletes were permitted to be compensated. For decades, the NCAA was content to only compensate student-athletes with college tuition and later cost of living expenses, while coaches’, administrators’ and NCAA coffers grew fat from billion-dollar broadcast deals.

Slowly, the castle of amateurism that the NCAA had built with Supreme Court *dicta* and outdated ideas was chipped away. In 2009, former UCLA basketball star Ed O’Bannon filed a federal lawsuit against the NCAA, arguing that Division I men’s basketball and football players should be compensated for the commercial use of their name, image and likeness (NIL) in mediums like the NCAA Basketball and NCAA Football video game franchises. In 2015, the Ninth Circuit Court of Appeals ruled in favor of O’Bannon, finding that these NCAA amateurism rules violated the Sherman Antitrust Act. When the case was not accepted for review at the Supreme Court level, the ruling remained intact, and O’Bannon received a settlement from the video game manufacturer.

By the late 2010s, the tide of public opinion had turned completely against the NCAA and the amateur model. In 2019, California became the first state to pass a law that made it illegal for state schools to prohibit athletes from being compensated for their NIL. The law was scheduled to take effect in 2023. In response, the NCAA threatened California schools with dismissal from their conferences and from the NCAA. However, the wave did not stop there, and more states began passing NIL legislation. Florida’s NIL Law even pushed the window forward by making its effective date July 1, 2021.

The final nail in the NCAA's coffin of amateurism came in the same court which strengthened its ability to police amateur status decades before. In the first collegiate athletics case heard before the Supreme Court since *Board of Regents* (1984), former West Virginia University Running Back Shawne Alston challenged the NCAA's power to cap educational benefits. In a stirring 9-0 decision, the Supreme Court ruled against the NCAA's ability to conspire to prevent schools from offering benefits to student-athletes that were related to education. In his scathing concurrence, Justice Brett Kavanaugh drove the point home, writing:

...traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.

As the NCAA came to reckon with the fact that its powers to rule with an iron fist over the eligibility of student-athletes were being snuffed out, a committee met to pass the interim policy on NIL. This policy made it clear that schools, states and conferences would dictate what was permissible under NIL policy. The NCAA would no longer stand in the way of student-athletes capitalizing on their athletic fame.

The Impact of Recent Name, Image and Likeness Changes at the NCAA

On July 1, 2021, NCAA student-athletes across all sports and divisions began exercising their opportunity to benefit from their name, image and likeness rights. The decision by Governance Bodies in all three NCAA divisions to adopt a uniform interim policy, which suspended prior rules that restricted student-athletes from profiting on these NIL rights related to athletic fame, created an environment with many individuals seeking to get involved but limited guidance. So far, 22 states have passed NIL legislation, with 16 of those states' new regulations becoming effective this year. The NCAA's interim policy calls for student-athletes to engage in NIL activities that are consistent with the law of the state where the school is located. College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to NIL. Student-athletes can use a professional service provider for NIL activities. The NCAA policy also calls for student-athletes to report NIL activities consistent with state law or school and conference requirements to their school. The NCAA still hopes to push Federal Legislators to craft a uniform federal law as it relates to NIL rights. Whether that is politically feasible remains to be seen. Minnesota is one of those states which has *not* yet passed any NIL rules. Therefore, it will be up to the individual conferences and universities to set NIL policy for collegiate student-athletes at Minnesota schools.

Can High School Athletes Take Advantage of NIL Rights?

It is unclear whether NIL policy has changed for Minnesota's high school student athletes. Currently, Minnesota State High School League's (MSHSL) eligibility requirements state that student-athletes confirm that they "have not accepted cash in any amount or merchandise valued at more than \$100 for participating in a sport." Furthermore, Bylaw 201.00 of the MSHSL Official Handbook, which governs Amateur Status, states that "A student cannot use athletic skills to promote or advertise products." This rule would seem to affect the most common methods that student-athletes have found to capitalize financially upon their athletic fame – sponsored social media posts and paid appearances.*

Karissa Niehoff, Executive Director of the National Federation of High School Associations (NFHS), used many of the same talking points that the NCAA's leadership used for decades in defending the organization's decision not to support a student-athlete owning their NIL rights. She argued that high schoolers are not adults, that they would be distracted from the best next step for them if they engaged in NIL work, and that student-athletes should not be making money while wearing their uniforms. Niehoff believes that high school students engaging in NIL contracts could compromise regulations and bylaws that were passed by 51 state associations preventing high school athletes from being paid. On the NFHS website, Niehoff emphatically wrote: "Current high school student-athletes CANNOT earn money as a result of their connection to their high school team."

Overall, there is currently no clarity as to what is allowable when it comes to high school athletes and NIL rights. There have certainly been exceptions, like North Carolina five-star-guard Mikey Williams, who recently signed a marketing representation agreement with Excel Sports Management and is poised to earn seven figures from possible endorsements. In a perfect confluence of events, Williams has millions of followers on social media, plays in a state without a NIL law which could have prohibited high school athletes from capitalizing upon their athletic fame, and is playing basketball at Vertical Academy while attending high school elsewhere. Vertical Academy is not sanctioned by an organization like the NFHS or a state high school league (similar to MSHSL), so there are no additional bylaws that Williams is bound by. Unless you are a high school student athlete in a nearly-identical situation to Williams, the best thing to do right now is to prioritize your eligibility until further clarity is attained so that you can take advantage of those contracts and rights at the collegiate and professional levels. As of this moment, the NCAA is willing to preserve a student-athlete's eligibility if they engage in NIL deals, but they must report and disclose all deals before signing with a school. This current guidance will develop as the working group and the D-I Council continue to meet, so it is essential that student-athletes, parents, advisors and coaches inform themselves as things change in this quickly-moving space and communicate with individuals that make it a point to stay up-to-date on such matters.

What Do I Need to Know as a Student-Athlete that can Capitalize on NIL Rights?

Upon determining that you can use your athletic fame to earn money while maintaining eligibility, you must be careful to accept the right type of deals. Many student-athletes, like Fresno State's Haley and Hanna Cavinder, have already experienced great success capitalizing on their athletic fame by signing endorsement deals with companies like Boost Mobile, hosting memorabilia signings, and doing brief videos on Cameo, amongst many other avenues. Some high-profile athletes, like former Minnehaha Academy basketball player Hercy Miller, son of hip-hop mogul Percy Miller (p/k/a "Master P"), have reached seven-figure endorsement deals before ever stepping on a college court. Many schools will be working with third-party entities like Opendorse to build school-specific platforms to help athletes take advantage of their NIL rights. While the school can be a resource along with these third-party entities, some student-athletes may hire a sports and entertainment lawyer for more formal and individualized representation.

Under the interim rules, student-athletes are able to enter marketing representation agreements with agents for the purposes of seeking advice for NIL deals, so long as there is no requirement that a student-athlete signs with the agent or firm for professional matters down the line. Student-athletes should be careful not to rush into the wrong deal, and there are certainly wrong deals. Student-athletes should retain professional advisors to evaluate these agreements and ensure they are being treated fairly. The consequences of entering a bad deal with the wrong company can be catastrophic. Bad deals can damage your reputation, financial prospects and jeopardize your chance of becoming a professional athlete. This also applies to any agreements you reach with athlete-agents who are empowered to sign deals on your behalf. The registration of athlete-agents is governed by state law. If you are offered a marketing representation agreement, you should retain an experienced sports and entertainment lawyer. Your lawyer will explain the agreement to you and negotiate its terms in your favor. Like a good coach, an experienced sports and entertainment lawyer will help you maximize your potential and avoid costly pitfalls.

The key for any young person and their team should be to maintain as much control over their "brand" as possible going forward. It is here that lawyers and financial advisors can be helpful to a young person that is experiencing the business-side of sports for the first time. NIL opportunities involve intellectual property and contract law. By working with a sports and entertainment lawyer, a student-athlete can ensure that they are not costing themselves future opportunities by signing a poorly constructed agreement. Financial advisors and accountants can also be a great part of any student-athlete's team. Be sure to work with reputable financial advisors and qualified accountants to invest any earnings from NIL deals properly and file the necessary taxes.

Possible Pitfalls to Avoid

Gray areas, or areas where there is uncertainty about what is allowable, exist wherever formalized rules have not been instituted. Dealing in these areas comes with the possibility of encountering pitfalls that could threaten future opportunities. These NIL rights are now available to both young men and women playing all sports at every level of collegiate competition, so every student-athlete who takes advantage of these rights should know that they will be under regulatory scrutiny from their school, conference and the NCAA.

When NIL rights were still being bandied about in a theoretical sense, the most frequently discussed possible advertising partners were other apparel companies (e. g. what if a student-athlete at an Adidas school is approached with a great deal from Jordan? Could that student-athlete wear Jordan apparel?). Other frequently discussed industries that may cause confusion are “vice” companies – alcohol, gambling, adult industries and marijuana. It is important for that reason that every student-athlete look at any guidance that has been offered by the compliance office at their institution. For example, the University of Kentucky states that student athletes are not permitted to engage in contracts with gambling, 18+ products, adult entertainment, tobacco/nicotine/marijuana, apparel and higher education/health care companies. If your school has not released a clear policy about what student-athletes are able to do, make sure you are asking questions of your coaches, athletic department, compliance officers, and that you do not make arrangements before you are absolutely sure it will not negatively affect your eligibility. No deal is worth losing your ability to compete.

Another complicating factor is if you are an international student. Due to issues with immigration requirements for those with student visas, no international student should enter into an agreement for compensation until things are ironed out between the schools and the federal government.

Conclusion

As the area of NIL continues to evolve, it is important for student-athletes, parents, advisors and coaches to stay up-to-date on the most current changes to the rules, because there is nothing more important than preserving one’s eligibility. Currently, high school players seem to be unable to capitalize on their NIL rights, but that may change as more decisions are made at the NCAA and perhaps Federal level. It is essential that those who can take advantage of NIL rights do so in compliance with any guidance offered by state laws, the NCAA’s interim policy on NIL enforcement, and each school’s individual policy guidelines. Additionally, it is helpful to have sports and entertainment lawyers, financial advisors and accountants on a student-athlete’s team to verify that all contracts preserve an individual’s power over their brand going forward, ensure that funds are invested properly, and that all necessary taxes are filed.

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Questions?

Please do not hesitate to reach out to Fredrikson with any questions about this fast-moving area. Chris Pham, the shareholder leading the Sports and Entertainment Group, along with Charlie Bennett, are happy to help as you begin evaluating and executing NIL-related deals.

** A call to the MSHSL to determine whether high school student-athletes can expect any changes to the NIL regulations considering the decisions made at the NCAA level was not returned at the time of this article's publication.*