

## **Name, Image and Likeness: How Companies are Opening Their Checkbooks for Younger Athletes**

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Headlines have circulated the mainstream media over the last several years discussing the concept of compensating student athletes for their name, image, and likeness (“NIL”). Within the last year, several states have passed laws to allow compensation for collegiate and high school student athletes as a response to Supreme Court jurisprudence on the issue.

Organized in the early 1900’s as a standard-setting body to address concerns regarding violence in football, the National Collegiate Athletic Association (NCAA) made clear at its inception that no student athlete is to be paid, directly or indirectly, for representing their institution in athletic competition. By the late 1940’s, the NCAA adopted the “Sanity Code,” echoing its stance on prohibiting promised-pay and allowing for suspension or expulsion for any violations. The NCAA has since distanced from these limitations, providing for allowable payments of cash for incidental expenses in the 1950’s, amateurism exceptions for multi-sport athletes in the 1970’s (*i.e.*, a student-athlete could be a professional in one sport while maintaining amateur status in another), and most recently, approving scholarships up to the full cost of attendance (“COA”) and providing for payments incidental to athletics participation, such as partaking in a bowl game or the Olympics.

In the first case to erode the NCAA’s rights, the U.S. Court of Appeals for the 9th Circuit held in *O’Bannon v. NCAA* (2015) that NCAA rules barring student-athlete NIL compensation were subject to antitrust laws, particularly Section 1 of the Sherman Antitrust Act, which prohibits “every contract, combination . . . , or conspiracy, in restraint of trade or commerce.” The plaintiffs showed that absent the NCAA’s compensation rules, video game makers would pay them for the right to use their NIL, satisfying the requirement of injury in fact and, accordingly, the requirement of antitrust injury.

In *National Collegiate Athletic Association (NCAA) v. Alston* (2021), though the Supreme Court did not expressly rule in favor of compensating student athletes, it did hold that colleges and universities were able to offer education-related benefits to student athletes as previously barred by the NCAA. In *Alston*, student athletes argued that the NCAA’s restrictions on eligibility and compensation violated federal antitrust laws by preventing student athletes from receiving remuneration for their labor. Lower courts in California ruled that the NCAA could restrict compensation for non-education-related benefits but could not do the same for education-related benefits. The U.S. Court of Appeals for the 9th Circuit upheld the decision, which led the NCAA to appeal to the Supreme Court. Justice Neil Gorsuch, who delivered the opinion, affirmed that the NCAA could not limit education-related benefits that may be made available to student athletes. While the opinion did not extend to non-educational-related benefits, it was a rational next step in attempting to transfer such reasoning to compensating student athletes.

NIL are the three elements that enable individuals to capitalize on anything that uniquely identifies them and collectively comprise the “right of publicity,” a legal concept related to the promotion of a product or service via third-party sponsorships and endorsements. NIL enables a company or organization to use a student athlete’s name and other traits in marketing and promotion, and supplies an alternative stream of income that would otherwise be unavailable given commitments in the classroom and on the field. The NCAA implemented an official policy in July 2021 that, despite deferring to the laws of individual states, universally clarifies that incoming and current student-athletes can

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benefit from their NIL without jeopardizing NCAA eligibility. However, schools may not use NIL transactions to compensate student-athletes for athletics participation or achievement, or as an improper inducement to have a student athlete matriculate, or remain in attendance at, a member institution.

Updated guidelines were published in October 2022 regarding university involvement, institutional education and monitoring, support of NIL activity, interacting with NIL entities and collectives, and negotiation, revenue sharing, and compensation. From an educational perspective, it is permissible for institutions to provide educational sessions to student athletes, NIL entities/collectives, boosters, and prospective student athletes. Additionally, it is permissible for the institution to inform student athletes of NIL opportunities, provide the student athlete's contact information to NIL entities, promote the student athlete's NIL activity (assuming no value or cost to the institution, by way of illustration, retweeting or liking a social media post), and arrange for the NIL entity and student athlete to meet on campus. Moreover, it is permissible for staff members to assist the NIL entity in raising money for the entity (for instance, appearing at a fundraiser, donating an autographed item), provide assets (such as tickets, suite) to the entity, and produce donor information to facilitate meetings between donors and the entity.

However, it is impermissible to communicate with the entity regarding a specific student athlete's request for compensation, or provide services other than education (for example a graphic designer, tax advisor, contract reviewer) and access to equipment (including cameras, computers, software equipment) to the student athlete to support the NIL activity, unless the same benefits are generally available to other students attending the institution. Additionally, it is impermissible to provide assets to a donor as an incentive for providing funds to the NIL entity, and for an athletics department staff member to be employed by the NIL entity.

Pennsylvania became the twenty-second state to allow for NIL activity. As athletes begin to capitalize on their athletic achievements at younger ages, safeguards must be put in place for their sake. How does a contract define success for an athlete's promotion? What happens if the athlete loses his or her prowess that made him or her a viable candidate for brands? What happens in the case of an injury? As we see in collegiate programs with wealthy alumni, more money is allocated to fulfill NIL obligations and remain competitive with other institutions. High school teams may see a similar trend where student athletes will seek out programs with a history of players earning NIL deals.

The Pennsylvania Interscholastic Athletics Association ("PIAA"), the governing body for interscholastic sports in the Commonwealth of Pennsylvania, began the process in July 2022 to approve policy around NIL at the high school level. The governing board set parameters including: (i) barring athletes from wearing their uniforms in promotions; (ii) referring to their high school teams or the PIAA; and (iii) prohibiting any promotion of adult entertainment, alcohol, controlled substances, other drugs, gambling or weapons. The PIAA is one of many organizations anticipating and preparing for any missteps athletes may encounter, stating that it would rather be proactive in forming policy around NIL rather than being reactive as issues arise. In November 2022, Pennsylvania's existing NIL law was modified to remove language that prohibited schools from arranging NIL for their student-athletes and eliminated the requirement that student-athletes must comply with notifying institutional officials of a contract at least seven days prior to execution. These changes, reflected in Pennsylvania House Bill 2633, give student-athletes more agency over their private contracts and the money they earn as a result. The modifications were made to ensure fairness for student athletes in the absence of national standards around NIL compensation by the NCAA or Federal Law.

Prior to *Alston*, the NCAA barred student athletes from receiving compensation for their athleticism, favoring the tradition of amateurism in college sports. In fact, the NCAA required student athletes to sign agreements prohibiting them from accepting money for simply being an athlete on a college team with a threat of losing collegiate eligibility. The only money that student athletes could accept came by way of scholarships and a variable cost. Today, student

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athletes vie for the few college sport scholarships that are available at each institution, which are independent from NIL agreements, as they pay for tuition and other school-related costs such as room and board or classroom materials.

Since the release of the *Alston* decision, college athletes took to their social media accounts to build personal brands, and they have begun to hire lawyers to oversee NIL deals. Several Power 5 institutions have even hired full-time members of their Athletic Departments to exclusively serve NIL directors with prerequisites of either a Juris Doctorate or several years' experience in business development, athletics compliance, or marketing. Of the student athletes successful in their endeavors to find endorsements, the title of "King of NIL" went to Rayquan Smith, a running back and decathlete from Norfolk State University, who secured over 70 different NIL deals with companies like Body Armor, Arby's and Eastbay. Brigham Young University Football secured a deal with Built Bars, a health food company, for its walk-on players who were not receiving scholarship money. Bryce Young, former Heisman Trophy Winner at Alabama and current quarterback for the Carolina Panthers, has inked over \$3.5 million in NIL deals that include Dr. Pepper, Nissan, Beats by Dre, and Celsius. At just 18 years old, Bronny James, son of LeBron James, is currently the highest-valued student athlete at \$6.8 million according to the NIL valuation database On3 due to deals from Nike, Beats by Dre, and Fast X.

The world of NIL is endless, but also presents new challenges for all parties involved. Whether or not one believes *Alston* is beneficial or detrimental to the student athlete, it opens the door for new factors to be considered when considering NIL in its totality.

The assumption that NIL serves to benefit only the most financially prestigious institutions has already proven to be a misconception, as it enables other schools to go all-in on a student athlete they otherwise would not be able to entice, which may help to reduce disparity in competition. It all comes down to how wisely the money is spent. Databases such as On3 should serve as efficient means for student athletes and institutions alike to monitor recruiting and NIL activity. NIL money has drastically changed the dynamic of college recruiting, as institutions can now impress NIL opportunities upon student athletes as an added variable of persuasion in conjunction with their student athlete facilities, equipment, scholarships, and education. Take Bronny James for example. As the highest-valued NIL student-athlete, he committed to USC, a program not typically known for its basketball prowess relative to institutions such as Duke, North Carolina, and Kentucky. Similarly, Nico Iamaleava, a five-star quarterback recruit, committed to the University of Tennessee to play football after signing an \$8 million deal executed by the school's collective in hopes they can compete with college football playoff regulars, such as Alabama, Georgia and Ohio State.

NIL has also had a residual impact on the transfer portal, allowing for players to move schools during the permissible transfer windows and further their personal brand. Though ostensibly under the guise of educational motivations, transfers are made pursuant to financial underpinnings now more than ever. The recent ratification of the "one-time transfer rule" gives student athletes the ability to transfer without sitting out a year and has had immediate implications on NIL opportunities. Shedeur Sanders, son of Deion Sanders, transferred from Division I-AA Jackson State University to the University of Colorado. Pre-NIL, it is difficult to conceive of such a move, as Colorado was 1-11 last year. However, Sanders received \$1.5 million in NIL deals including Mercedes-Benz and Under Armour.

The transfer portal and NIL have also seen an increase in relevance through the influx of collectives, which are independent of the university, but are used to pool funds from boosters and businesses to help facilitate NIL deals and induce movement within the transfer portal. Collectives come in several forms, including marketplace collectives, donor-driven collectives, and dual collectives. Marketplace collectives are those that create a meeting place for athletes and businesses to connect and discuss opportunities, while donor-driven collectives pool together support funds and provide opportunities to give money back to the student athletes. Dual collectives are a combination of marketplace and donor-driven collectives. Collectives can be formed as either a non-profit or for-profit entity.

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Non-profit entities have sought and obtained Internal Revenue Code (IRC) 501(c)(3) from the IRS, which subsequently allows donors to receive a tax deduction for their contributions. These collectives arrange for the student-athlete to act as an independent contractor to promote their charitable mission. Collectives that obtain a tax exemption should be mindful of certain considerations as applied to tax-exempt entities. For example, the organization cannot be organized for the benefit of private interests, and no part of the net earnings may be to the benefit of any private shareholder or individual. Excise taxes may be imposed on the person and any organization manager that agreed to such transactions. If a non-profit NIL collective engages in an activity that does not constitute a permissible purpose for a tax-exempt organization, the IRS could classify it as unrelated business income, *i.e.*, that which is not substantially related to the collective's charitable mission. The IRS could revoke a collective's tax-exempt status should it find that its activities constitute a primary or substantial non-exempt purpose of the organization. Unlike non-profits, for-profit NIL collectives are typically registered as an LLC and are not subject to a cap on what is considered reasonable compensation. Thus, NIL deals with for-profits can be made at any compensation structure and are not subject to limitations on the types of activities they can facilitate. Many student athletes find themselves presented with circumstances like current Washington State quarterback Cameron Ward. The former quarterback at Division I-AA powerhouse Incarnate Word transferred because of a \$90,000 inducement from Washington State's "Cougar Collective." The deal included an apartment through a housing firm, a brand-new pick-up truck from a booster-owned car dealership, and \$50,000 in cash for promotional appearances.

NIL considerations suggest a not-too-distant reality that student athletes could be paid more than the coaches that recruit and develop them, as an athlete with a couple fifty-thousand-dollar deals could easily eclipse their coach's salary, especially at the Division II and III levels. From an entertainment perspective, EA Sports will bring back its popular NCAA Football franchise after an 11-year hiatus because of the resolution of legal disputes regarding the use of players' NIL without compensation. Student athletes will be able to opt into the use of their NIL in the game and get paid for such inclusion. It remains to be seen whether this endeavor will expand to Division I-AA, II, and III, as well as to other sports. Team dynamics may also suffer from NIL deals, as endorsements, social media exposure and financial considerations have supplanted academic and geographical motivations that were once at the forefront of a student athlete's decision making. Should a student-athlete be dissatisfied at their current institution, it is easier than ever to find a new home that allows for those hardships to be cured. With the adoption of the one-time transfer exception working in tandem with NIL opportunities, player retention should continue to see drastic decreases, as the consequence of forgoing a year of competition has been replaced by potential financial opportunities.

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