

LEGAL UPDATES

PUBLISHED: APRIL 24, 2024

Services

Higher Education
Title IX

Industry

Education

Professionals

JASON J. MONTGOMERY
KANSAS CITY:
816.983.8291
JASON.MONTGOMERY@
HUSCHBLACKWELL.COM

TARONDA RANDALL
KANSAS CITY:
816.983.8255
TARONDA.RANDALL@
HUSCHBLACKWELL.COM

KRISTINA MINOR
CHICAGO:
312.985.8363
KRISTINA.MINOR@
HUSCHBLACKWELL.COM

NCAA Adopts Changes to Transfer Rules and NIL Rules

On April 22, 2024, the NCAA approved significant changes to NCAA Division I transfer eligibility and name, image, and likeness (NIL) rules. The changes to transfer and NIL rules are immediately effective.

Transfers

The NCAA adopted legislation allowing immediate eligibility for all NCAA Division I transfer student-athletes who are academically eligible; in good standing in accordance with their previous institution's standards; and meet the applicable "progress-toward-degree" requirements at their new institution (See Proposal 2024-5). This eliminates the decades old year-in-residence requirement for student-athletes transferring from one four-year institution to another. Note, the legislative action did not change the requirement that student-athletes seeking to transfer must enter the Transfer Portal only during the prescribed windows, or the restriction against competing for multiple schools in the same championship segment (e.g., during the same basketball season), which is particularly important for midyear transfers. Further, this proposal did not eliminate or otherwise modify existing exceptions to transfer rules (e.g., head coach departure), which applies only to student-athletes who miss their Portal window.

Despite the Division I Council, which is mainly comprised of university presidents and athletics directors, noting that "its support for the proposal is not an endorsement of multiple transfers" (See Proposal 2024-5), the new rule permits unlimited transfers, for both graduate and undergraduate student-athletes. The rule in some ways codifies the temporary injunction that was issued in *Ohio et al. v. NCAA* (Case No. 1:23-CV-00100 JPB) on December 18, 2023, that enjoined the NCAA Division I and its Division I member conferences and schools from enforcing NCAA Bylaws that require student-athletes who did not meet the one-time transfer exception to serve a year-in-

residence (i.e., sit out one season), prior to being eligible to compete (See NCAA Bylaw 14.5.5.2). This will likely render *Ohio et al. v. NCAA* and other individual claims alleging the NCAA's transfer regulations violated antitrust law, moot so long as the Court accepts the new rule based on academic eligibility as defined by the NCAA.

The near total transfer flexibility for student-athletes will likely end the influx of the hundreds of transfer waivers that were being submitted annually. NCAA staff reported that 21,685 total student-athletes entered the Transfer Portal seeking to compete for the 2023-24 academic year, 3% of whom (approximately 650 student-athletes) were multiple-time transfers that would have needed a waiver to compete. While some Division I member schools may rejoice over the long-desired clarity and consistency with regard to transfers, when considered in conjunction with increased involvement of institutions in student-athletes' NIL activities, there will likely continue to be roster instability, allegations of tampering, and unclear guidelines related to the role of NIL in recruitment.

Name, Image, and Likeness (NIL)

The NCAA adopted rules that permit institutions to provide assistance and services (e.g., identify NIL opportunities, and facilitate deals) for student-athletes pursuing NIL opportunities (Proposal 2024-3). The new Bylaw supersedes the NCAA NIL Interim Policy guidance that prohibited athletics department staff members and any individual or entity acting on behalf of the athletics department (e.g., third-party rights holders, third-party agents) from representing enrolled student-athletes for NIL deals, including securing and negotiating deals on behalf of the student-athlete.

The NCAA also amended the NIL "student-athlete protections" that were unanimously adopted in January 2024, but not effective until August 1, 2024, to eliminate the risk to a student-athlete's eligibility for failure to disclose their NIL activities (See Proposal 2024-4). However, the amendment also conditioned the ability for an institution to provide "assistance and services" discussed above on a student-athlete disclosing NIL activities (See *Id.*). Thus, only those student-athletes who disclose their NIL activities are permitted to receive permissible NIL assistance and services from the institution. The remainder of the rule that established a voluntary registration process for NIL professional service providers and a comprehensive NIL education plan for prospective student-athletes remains in effect, as does the threshold for the now voluntary disclosure of NIL agreements over \$600 (See Proposal 2023-58 and Proposal 2024-4).

The permissible "assistance and services" do not extend to compensation or inducements and is limited to student-athletes, not prospective student-athletes. It remains impermissible for colleges and universities to compensate student-athletes for use of their NIL or to use NIL as a recruiting inducement. The proposal is silent on the ability for NIL Collectives to discuss and negotiate NIL opportunities with prospective student-athletes, which is the subject of *Tennessee & Virginia v.*

NCAA. (See Case No. 3:24-CV-00033-DCLC-DCP). Similarly, the NCAA specified in its rationale that institutions remain prohibited from contracting with third parties “to do what institutions are not permitted to do (e.g., provide indirect or direct compensation for use of NIL)” (See Proposal 2024-3). Despite the actions by the NCAA to permit some institutional involvement, some state legislatures, like Virginia, have gone further. Virginia modified their state NIL legislation to permit institutions to make direct payments to student-athletes for use of their NIL:

Effective July 1, 2024, “No athletic association, athletic conference, or other organization with authority over intercollegiate athletics shall ... 4. Prevent an institution from compensating a student-athlete for the use of his name, image, or likeness; or 5. Prevent an institution, its supporting foundations, or an entity acting on its behalf from identifying, creating, negotiating, facilitating, supporting, engaging with, assisting with, or otherwise enabling a name, image, or likeness opportunity for a student-athlete.” (HB 1505, § 23.1-408.1 of the Code of Virginia).

It is currently unclear how strongly the NCAA will maintain its approach to state rules that violate NCAA legislation, after continued setbacks in federal court based on alleged antitrust violations. The current NCAA NIL Q&A on the topic states,

“NCAA rules are adopted by member schools. It is not fair to those schools who follow the rules to not enforce rules against those who choose not to do so. Schools who do not like the application of a particular rule should work through the NCAA governance process to change the rule. Unless and until the membership changes a particular rule, all schools, as part of a voluntary membership, are required to comply.” (NIL Q&A, Question 6).

The NCAA is anticipated to soon release an updated NCAA NIL Q&A, the most recent version of which was published June 2023.

Even though it remains impermissible under NCAA rules for institutions to provide direct compensation, institutions should proactively evaluate whether NIL-services they provide are consistent with Title IX gender equity guidance. In a case of first impression in December 2023, female student-athletes filed a class action lawsuit alleging their university and the NIL Collective that supports it has provided unequal publicity and NIL-related training, opportunities, and income, in violation of Title IX.^[1] In light of the new legislation, increased institutional involvement in NIL may result in increased Title IX scrutiny.

What this means to you

Student-athletes continue to be granted more flexibility and autonomy, with respect to freedom of movement and NIL activities. Similarly, institutions continue to be granted more discretion, but with a caveat of increased risk and responsibility. Schools that choose to provide NIL-related assistance

and services directly to student-athletes, should be prepared to address compliance with Title IX gender equity and the remaining NCAA NIL rules. Therefore, a comprehensive plan for an evolving collegiate model must include an analysis of current institutional compliance with Title IX, implications of greater involvement in third-party agreements for student-athletes, and the implications of increased interactions between the institution, its coaches, and third-party entities entering into purported NIL agreements with prospective and enrolled student-athletes.

Contact us

For more information about the effect of recent Division I NCAA rule changes on your institution, please contact your Husch Blackwell attorney, Jason Montgomery, TaRonda Randall, or senior athletics consultant Kristina Minor. Husch Blackwell regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please fill out this quick form if you would like to receive electronic updates and newsletters.

[1] *Schroeder et al v. University of Oregon*. Case 6:23-cv-01806-AA (D. Oregon, District Judge Michael J Mcshane).