

Unanticipated Problems with the Transfer Portal

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I. INTRODUCTION

The world of college athletics has undergone a seismic shift in the past few years. The NCAA's transfer portal debuted in October

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2018.¹ That same year, in *Murphy v. NCAA*, the United States Supreme Court overturned the law that had prohibited most states from authorizing betting on college or professional sports.² In April 2021, the NCAA Board of Directors ratified one-time transfer legislation allowing athletes in all sports immediate eligibility after transfer.³ In June 2021, the Supreme Court ruled unanimously in *NCAA v. Alston* that the NCAA cannot limit education-related benefits to athletes.⁴ Later that month, on the eve of the new laws taking effect in Georgia and other states, the NCAA suspended its previous rules and announced an

1. Julia Elbaba, *NCAA Transfer Portal: What It Is, How It Works*, NBC SPORTS BOSTON (June 29, 2022), <https://www.nbcsports.com/boston/ncaa-transfer-portal-what-it-how-it-works-0>. In 2022, notification windows specific to each sport were adopted limiting when student-athletes could enter the transfer portal. See Meghan Durham, *NCAA Division I Board Adopts Changes to Transfer Rules*, NCAA (Aug. 31, 2022), <https://www.ncaa.com/news/ncaa/article/2022-08-31/ncaa-division-i-board-adopts-changes-transfer-rules>; Nicole Auerbach, *New Transfer Windows Approved by NCAA DI Board of Directors*, ATHLETIC (Aug. 31, 2022), <https://theathletic.com/3555260/2022/08/31/ncaa-transfer-rules-changes>; Shehan Jerarajah & Barrett Sallee, *NCAA Board Approves Transfer Portal Windows, 'Modernizes' Infractions Process*, CBS SPORTS (Aug. 31, 2022), <https://www.cbssports.com/college-football/news/ncaa-board-approves-transfer-portal-windows-modernizes-infractions-process>.

2. *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) (ruling that the Professional and Amateur Sports Protection Act was unconstitutional). For background, see Ronald J. Rychlak, *A Bad Bet: Federal Criminalization of Nevada's Collegiate Sports Books*, 4 NEV. L. REV. 320 (2003).

3. Dennis Dodd, *ADs Explore Options Aiming to Create Leverage in Future Restructuring of College Football, Basketball*, CBS SPORTS (Oct. 3, 2022), <https://www.cbssports.com/college-football/news/ads-explore-options-aiming-to-create-leverage-in-future-restructuring-of-college-football-basketball>.

4. *NCAA v. Alston*, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring) (“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.”). The NCAA then deferred to state laws on NIL and, in states that had not passed related laws, to the schools themselves. The Athletic College Football Staff, *What Is NIL?: Everything You Need to Know About the NCAA and Name, Image and Likeness*, ATHLETIC (May 10, 2022), <https://theathletic.com/3301694/2022/05/10/nil-ncaa-definition>. Two things remained prohibited by the NCAA: pay-for-play and quid pro quo. *Id.* In other words, athletes were not supposed to receive compensation tied to performance, and recruits were not supposed to sign deals contingent on going to a certain school. *Id.*

“interim” policy allowing athletes across the nation to profit off of their “name, image, and likeness” (NIL).⁵

Now, collectives are coming together to entice premiere college athletes with significant promotional opportunities,⁶ and high school students are seeing possibilities that extend beyond a college scholarship.⁷ Collectives typically are nonprofit organizations founded by

5. Zach Braziller, *NCAA Changes College Sports Forever: ‘An Entirely New Landscape,’* N.Y. POST (June 30, 2021), <https://nypost.com/2021/06/30/ncaas-new-nil-rule-changes-everything>. The NCAA said athletes in states with applicable laws “can engage in NIL activities that are consistent with the law of the state where the school is located” and instructed schools in other states to set their own guidelines with minimal restrictions. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>. The NCAA stressed that rules against “pay-for-play” and recruiting inducements were to remain in effect. *Id.*; see also, Dennis Dodd, *Inside the World of ‘Collectives’ Using Name, Image and Likeness to Pay College Athletes, Influence Programs*, CBS SPORTS (Jan. 26, 2022), <https://www.cbssports.com/college-football/news/inside-the-world-of-collectives-using-name-image-and-likeness-to-pay-college-athletes-influence-programs> (noting that “the athletes have to do something for the money they’re getting”).

6. Dodd, *supra* note 5.

7. “Currently, 16 states allow high schoolers to sign NIL deals, including California.” Andy Staples, Bruce Feldman & Stewart Mandel, *How a Five-Star Prospect From Georgia Ended Up Homeless, Ineligible and 2,000 Miles Away*, ATHLETIC (Sept. 19, 2022), <https://theathletic.com/3605831/2022/09/19/t-a-cunningham-eligibility-recruiting-nil>. “Nico Iamaleava, a senior quarterback at Long Beach (Calif.) Poly High, signed an NIL deal on March 11 that could pay him slightly more than \$8 million after four years.” *Id.* “‘Buying’ recruits is . . . prohibited by the NCAA, but it’s obvious that high school prospects are watching as schools try to top each other in NIL.” Dodd, *supra* note 5. Mississippi recently amended its NIL law to give institutions and their athletic departments more involvement in the process. S.B. 2690, Reg. Sess. (Miss. 2022). The amendment provides for the following changes:

- Revising the definition of “student-athlete” to include a “prospective student-athlete,” meaning student-athletes do not need to be enrolled at a school prior to entering into a NIL deal.
- Allowing institutions to facilitate NIL opportunities for student-athletes with third parties, and permitting communication with third parties interested in providing NIL opportunities to student-athletes.
- Modifying the warning language that is required to be included in NIL contracts.

alumni and boosters. They operate independently of the university and the athletic department to collect funds and direct them to athletes for the rights to use their name, image, and likeness.⁸ They help facilitate NIL deals with their school's current athletes and sometimes with prospective athletes.⁹ "[T]hese groups have become the biggest influencers" in college athlete recruitment.¹⁰

With all of these changes, the collegiate athletics compliance world has been upended, and the changes are not over.¹¹ The "Transformation Committee," a group of high-ranking college leaders charged with overhauling and modernizing NCAA governance, developed additional changes that have been described as "radical."¹² In January, the Committee submitted its final report with concepts for change that was endorsed by the Board of Directors.¹³

Id.; see also MISS. CODE ANN. §§ 37-97-103(1)(j), 107 (2022); MISS. CODE ANN. § 73-42-19 (2022).

8. The Athletic College Football Staff, *supra* note 4.

9. Top recruits at some schools sign large contracts with money guaranteed, regardless of the recruit's long-term presence on the team. *Id.* "Those programs that fail to be affiliated with a robust collective risk being left in the dust in the ultra-competitive world of football and basketball recruiting." On3 Staff Report, *The On3 Guide to NIL Collectives Around the Nation*, ON3 (Aug. 25, 2022), <https://www.on3.com/nil/news/on3-guide-to-nil-collectives-around-the-nation>.

10. Dodd, *supra* note 5. "The Clark Field Collective at Texas is paying Longhorns offensive linemen \$50,000 each . . . basically just for being Texas offensive linemen. To date, it has not been ruled to be an NCAA violation, but such boundary-straddling conduct by collectives are the talk of college athletics at the moment." *Id.* (later noting that "athletes must do charity work in the form of appearances and promotion, according to the Associated Press").

11. For instance, the situation at Brigham Young University "would essentially allow the Cougars to have 120 [football] scholarship players. The NCAA limit is 85. You can see why coaches everywhere would be concerned or at least seeking to create a similar advantage at their school." *Id.*

12. *D-I Committee Considering Major Changes to NCAA Governance*, SPORTS BUS. J. (Apr. 28, 2022), <https://www.sportsbusinessjournal.com/Daily/Issues/2022/04/28/Colleges/NCAA-Committee>.

13. *NCAA Division I Transformation Committee Final Report*, NCAA, (Jan. 3, 2023), https://ncaaorg.s3.amazonaws.com/committees/d1/transformation/Jan2023D1TC_FinalReport.pdf. The final report includes concepts seeking to enhance Division I membership requirements, implement a new sport-specific governance and decision-making model, develop a holistic student-athlete benefit model,

In August 2022, the NCAA Board of Directors adopted new legislation expanding the benefits institutions can provide to student-athletes, and many are concerned that this will result in a new “arms race.”¹⁴ The Board also adopted changes in transfer legislation that limit the time periods during which student-athletes can enter the transfer portal but also guarantee undergraduate four-year transfers athletics aid through graduation or exhausted eligibility.¹⁵ Legislative proposals have been put forth that would change the personnel and recruiting rules.¹⁶ The Transformation Committee continues to work in the areas of Division I membership requirements and financial aid. The changes, according to one Director of Athletics, are “going to make some heads explode.”¹⁷

In addition to college administrators and compliance officers, these changes are having real impacts on students who play sports.¹⁸ The rule changes seem to have been driven by a sincere desire to help the student-athletes as *athletes*.¹⁹ It is less clear whether the changes are beneficial to them as *students*.²⁰

and decentralizing current legislative limitations including whether national regulation in the areas of financial aid, agents, amateurism, and playing seasons is necessary. *Id.*

14. Michelle Brutlag Hosick, *DI Board of Directors Adopts Student-Athlete Benefit Legislation*, NCAA (Aug. 3, 2022), <https://www.ncaa.org/news/2022/8/3/media-center-di-board-of-directors-adopts-student-athlete-benefit-legislation.aspx>.

15. Meghan Durham, *NCAA Division I Board Adopts Changes to Transfer Rules*, NCAA (Aug. 31, 2022), <https://www.ncaa.com/news/ncaa/article/2022-08-31/ncaa-division-i-board-adopts-changes-transfer-rules>.

16. *Council Introduces Proposals Related to Official Visits, Coaching Limits*, NCAA (Oct. 27, 2022), <https://www.ncaa.org/news/2022/10/27/media-center-council-introduces-proposals-related-to-official-visits-coaching-limits.aspx>.

17. Ross Dellenger, *A Candid Lane Kiffin on NIL, Recruiting and Boosters: ‘We’re a Professional Sport,’* SPORTS ILLUSTRATED (May 25, 2022), <https://www.si.com/college/2022/05/25/lane-kiffin-nil-recruiting-boosters-nick-saban>.

18. Jay Bilas, *Why NIL Has Been Good for College Sports . . . and the Hurdles That Remain*, ESPN (June 29, 2022), https://www.espn.com/college-sports/story/_/id/34161311/why-nil-good-college-sports-hurdles-remain.

19. *Id.*

20. See Khristopher J. Brooks, *In Choosing Colleges, Top Young Athletes Say: ‘Show Me the NIL,’* CBS NEWS (June 3, 2022), <https://www.cbsnews.com/news/nil-college-athletes-boosters-collectives-nick-saban-coaches/> (“The academic side, that’s not being discussed at all . . . The first question out of their mouth is ‘How much money am I going to get?’”).

It has long been true—for any student—that changing institutions makes the road to graduation longer and harder.²¹ Equivalent degrees may not exist between schools. Credits awarded at one school may not be accepted at another. Prerequisites may be missing, and most schools limit the total number of credits that can be earned at a different university. On top of all that, the term “transfer shock” applies to the common result of a dip in students’ grades during the first semester after transferring to a new institution.²² As such, students must take particular care when transferring from one school to another. Student-athletes have extra layers of concern—they have significant demands on their time and are likely to have been recruited to the new school.

In the past, recruitment of an athlete usually came with the promise of more playing time or an opportunity to win a championship.²³ Today’s recruiting is different. Current college athletes are being induced to change schools with the promise of large amounts of money.²⁴ Consider:

21. See Harold G. Severance, *Advising Transfer Students*, 31:3 N. AM. COLLS. & TCHRS. OF AGRIC. J. 19 (September 1987); Meredith Kolodner, *6 Reasons You May Not Graduate on Time (and What to Do About It)*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/education/edlife/6-reasons-you-may-not-graduate-on-time.html>.

22. Olivia Vanessa Matthews, *The Transfer Student Experience: Challenges and Institutional Support Systems for Undergraduate Transfer Students at a Public Four-Year University* 16 (2013) (M.A. thesis, Wright State University) (on file with Wright State University) (CORE Scholar) (noting that it is “typically resolved within a year”).

23. See, e.g., *Research on Student-Athlete Transfers*, NCAA, <https://www.ncaa.org/sports/2019/8/5/research-on-student-athlete-transfers.aspx> (last visited Feb. 25, 2023) (noting that “student-athletes are most likely to report transferring for athletics reasons, including playing time, mismatch between their athletics expectations and their experience, coaching issues, and the hope of playing professionally in their sport”); Finn Rice, *The Main Reasons College Athletes Transfer*, 2ADAYS BLOG (Mar. 16, 2022), <https://www.2adays.com/blog/the-main-reasons-college-athletes-transfer>; Sheldon H. Jacobson, Op-Ed, *New NCAA Transfer Policy Needs Revision to Alleviate Adverse Effects*, INDYSTAR (May 10, 2022), <https://www.indystar.com/story/opinion/readers/2022/05/10/op-ed-ncaa-transfer-policy-needs-revision-aid-adverse-effects/9539447002> (arguing that playing time is a “wrong reason”).

24. Consider this statement from Lane Kiffin, head football coach at the University of Mississippi:

An entity called “Horns with Heart” has announced plans to offer University of Texas offensive linemen \$50,000 in “annual financing per player” to participate in charitable endeavors “utilizing their name, image and likeness.”²⁵

A men’s basketball student-athlete, Nigel Pack, was reported to receive an NIL deal worth \$400,000 per year, which was publicized immediately after his commitment to transfer to the University of Miami.²⁶

Boston College wide-receiver Zay Flowers, a two-time All-ACC selection, reported turning down

In the recruiting process [with the elite ones], coaches can’t say it to recruits, but whoever is talking to [recruits], they say, ‘Just know, you’ll get more here than anywhere else! Whatever you come back with, you’ll get 20% more here.’ Those people are going to get the best players.

I can recruit way better than you or you can me, but in the end, your school offers more money or mine does, and in the end, that’s where they are going. I could have worked my butt off for three years, and you could have done three minutes. There was a player who went to a school that we got beat on, and I asked him about the relationship with the head coach. He had never talked to him. NIL.

Dellenger, *supra* note 17.

25. Tim Tucker, *NIL Timeline: How We Got Here and What’s Next*, ATLANTA J.-CONST. (Mar. 18, 2022), <https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4>. In June 2022, Arch Manning, perhaps the most sought-after high school player in the nation, announced that he would sign with Texas. See Zach Dimmit, *NIL Jackpot? Arch Manning’s Worth with Longhorns*, SPORTS ILLUSTRATED (July 25, 2022), <https://www.si.com/college/texas/football/longhorns-arch-manning-nil-money-cash-value-earnings-commitment-steve-sarkisian> (“The floodgates for Manning’s potential NIL earnings could pour in at any second should he choose to pursue endorsements.”).

26. Manny Navarro, *Former Kansas State Guard Nijel Pack Transferring to Miami*, ATHLETIC (Apr. 23, 2022), <https://theathletic.com/news/nijel-pack-transfer-miami/19LILnIWxM8L>.

six-figure offers to remain at the institution despite never even entering the transfer portal.²⁷

Reigning Biletnikoff Award winner Jordan Addison reportedly received NIL deals totaling over \$3 million to transfer.²⁸

Significant NIL deals like these seem to emerge every day.²⁹ Now, just a little over a year into NIL, athletics departments are soliciting funds for NIL purposes and endorsing collectives for fear of getting left behind.³⁰ As the next cycle of the transfer portal looms, one SEC staff member said “I’m expecting total chaos” given the ease of transfer and influence of NIL.³¹

When student-athletes transfer, they are as likely as any other student to encounter problems with transferring credits, losing hours, and delaying graduation.³² In fact, with their attention often focused on athletics rather than academics, they are likely to encounter more

27. Nick Selbe, *BC's Zay Flowers Says He Turned Down Huge NIL Transfer Offers*, SPORTS ILLUSTRATED (May 5, 2022), <https://www.si.com/college/2022/05/06/boston-college-zay-flowers-transfer-portal-nil-offer>.

28. Big Tennessee, *Former Pitt WR Jordan Addison Is Transferring to USC with a Rumored \$3.5 Million NIL Deal*, BARSTOOL SPORTS (May 19, 2022), <https://www.barstoolsports.com/blog/3418390/former-pitt-wr-jordan-addison-is-transferring-to-usc-with-a-rumored-dollar3.5-million-nil-deal>.

29. See Oliver Hodgkinson, *Top 10 NIL Deals in 2022: Ohio State and Alabama Players at the Forefront of CFB's Financial Revolution*, PRO FOOTBALL NETWORK (Aug. 18, 2022), <https://www.profootballnetwork.com/top-10-nil-deals-in-2022>.

30. For example, Tennessee Athletic Director Danny White, Kansas State head football coach Chris Klieman and Kansas State head men's basketball coach made videos encouraging donations to collectives supporting their institution's athletics programs. Jeremy Crabtree, *Athletic Officials Realize It's Time to Support NIL Collectives or Get Left Behind*, ON3 (Nov. 14, 2022), <https://www.on3.com/nil/news/more-and-more-athletic-officials-throwing-support-behind-nil-collectives-tennessee-kansas-state-colorado-oregon-state-kentucky-wisconsin-oklahoma>.

31. Pete Nakos, *Transfer Portal, NIL on Collision Course*, ON3 (Nov. 17, 2022), <https://www.on3.com/nil/news/transfer-portal-nil-college-football-collision-course-ncaa-collectives>.

32. SaBrina Althea White, *Transfer Shock and the Student-Athlete* (Apr. 15, 2011) (Ph.D. dissertation, San Diego State University), <https://digitallibrary.sdsu.edu/islandora/object/sdsu%3A4534>.

problems than other students.³³ This article addresses those problems and how recent changes in the field have impacted them.

Part II of the paper explores typical problems associated with transferring from one institution to another. Part III reviews the opportunities and problems associated with recent changes to college athletics, particularly those found with the Transfer Portal, immediate eligibility, and NIL. Part IV delves into a handful of new situations that have arisen in which student-athletes were particularly impacted. Part V concludes with suggestions for best practices and a model solution.

II. THE TRANSFER PROBLEM: CLASS RECONCILIATION AND CHANGING MAJORS

About one-third of all college students transfer from one institution to another at least once, with transfers from a two-year public institution to a four-year institution being the most common.³⁴ Various factors can add to the complexity of a transfer,³⁵ and transferring from a junior college or community college to a four-year institution comes

33. See Jared K. Richards, Shelley L. Holden, & Steven F. Pugh, Factors That Influence Collegiate Student-Athletes to Transfer, Consider Transferring, or Not Transfer, *Sport J.*, <https://thesportjournal.org/article/factors-that-influence-collegiate-student-athletes-to-transfer-consider-transferring-or-not-transfer> (last visited Feb. 23, 2023); *Research on Student-Athlete Transfers*, *supra* note 23 (“The two-year degree completion rate for graduate transfers (50%) is lower than for graduate student-athletes who remain at their undergraduate school (70%) and is substantially lower in Division I football (31%) and men’s basketball (34%).”).

34. Lora Leigh Chrystal, Ann Gansemer-Topf & Frankie Santos Laanan, Assessing Students’ Transition from Community College to a Four-Year Institution, 3:1 *J. Assessment & Institutional Effectiveness* 1 (2013); Matthews, *supra* note 22, at 1 (“One-third of all students transfer at least once during their college years, with 25% of the students who transfer changing institutions two or more times.”). See *Research on Student-Athlete Transfers*, *supra* note 23.

35. See, e.g., Joseph N. Cooper & Billy Hawkins, *The Transfer Effect: A Critical Race Theory Examination of Black Male Transfer Student Athletes’ Experiences*, 7 *J. INTERCOLLEGIATE SPORT* 80 (2014). Even before the Transfer Portal and immediate eligibility, about 40 percent of men’s basketball student-athletes changed schools at least one time over their college career. *Id.* at 82 (noting “men’s basketball student athletes transfer at a rate 36% higher than the general student population”). Matthews, *supra* note 22, at 17 (“Race, ethnicity, gender, age, military status, class level, and institutional grade point average are important characteristics to assess when discussing the undergraduate transfer student population.”).

with its own set of problems.³⁶ For any student, this can be a “difficult and stressful process.”³⁷ That is why all transferring students are in need of solid advising.³⁸

Research indicates that transfer student-athletes are less likely to persist through graduation compared to non-transfer student-athletes.³⁹ For that reason, the NCAA implemented several measures to dissuade student-athletes, especially those in academically underperforming sports such as football, baseball, and men’s basketball, from transferring.⁴⁰ However, many of those measures have now been eliminated, and others may also be set aside in the coming months. The result is that athletes will be more likely to transfer and more likely to encounter difficulties associated with transferring.⁴¹

36. “The probability of earning a bachelor’s degree among community college transfer function of demographic, high school, and college experience correlates. Female transfer students are more likely to attain a bachelor’s degree than male students.” Xueli Wang, *Baccalaureate Attainment and College Persistence of Community College Transfer Students at Four-Year Institutions*, 50:6 RSCH. HIGHER EDUC. 570, 581 (2009).

[T]wo-year institutions serve as a critical gateway into college for a significant proportion of college-going students but frequently are not the final degree destination. Although students may have been successful adjusting to and navigating their two-year institutions, research on “transfer shock” suggests that transitioning from one institution to another can be difficult. Transfer students may struggle to do well academically or socially and may be at risk of dropping out.

Chrystal et al., *supra* note 34, at 2 (internal citations omitted).

37. Matthews, *supra* note 22, at 19 (“When credits do not transfer to a subsequent institution, transfer students feel that their time and money has been wasted.”).

38. Severance, *supra* note 21.

39. Cooper & Hawkins, *supra* note 35, at 82.

40. *Id.*

41. UNC Coach Mack Brown, speaking of recent proposals to ease restrictions on multiple transfers said:

I think the graduation rates of first-time transfers are like 68 percent and most of the second-time transfers don’t graduate. I’m worried about putting more mental pressure on young people. Because it’s easier if you get mad to say I’m leaving, and it takes you five

According to *CollegeTransfer.net*, college-level courses completed at regionally-accredited institutions generally transfer to a new institution, provided “that a grade of at least ‘C’ (2.0) is earned and the course is similar in content and scope to work” offered at the transfer institution.⁴² Colleges, however, usually accept a maximum of 60 credit hours from a community or two-year college. When there is a combination of two- and four-year institutions, up to 90 hours might be accepted. Students, however, are typically required to complete the final 30 to 60 credits in residence at their new institution.⁴³ Thus, a transfer after more than two years of enrollment is likely to impede graduation.

Moreover, a change in majors often puts students in a bind.⁴⁴ For example, the student may be pursuing a sport management major at Institution A, but when she transfers to Institution B, it may not offer a similar degree. She must then look for a similar program or completely change course. Either of those options is likely to delay graduation.

Another significant problem is identifying classes that are “similar in content and scope to work” for the purpose of transferring them. When transfers are common between two institutions, there may be a catalogue of courses showing how they transfer.⁴⁵ However, in other

minutes to get in the portal. That’s not good for later, for your family as a father or a husband, or at your job.

Steve Wiseman, *Transfer Portal Windows? Unlimited Movement? What Proposed NCAA Rule Changes Would Mean*, NEWS & OBSERVER (July 22, 2022), <https://www.newsobserver.com/sports/college/article263698198.html>.

42. *How Does the Course Credit Transfer Process Work?*, COLLEGETRANSFER.NET, <https://www.collegetransfer.net/AskCT/How-does-the-course-credit-transfer-process-work> (last visited June 25, 2022) (noting that some institutions accept a grade of “D” or better). Regional accrediting bodies include the Middle States Association of Colleges and Schools, New England Association of Schools and Colleges, North Central Association of Colleges and Schools, Northwest Association of Schools and Colleges, Southern Association of Colleges and Schools and Western Association of Schools and Colleges. *Id.*

43. *Id.*

44. Chrystal et al., *supra* note 34, at 9 (providing as an example, the one year-in-residence rule). Sometimes, following a transfer, the student finds out that the two schools do not even have compatible degree program options.

45. Duke University notes that it has a “GEO Approved Course Database” that incoming students can reference. Course Approval Process, Duke Glob. Educ. Off.,

circumstances significant administrative work is often necessary at the incoming school to determine transfer equivalencies. That may be done after the student has already arrived on campus. Naturally, that can create significant problems, especially when no equivalency is found.

Finally, since advising generally occurs with the “best” path toward graduation at the original institution (A, in our example) in mind, it is not uncommon that the basic/core courses for a new major must be taken (or re-taken) at the new school (B). This can create many issues for the transferring student, and may lead to a complete change in direction, necessitating a further delay in graduation.

III. THE TRANSFER PORTAL, IMMEDIATE ELIGIBILITY, AND NIL

The Transfer Portal, which debuted on October 15, 2018, was designed to provide student-athletes freedom to make transfer decisions, systematically manage the transfer process, add transparency among schools, and empower student-athletes to make known their desire to consider other institutions.⁴⁶ By itself, the portal does not impact eligibility at the new institution. It does, however, put them “on the market,” and invite inquiries from coaches at other schools.⁴⁷

The process allows student-athletes to ask a compliance administrator to place their name in the Transfer Portal.⁴⁸ Once that happens,

https://globaled.duke.edu/academics/course_approval (last visited June 25, 2022). It also notes, “This database is not comprehensive. If you do not see a particular course listed, it simply means you will need to seek approval for the course yourself using the process outlined below.” *Id.*

46. Division I Proposal 2017-108: *Recruiting and Infractions Program, Contacts and Evaluations, Four-Year College Prospective Student-Athletes*, Notification of Transfer, NCAA (Aug. 8, 2018), <https://web3.ncaa.org/lstdbi/search/proposalView?id=101810>. See Greg Johnson, *What the NCAA Transfer Portal Is . . . and What It Isn't*, CHAMPION MAG., Fall 2019, <http://s3.amazonaws.com/static.ncaa.org/static/champion/what-the-ncaa-transfer-portal-is/index.html> (“The Transfer Portal was created as a compliance tool to systematically manage the transfer process from start to finish, add more transparency to the process among schools and empower student-athletes to make known their desire to consider other programs.”).

47. Johnson, *supra* note 46.

48. *Id.* The compliance office at the first school must “enter” the student-athlete into the portal, the student-athlete cannot do it on their own. *Id.*

the school has two business days to submit the information.⁴⁹ The current school, however, can reduce or cancel athletics aid for requesting student-athletes at the end of the term in which the request was made. In fact, and unknown to many student-athletes, the day they enter the portal, their current university may deny access to tutoring, academic advisors, strength and conditioning facilities, athletic training rooms, team meals, and locker rooms.⁵⁰ Of course, these benefits do not have to be withheld, and if the student-athlete withdraws from the portal, the school may return him or her to the roster and restore those benefits. However, the restoration of benefits is not certain.

Before the portal process was in place, when Division I student-athletes wanted to transfer, they had to ask their current institution for permission to contact other schools.⁵¹ Athletics departments could grant the student-athlete permission to contact all other schools, only certain schools, or deny the request altogether.⁵² If permission were denied, the student-athlete could appeal to a designated group consisting of campus administrators, typically including the Faculty Athletics Representative.⁵³ A student-athlete who did not receive permission was still free to transfer, but he or she could not receive athletics aid at the new school.⁵⁴

49. *Id.* Precisely how the request is made is left up to the individual school. *Id.*

50. NCAA Bylaw 13.1.1.3.3 requires institutions to have a policy about implications of providing written notification of transfer including a description of services and benefits that will or will not be provided upon receipt of notification. NCAA, DIVISION I MANUAL 84 (2022).

51. NCAA, DIVISION I MANUAL 97 (2017) (noting that a second institution could not contact a student-athlete of another institution withing “first obtaining the written permission of the first institution’s athletics director (or an athletics administrator designated by the athletics director) to do so”); John Infante, NCAA Four Year Transfer Rules, Athnet, <https://www.athleticscholarships.net/college-transfer-4-4.htm> (last visited Apr. 3, 2023).

52. NCAA, DIVISION I MANUAL 97 (2017).

53. NCAA, DIVISION I MANUAL 97–98 (2017) (noting that “[i]f the institution decides to deny a student-athlete’s request to permit any other institution to contact the student-athlete about transferring, the institution shall inform the student-athlete in writing that he or she, upon request, shall be provided a hearing conducted by an institutional entity or committee outside the athletics department”).

54. NCAA, DIVISION I MANUAL 97 (2017) (noting that “[i]f permission is not granted, the second institution . . . shall not provide athletically related financial

Under that older system, if and when the student-athletes received permission and identified schools that they wanted to explore, a compliance administrator had to send correspondence to each of those schools.⁵⁵ Those schools would send back a transfer tracer that had to be completed and monitored. This was a cumbersome and inefficient process that the Transfer Portal certainly improved. It added a level of transparency after some very public situations where students were denied permission to transfer or permitted to select among very few institutions.⁵⁶

Along with the portal process, other NCAA rules recently have been amended to make it easier for the athletes to be immediately eligible at the new institution.⁵⁷ These changes have had a dramatic impact. More than 1,700 Division I men's college basketball players

assistance to the student-athlete until the student-athlete has attended the second institution for one academic year").

55. If the student-athlete participated in a sport that had the one-time transfer exception, the student's original institution could grant an exception so that the student-athlete was immediately eligible, or it could deny the exception (and set off another appeal process) requiring the student-athlete to serve a year-in-residence before participating in the sport. Johnson, *supra* note 46.

56. For instance, the team was on the next year's schedule, a coach took a job there, etc. See, e.g., *Men's Basketball: Uthoff, Wisconsin at Odds Over Transfer*, AMES TRIBUNE (Apr. 19, 2012), <https://www.amestrib.com/story/sports/college/2012/04/19/men-s-basketball-uthoff-wisconsin/27271922007> (last visited Feb. 20, 2023); Seth Davis, *Former St. Joe's Center Todd O'Brien Denied NCAA Waiver*, SPORTS ILLUSTRATED (Jan. 9, 2012), <https://www.si.com/more-sports/2012/01/09/todd-obrien> (last visited Feb. 20, 2023); Matt Fitzgerald, *Austin Nichols Granted Conditional Transfer by Memphis*, BLEACHER REPORT (July 7, 2015), <https://bleacherreport.com/articles/2517304-austin-nichols-reportedly-denied-transfer-release-by-memphis> (last visited Feb. 20, 2023).

57. The big changes in April 2021, included the NCAA's "one-time transfer rule" taking effect. *NCAA Division I One-Time Transfer FAQs*, NCAA ELIGIBILITY CENTER, http://fs.ncaa.org/Docs/eligibility_center/Transfer/OneTime_Transfer.pdf; see also NCAA, Division I Manual 168 (2022) (explaining the one-time transfer rule). Then in July, the NCAA made it possible for athletes to profit off of their name, image and likeness which created great incentive for players to move (or at least consider doing so) to schools located in more lucrative markets. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

entered the NCAA's transfer portal in 2021.⁵⁸ Ten years ago, only 577 Division I basketball players transferred.⁵⁹ More than 15,000 athletes from all sports entered the transfer portal in 2018 (the first year it was created).⁶⁰

Division I football players have been the most active users of the transfer portal. During 2020-2021, 2,626 football players entered the transfer portal, up almost a thousand from the 2019-2020 season.⁶¹ A total of 4,084 Division I football players entered the transfer portal in the 2021 academic year. According to the NCAA, however, only 54% of the players from the Football Bowl Subdivision who entered the portal in 2020 and 2021 actually enrolled at a new school.⁶² Forty one percent transferred to non-NCAA schools, quit the sport entirely, or were left exploring other options.⁶³ The number of transfer portal entrants left unsigned in other sports was as bad or worse.⁶⁴ Unfortunately, even those who successfully transferred often encountered difficulties at their new institution.

58. Dean Golembeski, *Here's How the NCAA Transfer Portal Changed College Athletics in 2021*, BESTCOLLEGES, <https://www.bestcolleges.com/news/2021/12/22/ncaa-transfer-portal-nil-college-football-playoff> (last updated Feb. 3, 2022).

59. *Id.*

60. *Id.*; see *Transfer Portal Data: Division I Student-Athlete Transfer Trends*, NCAA, <https://www.ncaa.org/sports/2022/4/25/transfer-portal-data-division-i-student-athlete-transfer-trends.aspx> (last visited Feb. 25, 2023).

61. David Marsh, *Transfer Portal Will Be a Disaster for Student-Athletes*, FISHDUCK (Dec. 19, 2021), <https://fishduck.com/2021/12/transfer-portal-will-be-a-disaster-for-student-athletes>.

62. Tom VanHaaren, *NCAA: Only 54% of FBS Players Who Entered Portal Enrolled at New School*, ESPN, (Apr. 25, 2022), https://www.espn.com/college-sports/story/_/id/33805662/ncaa-only-54-fbs-players-entered-portal-enrolled-new-school.

63. Dean Golembeski, *Half of College Athletes in Transfer Portal Go Unsigned*, BESTCOLLEGES, <https://www.bestcolleges.com/news/2022/05/02/ncaa-transfer-portal-dashboard> (last updated May 2, 2022).

64. *Id.*

IV. NEW PROBLEMS

A. Transfer Admissions

All of the typical problems associated with lost credits, missing prerequisites, and delayed graduations exist for student-athletes. However, student-athletes face unique challenges. Often, athletic opportunities and scholarship availability are driving factors in a student-athlete's choice of a new institution.⁶⁵ These decisions may be made before the student-athlete's academic situation is clear, and the student-athlete may later find out that academic and eligibility requirements are significant barriers at the new institution.⁶⁶ Thus, it is very important that the student-athletes have a good understanding of the process before entering the transfer portal.⁶⁷

A particular challenge for transferring student-athletes lies with the NCAA rule requiring student-athletes to 'leave eligible' in order to receive a scholarship at the new school.⁶⁸ This can create serious problems considering the apparent conflict, with the academic benchmarks

65. This is more common than ever, with the advent of NIL collectives. Nicole Auerbach, *College Leaders 'Extremely Concerned' with NIL Collectives' Direction: Survey*, ATLANTIC (May 4, 2022), <https://theathletic.com/news/athletic-directors-ncaa-nil-survey/wA4u5Y8rqf8P>.

66. Consider former University of Arkansas men's basketball student-athlete, Desi Sills, who initially committed to transfer to Auburn University only to end up transferring to Arkansas State. The issue was reportedly "academic credits for his major at Arkansas not transferring to Auburn to make him immediately eligible." Josh Vitale, *Arkansas Transfer Desi Sills Will Not Play for Auburn Basketball; Commits to Arkansas State*, MONTGOMERY ADVERTISER (June 8, 2021), <https://www.montgomeryadvertiser.com/story/sports/college/auburn/2021/06/08/auburn-basketball-desi-sills-arkansas-academic-credits-transfer/7578170002>.

67. Reversing course and returning to the original school, when that is an option, may cause the student-athlete to miss out on other transfer opportunities, and the institution may miss out on the chance to recruit other student-athletes.

68. See NCAA, DIVISION I MANUAL 183 (2022) (NCAA bylaw 14.5.5.4 states that "a transfer student from a four-year institution may receive institutional athletically related financial aid during the first academic year at the certifying institution only if the student-athlete would have been academic eligible to compete during the next regular academic term had the student-athlete remained at the previous institution").

typically being measured at the start of the fall semester.⁶⁹ Student-athletes transferring at the end of the spring semester must meet credit-hour requirements at that time as opposed to using summer school to reach the benchmarks, which is fairly common among D-1 athletes.⁷⁰

Since calendar year 2022, the authors of this article have seen at least five cases that could have had serious consequences to a transferring student-athlete. Although details have been omitted and precise GPAs have been changed, these cases took place within months of this article being written:

A student-athlete transferring from University A to University B had a GPA of 2.5. The new school, however, did not accept several of the classes in which the student had earned As. Once those classes were factored out of the GPA, the student was no longer eligible for admission into University B—even though he had essentially severed ties with University A.

A student-athlete was planning to transfer from University A to University B. At University A, he had dropped a class, planning to re-take it the next semester. University A did not use that class to calculate his GPA, as his plan was quite common and grades in classes that were retaken did not factor into the GPA.

69. For example, NCAA bylaw 14.4.3.1 requires students to successfully complete 24 semester hours or 36 quarter hours prior to the start of the student's second year (third semester) of college enrollment. NCAA, *DIVISION I MANUAL* 166 (2022). Further, NCAA bylaw 14.4.3.2 requires students entering their third year of enrollment to have completed 40% of a degree (60% and 80% respectively entering their third and fourth year). NCAA, *DIVISION I MANUAL* 169 (2022).

70. The summer could still be used, but NCAA rules prohibit the institution the student-athlete is transferring to from providing athletics aid if the student-athlete needs to use those credits for eligibility for the upcoming year. Since the institution from which the student athlete is departing does not have to provide aid after the spring term for anyone who has entered the portal, it may choose not to provide aid during the summer just so that the student-athlete can "leave eligible." See NCAA, *DIVISION I MANUAL* 183–84 (2022) (NCAA bylaw 14.5.5.4 notes that a student-athlete can only receive athletically related aid at the new institution if the student-athlete would have been academically eligible at the prior institution; NCAA, *DIVISION I MANUAL* 207 (2022) (NCAA bylaw 15.3.5.1 notes that a school can cancel aid at end of term if the student-athlete enters transfer portal)).

University B, however, did not forgive grades received in classes that were retaken at other schools, and the dropped class showed up on his transcript as a 0. When that was factored into his GPA at University B, he was ineligible for admission. He too had severed ties with his first university.

A student-athlete transferred into University B at the beginning of the summer and enrolled in a popular course. Three weeks into that course, University B administrators determined that the course was too similar to a class he had taken at University A, and he was forced to drop that class, losing credit for the three weeks of work.

A student-athlete transferring from University A to University B at the beginning of the summer did not have the 24 credit hours required by the start of his third semester. University A was not obligated to, and chose not to, provide summer aid. University B could not provide aid under NCAA rules. As a result, the student-athlete enrolled at University B, took summer courses, but paid for those courses himself in order to meet eligibility requirements.

A student-athlete transferring from University A to University B during the summer realized he would not leave University A eligible because he did not meet his percentage of degree. University A had permissibly cancelled the student's scholarship because he entered the transfer portal. Upon learning the student would not be eligible, University B withdrew the financial aid agreement it had offered. The student-athlete returned to University A without an athletics scholarship.

Each of these scenarios left the student-athlete at risk of being without a scholarship, a team, or even a school.

B. School Requirements

Transfer students are defined as college students who have completed 12 or more credit hours at one school before leaving that school

to complete their degree at another school.⁷¹ There is a separate application process at the new school, and typical factors include standardized test scores, high school and/or college GPAs, and extracurricular activities.

Today's transferring student-athletes are likely to be in discussions with coaches at the new school. As long as that coach is interested in the athlete, his or her extracurricular activities are likely to be sufficient. The pool would also tend to be limited to students who at one time had a sufficient SAT or ACT test for college admission. That leaves the GPA as perhaps the most important factor.

GPA requirements are often 2.0, but they can vary, even for schools within the same system. Consider, for instance, this statement from Penn State University: "Our campuses have different eligibility requirements for four-year programs. Please review the following campus-specific information. Minimum GPA for University Park: 2.5 GPA. Minimum GPA for other campuses: 2.0 GPA."⁷² While fairly common, these requirements are higher than the NCAA requirements for maintaining eligibility,⁷³ which are as follows:

By the start of the sophomore year, the student-athlete must:

- have a cumulative GPA of 1.8
- have completed 24 semester credits

By the start of the junior year, the student-athlete must:

- declare a major
- have a cumulative GPA of 1.9

71. *What Does It Mean to Be a Transfer Student?*, COURSERA, <https://www.coursera.org/articles/transfer-student> (last updated July 28, 2022).

72. *Academic Requirements for Transfer Students: 4-Year Degrees*, PENN STATE UNDERGRADUATE ADMISSIONS, <https://admissions.psu.edu/info/future/transfer/eligibility/4year> (last visited Mar. 24, 2023).

73. For incoming freshmen, the NCAA minimum high school requirements to compete at the Division I level is a 2.3 GPA in approved core-courses and an SAT score of 900 or ACT sum score of 75. If the core-course GPA is higher, the SAT or ACT score can be lower. That is the NCAA's "sliding scale." *Everything You Need To Know About the NCAA's GPA Requirements*, NAT'L SCOUTING REP., <https://www.nsr-inc.com/scouting-news/everything-you-need-to-know-about-the-ncaa-gpa-requirements> (last visited Mar. 24, 2023).

have completed 72 units⁷⁴ (40 percent of total degree requirements)

By the start of senior year, the student-athlete must:

have a cumulative GPA of 2.0

have completed 108 units (60 percent of degree requirements)

By the start of a fifth year, the student-athlete must:

have a cumulative GPA of 2.0

have completed 144 units (80 percent of degree requirements)

Focusing on GPA requirements alone,⁷⁵ transferring students may be eligible at their current institution but unable to meet GPA requirements to transfer into a new school. Moreover, even if the student's GPA appears to be sufficient to support a transfer, sometimes the target university will have provisions that complicate matters. At the University of Mississippi, for instance:

74. Credits estimated based on 120 hours required in a degree program.

75. Of course, there are other requirements. For instance, information from Penn State goes on to provide:

In addition to the campus requirements, the academic colleges offering our degree programs have academic requirements.

- Criteria for transfer admission may include specific course requirements.
- Successful completion of the required coursework is not a guarantee of admission.
- Unless specified otherwise, course requirements apply regardless of campus choice.
- Credits of required coursework are listed in semester hours.
- Lack of prerequisite coursework may prevent admission to the major but may still be sufficient for admission to the academic college.
- Prerequisite coursework must be completed with a grade of C (2.0) or better.
- GPA requirements vary across academic colleges; some academic colleges may have higher GPA requirements.
- Not all majors are open to transfer students, and this information is outlined when applicable.

Penn State Undergraduate Admissions, *supra* note 72.

Students may be accepted for transfer from other regionally accredited colleges and universities if they have earned an associate degree intended for transfer to a four-year school with a minimum 2.0 cumulative GPA. In addition, students may be accepted from other regionally accredited colleges and universities if a minimum 2.0 cumulative GPA has been maintained on all coursework attempted, with the exception of vocational/technical or other courses not acceptable for transfer. Every attempt on repeated courses is counted.⁷⁶

Two aspects of this rule can work to the disadvantage of incoming students. First, some classes in which they received good grades may not be included when Mississippi calculates their GPA. Second, students who were permitted by the former school to re-take a course and drop the earlier (low) grade are denied the ability to drop that earlier score when Mississippi calculates the GPA for transfer purposes. The result of these two rules can be that an eligible student with a GPA at the original school above 2.0 may see his or her GPA drop below 2.0 and therefore be ineligible for admission. This is true even for students who have been admitted into a different university, have complied with the rules of that institution, and have remained eligible (i.e. stayed off academic probation, etc.). Admission, of course, appropriately is an institutional decision, not an NCAA standard.⁷⁷

Moreover, meeting the NCAA percent of degree requirements may be even more problematic for transferring student-athletes. The rationale behind the progress-toward-degree bylaws is to ensure a

76. Transfer Admissions, Off. Admissions, <https://admissions.olemiss.edu/transfer> (last visited Mar. 24, 2023).

77. It is, however, interesting to note that the student-athletes would be eligible for competition under NCAA rules if admitted to the institution. Moreover, at the University of Mississippi, NCAA eligibility is a basis for admission for incoming freshmen: “Meeting certification requirements for the National Collegiate Athletic Association (NCAA). This option is available to all freshman applicants.” *Freshman Admissions*, OFF. ADMISSIONS, <https://admissions.olemiss.edu/apply/freshman> (last visited Mar. 24, 2023). In other words, if these students were coming out of high school, they would be eligible for admission.

meaningful academic experience for student-athletes, including timely progressing towards a degree, and to prohibit them from enrolling in “easy” courses during the academic year so they can focus solely on their sport.⁷⁸ However, as students transfer, it is likely their major and/or major requirements will change as requirements vary from institution to institution. As a result, a student-athlete may depart an institution meeting the 60 percent requirement while only having completed 50 percent at his or her new institution. The speed at which transfers occur makes it common for the exact academic situation of the transfer student to be less than certain. Students, therefore, are forced to change majors, have limited selection of majors, take an overload of courses to maintain eligibility, or be ineligible for a period of time upon transfer.

C. Name, Image, and Likeness Legislation

Throughout its history, the NCAA prohibited student-athletes from making money off of their name, image, or likeness (NIL).⁷⁹ These amateur athletes could not be paid for signing autographs, entering into sponsorship deals, or making persona appearances. Nor could they profit from the sales of jerseys bearing their name. So, many of the ways that professional athletes make money were off-limits to college players. Two significant cases, however, led to state legislation that ultimately forced the NCAA to modify its stance.⁸⁰

In *O’Bannon v. NCAA*,⁸¹ former collegiate basketball player Ed O’Bannon sued the NCAA, Electronic Arts, and Collegiate Licensing

78. The legitimacy of academic performance among high-performing college athletes has long been a matter of concern. *See, e.g.*, FRANCIS X. DEALY, JR., WIN AT ANY COST: THE SELL OUT OF COLLEGE ATHLETICS (1990) (especially chapter 4, Academic Fraud); JAY M. SMITH & MARY WILLINGHAM, CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME COLLEGE SPORTS (2015); MURRAY SPERBER, COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY (1990); STEWART MANDEL, BOWLS, POLLS & TATTERED SOULS: TACKLING THE CHAOS AND CONTROVERSY THAT REIGN OVER COLLEGE FOOTBALL (2008).

79. *O’Bannon v. NCAA*, 802 F.3d 1049, 1052 (9th Cir. 2015).

80. *See* Ezzat Nsouli & Andrew King, *How U.S. Federal and State Legislatures Have Addressed NIL*, SPORTS SHORTS (July 13, 2022), <https://www.sports-legal/2022/07/how-us-federal-and-state-legislatures-have-addressed-nil>.

81. 802 F.3d at 1055.

Company over using his name, image, and likeness in an NCAA basketball video game. In 2015, the U.S. Court of Appeals for the Third Circuit upheld a district court ruling that the NCAA's model of amateurism (and thus not paying athletes) had violated antitrust laws. As a result, Electronic Arts put a halt to its NCAA video games and had to pay \$60 million.⁸²

In 2019, a number of current and former college athletes sued the NCAA, in the case *NCAA v. Alston*.⁸³ The plaintiffs sought to challenge the NCAA's rules limiting the compensation that student-athletes could receive, arguing that they were in violation of federal antitrust law. The court found the restrictions to be in violation of Section 1 of the Sherman Act. As a result, the court issued an injunction barring the NCAA from enforcing the rules. The Supreme Court agreed with the lower courts and found that the NCAA's rules limiting player compensation were unreasonable because they substantially suppressed and destroyed competition, thus violating the Sherman Act.⁸⁴

These cases set in motion the dismantling of the NCAA's prohibiting athletes from being paid for their name, image, and likeness in large part because they prompted state legislators into action. The first such legislation was in California, where on September 30, 2019, Governor Gavin Newsom signed the "Fair Pay to Play Act" that would, starting in 2023, prohibit schools from punishing athletes who accept endorsement money while in college.⁸⁵

Many states followed on the heels of the California legislature. By July 2022, almost 30 states had passed legislation addressing how student-athletes could profit from their name, image, and likeness.⁸⁶ After unsuccessfully pleading for federal intervention,⁸⁷ the NCAA

82. See Patrick Pinak, O'Bannon v. NCAA: *How One Man Pioneered NIL Deals into Existence*, FAN BUZZ (Mar. 19, 2022), <https://fanbuzz.com/college-basketball/ed-o-bannon-vs-ncaa>.

83. See generally *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

84. *Id.* at 2166.

85. Dan Murphy, *California Defies NCAA as Gov. Gavin Newsom Signs into Law Fair Pay to Play Act*, ESPN (Sept. 30, 2019), https://www.espn.com/college-sports/story/_/id/27735933/california-defies-ncaa-gov-gavin-newsom-signs-law-fair-pay-play-act.

86. Nsouli & King, *supra* note 80.

87. Tim Tucker, *NIL Timeline: How We Got Here and What's Next*, ATLANTA J.-CONST. (Mar. 18, 2022), <https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4>.

suspended its previous regulations and implemented an interim NIL policy that became effective on July 1, 2021. It permits student athletes to profit off of their name, image, and likeness.⁸⁸

This development was, of course, highly controversial.⁸⁹ For purposes of this paper, the most important factor is that NIL opportunities now provide a huge incentive for student athletes to transfer from one school to another.⁹⁰ The NCAA and others in college athletics

88. Dodd, *supra* note 5; Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

89. One of the strongest critiques of the new mobility given to college student athletes with this rule change came from Muffet McGraw, head women's basketball coach at Notre Dame from 1987 to 2020. In 2023, the NCAA awarded her the *Pat Summit Award* in recognition of her devotion to the development of college athletes and for making a positive impact on their lives. In her acceptance speech she said,

Championships are built on trust, honesty, accountability, and leadership. That's what we all learned from playing sports, and that's what we teach our players. Because we're more than coaches. We're educators, and we teach these young men and women things that are a lot more important than winning a game. We're supposed to be preparing them to go out into the world, armed with life skills that they need to help them succeed, but somewhere along the way, I wonder if we're still doing our job. Because instead, we're teaching them that loyalty, commitment aren't really important. We're allowing kids to enroll our schools with one foot out the door, because we gave them an out. They know that if it doesn't work out here, they'll just go somewhere else—not once, as the one-time transfer rule would suggest, but as often as they want. What are we teaching them about the value of making good choices and the consequences when we don't? What are we teaching them about what matters most in life? Recruiting used to be about finding the best fit, where a student-athlete could grow, reach their potential and get their degree. Now it's an arms race that comes down to the highest bidder. Whoever has the most money wins.

Muffet McGraw, NCAA 2023 Annual Convention, San Antonio, Texas (Jan. 13, 2023) <https://www.ncaa.org/sports/convention> (last visited Feb. 25, 2023).

90. See Dan Morrison, *Lane Kiffin Predicts Continued Problems with Transfer Portal, NIL*, ON3 (Feb. 7, 2023), <https://www.on3.com/college/ole-miss-rebels/news/lane-kiffin-predicts-continued-problems-with-transfer-portal-nil> (“The way they set it up is it's pay for play, and how much money do kids get to go places.

administration still home for uniform federal legislation that can even the playing field from one state to another.⁹¹

Early in 2022, Senator Roger Wicker (R-Miss) reintroduced the Collegiate Athlete Compensation Rights Act,⁹² and Senator Corey Booker (D-N.J.) filed the newest version of the College Athlete Bill of Rights,⁹³ originally introduced in 2020. Although the two bills differ in their scope and regulation of NIL opportunities, the goal of both is to establish one set of laws for student-athletes, boosters, and institutions regardless of the state.⁹⁴ A federal bill would eliminate the need for NCAA legislation and the Association's enforcement of NIL legislation.

The Collegiate Athlete Compensation Rights Act focuses on NIL regulation while the College Athlete Bill of Rights goes beyond NIL regulation to include a right to transfer, right to Title IX equity, right to medical expenses and health care services, and scholarship protections.⁹⁵ On the NIL front, the Collegiate Athlete Compensation Rights Act requires student-athletes to earn 12% of graduation requirements prior to earning NIL compensation, a provision the College Athletes Bill of Rights does not contain.⁹⁶ However, the College Athletes

And, if I transfer and go there, how much am I gonna get versus how much if I stay?"); Rob Oller, *College Sports Need Rescuing from the Transfer Portal. I Am Here to Help*, THE COLUMBUS DISPATCH (May 17, 2022), <https://www.dispatch.com/story/sports/2022/05/17/ncaa-college-sports-how-fix-nil-transfer-portal-athletics/9791268002> ("I'm tackling the college transfer portal, and by extension name, image and likeness (NIL), because the two are so closely linked. And not always for the good.").

91. Nicole Auerbach, *The NCAA Has Rallied Around Its Main Priority for 2023: Get Help from Congress*, ATHLETIC (Jan. 12, 2023), <https://theathletic.com/4086860/2023/01/12/ncaa-convention-congress-federal-nil-law>.

92. Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. (2022), <https://www.commerce.senate.gov/services/files/A051885A-E82B-4875-97A0-92332E14822F>.

93. College Athletes Bill of Rights, S. 4724, 117th Cong. (2022). <https://www.congress.gov/bill/117th-congress/senate-bill/4724>.

94. See *supra* notes 92–93.

95. See *supra* notes 92–93.

96. The credit requirement is likely an attempt to reduce the potential of using NIL compensation as an inducement in recruiting. See *supra* notes 86–87.

Bill of Rights does specify that NIL compensation may not be used to induce a college athlete to *transfer*.⁹⁷

Another difference between the two pieces of legislation is the ability of institutions to restrict the types of NIL endorsements in which student-athletes can engage. The Collegiate Athlete Compensation Rights Act permits restrictions by identified industry (e.g., gambling, alcohol, etc.) as well as agreements that conflict with an institution's athletics department sponsorships.⁹⁸ Further, the Act would prohibit direct or indirect NIL compensation from the institution.⁹⁹ Conversely, the College Athlete Bill of Rights only permits restrictions where state law has been enacted prohibiting the agreement, or where the contract would violate rules to which all students, not just student-athletes, are subject.¹⁰⁰

Each of the bills calls for a different body to enforce NIL legislation. The Collegiate Athlete Compensation Rights Act would establish an "independent entity for intercollegiate athletics" operating under the terms and provisions of the Federal Trade Commission Act.¹⁰¹ The College Athlete Bill of Rights establishes a "Commission on College Athletics," but the Commission would not be an agency and would adopt its own constitution and bylaws.¹⁰² The commonality in both bills is that an entity other than the NCAA would be responsible for the enforcement of NIL legislation where, absent real enforcement, there is little to dissuade some of the existing NIL practices.

The two legislative proposals approach NIL regulation in different ways, but both aim to provide some level of protection to student-athletes in terms of earning NIL compensation.¹⁰³ They also both

97. College Athletes Bill of Rights, S. 4724, 117th Cong. (2022). <https://www.congress.gov/bill/117th-congress/senate-bill/4724>.

98. See Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. (2022), <https://www.commerce.senate.gov/services/files/A051885A-E82B-4875-97A0-92332E14822F>.

99. *Id.*

100. College Athletes Bill of Rights, S. 4724, 117th Cong. (2022). <https://www.congress.gov/bill/117th-congress/senate-bill/4724>.

101. Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. (2022), <https://www.commerce.senate.gov/services/files/A051885A-E82B-4875-97A0-92332E14822F>.

102. College Athletes Bill of Rights, S. 4724, 117th Cong. (2022). <https://www.congress.gov/bill/117th-congress/senate-bill/4724>.

103. See *supra* notes 92–101.

attempt to remove NIL as an inducement from transfer recruiting while creating the same framework for all student-athletes and institutions.¹⁰⁴ Either piece of federal legislation would remove the NIL question and enforcement from the NCAA umbrella.¹⁰⁵

D. Sports Betting

Until recently, most gambling on college sports was illegal under federal and state law everywhere except in Nevada. The Professional and Amateur Sports Protection Act (PASPA), enacted in 1992, made it unlawful for a State or its subdivisions “to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme” based on competitive sporting events, and for “a person to sponsor, operate, advertise, or promote” those same gambling schemes if done “pursuant to the law or compact of a governmental entity.”¹⁰⁶ PASPA

104. See *supra* notes 92–101.

105. Recent experience should shape the NCAA response. Dodd, *supra* note 7 (“For all the doom and gloom predicted by the NCAA For all the doom and gloom predicted by the NCAA, NIL hasn’t been disaster. Rather, 6 ½ months in the experience has largely been refreshing. Locker rooms haven’t fractured. Attendance and viewership weren’t impacted by the “impurity” of paid athletes. No one foresaw the NIL initiative taken by several athletes who contributed part of their newfound incomes to charities.”).

106. PASPA provided:

It shall be unlawful for—

- (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
- (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (1992); see Ronald J. Rychlak, *A Bad Bet: Criminalization of Nevada’s Collegiate Sports Books*, 4 NEV. L. J. 320 (2004).

did not make sports gambling a federal crime but restrained the states' ability to enact legislation regarding sports gambling.

A major shift in this area of the law began in 2018 with *Murphy v. National Collegiate Athletic Association*.¹⁰⁷ In *Murphy*, the United States Supreme Court ruled that PASPA violated the Tenth Amendment's anti-commandeering rule.¹⁰⁸ This opened the door for state legislation to legalize sports betting.¹⁰⁹ Many states worked quickly to pass legislation or modify their existing legislation to legalize sports betting. In Delaware, for instance, less than one month after *Murphy*, the state authorized single game betting at three casinos.¹¹⁰ Since that time, legal sports betting has grown at a dizzying pace while state legislators and regulatory agencies struggle to keep up.¹¹¹ In 2018, the total amount of legal sports betting revenue in the United States was roughly \$430 million dollars.¹¹² By 2020, that figure tripled to over \$1.5 billion dollars, not including sportsbooks at tribal casinos in Mississippi, New Mexico, New York, and Oregon.¹¹³ By 2021, the amount stood at \$4.33 billion.¹¹⁴

Much attention has been directed toward maintaining the integrity of the game with efforts to keep inside information away from gamblers. It may be more important, however, to protect college students, including college athletes, from the dangers typically associated with

107. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

108. *Id.* at 1478. The anti-commandeering rule prohibits the federal government from creating laws that force states to act. Here, PASPA was ordering states not to act. Essentially, PASPA regulated a state's exercise of its lawmaking power by prohibiting modifying, or repealing, its laws prohibiting sports gambling.

109. The monumental affect that *Murphy* had on the sports betting industry can be attributed to the Supreme Court ruling that no provision of PASPA was severable and no part of it would remain in effect. *Murphy*, 138 S. Ct. at 1484.

110. *Delaware Becomes First State to Legalize Sports Betting*, WDEL (Dec. 27, 2018), https://www.wdel.com/delaware-becomes-first-state-to-legalize-sports-betting/collection_fbc8ac94-09f6-11e9-ad26-3b927b476130.html.

111. See Mike Lukas, *Report Has Global Sports Betting Market Size at \$84.6B with 12.4% Annual Growth*, WSN (Oct. 14, 2023), <https://www.wsn.com/betting/global-sports-betting-market-annual-growth>.

112. *Total Sports Betting Revenue in the United States from 2018 to 2021*, STATISTA, <https://www.statista.com/statistics/1126480/sports-betting-revenue-us> (last visited Feb. 25, 2023).

113. *Id.*

114. *Id.*

problem gambling. App-based betting on phones and online casinos make competitive young people easy targets for aggressive marketing.¹¹⁵

According to the NCAA, “[o]ne notable difference between student-athletes and their peers is that student-athletes tend to be drawn to sports wagering at higher rates.”¹¹⁶ Additionally,

To protect the integrity of college athletics contests, NCAA regulations prohibit student-athletes from betting money on any sporting event (college, professional or otherwise) in which the NCAA conducts collegiate championships. Violations of this regulation can result in a student-athlete losing his or her athletics eligibility, which has clear negative repercussions for the individual and his or her team.”¹¹⁷

Unfortunately, not much attention has yet been directed at that very serious issue.

115. Pete Rose, of course, is well known for his gambling-related problems. *See* Ronald J. Rychlak, *The Dowd Report: Pete Rose, Bart Giamatti, and the Dowd Report*, 68 *MISS. L.J.* 889 (1999); *see also* Dave Feschuk, *Compulsive Gambling by Athletes Is a ‘Silent Plague’ in Pro Sports*, *TORONTO STAR* (Mar. 12, 2022), <https://www.thestar.com/sports/opinion/2022/03/12/compulsive-gambling-by-athletes-is-a-silent-plague-in-pro-sports-perception-is-money.html>.

116. Jeffrey L. Derevensky & Tom Paskus, *Mind, Body and Sport: Gambling Among Student-Athletes*, NCAA SPORT SCI. INST., <https://www.ncaa.org/sports/2014/11/5/mind-body-and-sport-gambling-among-student-athletes.aspx> (last visited Nov. 13, 2022).

117. *Id.* (based on a 2012 study that the NCAA commissioned).

Despite NCAA regulations prohibiting sports wagering for money, 26 percent of male student athletes report doing just that, with 8 percent gambling on sports at least monthly. Of particular concern is the culture surrounding golf, where on-course wagering is considered a normative aspect of the experience. Males who participate in NCAA golf are approximately three times more likely to wager on sports (or engage in other gambling behaviors) than other student-athletes.

Id.

In April 2022, the NCAA issued an interpretation that would allow “any individual, school, or conference to provide information to sports betting company suppliers, provided the information is available to the general public.”¹¹⁸ The NCAA also rescinded its policy prohibiting championship events from being held in states that have legalized sports gambling (which essentially meant Nevada).¹¹⁹ Those actions, coupled with changed societal attitudes toward gambling and legal sports betting becoming widely available, make it quite difficult for those who are susceptible to problem gambling, including student-athletes, to avoid the temptation of legal, commercial gambling.

V. A MODEL SOLUTION

All educational institutions are justifiably concerned about the academic success of their students. Difficulties with transferring student-athletes can have negative consequences for the students, but they

118. John Holden, *New Official Data Rule Means NCAA Must Change Betting Tack*, LEGAL SPORTS REP. (May 10, 2022), <https://www.legalsportsreport.com/69537/opinion-ncaa-official-data-sports-betting>. On April 27, 2022, the NCAA released revised guidance regarding the sale of data. The new interpretation states:

The NCAA Division I Interpretations Committee determined the legislation precluding an individual, institution or conference from providing information for sports wagering purposes does not apply to competition statistics compiled by, or with the permission of, the institution, provided that information is available to the general public. As a result, it is permissible for an individual, institution or conference subject to the sports wagering activities legislation to provide such information to individuals or companies involved in or associated with sports wagering activities. It is not permissible to provide information that is not available to the general public.

Id.

119. Chris Murray & AP Wire, *Good News: Nevada Can Now Host NCAA Championship Events*, NEV. SPORTS NET (May 3, 2019), <https://nevadasportsnet.com/news/reporters/good-news-nevada-can-now-host-ncaa-championship-events>.

also create issues for the coaches, teams, and Athletics Department.¹²⁰ With an increase in transferring students, and pressure to improve retention and graduation rates, universities must closely examine the transfer student and transfer student-athlete experience.¹²¹ To that end, we propose the following best practices to facilitate the transition of all transfer students:

A dedicated orientation program for transfer students, providing transfer-specific information and a sense of community.¹²²

Bridge programs and boot camps to better prepare students for academic success.

An online transfer center, a one-stop resource center for transfer students.

Special sections of high-demand/high-DFW courses targeted at transfer students.

Supplemental instruction opportunities.

Outreach and peer mentoring programs to connect transfer students to campus and provide practical advice.

Strong articulation agreements, accessible resources to examine transfer credits, and access to advisers.”¹²³

Institutions should provide student-athletes entering the transfer portal with the specific individual requirements for them to leave eligible.

Awareness and training not only about the traditional gambling-related eligibility concerns, but programs to help all students avoid gambling problems.

120. The problem is magnified when student-athletes who are ineligible to transfer to one institution are eligible to transfer to other schools against which that university competes.

121. See Chrystal et al., *supra* note 34, at 2.

122. Matthews, *supra* note 22, at 20 (“Orientation programs and residence life experiences are two ways in which incoming students frequently forge social relationships with peers and feel a sense of community on campus.”).

123. Chrystal et al., *supra* note 34, at 14.

In addition, if the institution uses special admission reviews for transfers,¹²⁴ we propose the creation of an on-campus panel that is empowered to review petitions to admit transfer students who meet minimum requirements.¹²⁵ Factors for consideration might include: a department on campus has requested that the student be admitted; the student has a 2.0 GPA or better at his or her home school; and the student (whether an athlete or not) meets the NCAA eligibility requirements.

Other matters, perhaps beyond the reach of individual institutions, would be NCAA or conference requirements that:

1. Schools provide a transfer evaluation before being permitted to sign a student-athlete.¹²⁶
2. Institutions that repeatedly take transfer student-athletes who end up not graduating be held accountable, perhaps with a restriction on future transfers.
3. Transfer student-athletes be provided “academic and graduation data” specific to transfers, similar to that which is provided to students when they register for the Eligibility Center.¹²⁷

These practices will best serve student-athletes and the institutions.

VI. CONCLUSION

College athletics is undergoing change at a pace that has never been seen. Meanwhile, young people still in school are making decisions that will affect the rest of their lives. Most of the legislatively-driven changes seem geared toward premiere athletes who might make

124. Not all schools do this.

125. Such a panel should be kept very small so that it can act quickly. It might be made up of representatives of the provost, the registrar, and the admissions office. The Faculty Athletics Representative (or a designee from the Athletics Committee) might also have a role. The petition would have to come from an interested department (not an incoming student).

126. This would create logistical issues but provide transparency.

127. This could be done through the transfer portal.

a career out of their sport. As the NCAA has long reminded everyone, however, over 98 percent of college athletes never go professional.¹²⁸ As such, universities need to maintain focus on the *student* part of student-athletes.

Final solutions will likely take time as the new rules and procedures are evaluated and amended. That does not mean, however, that intuitions can sit back, even for a year, to see how matters develop. Young men and women are making decisions right now that will affect their futures and those of their families. Staying on top of developments and continually striving to use best practices is the surest way for educational institutions to create opportunities for all students, regardless of their current path or their eventual destination.

128. *College Sports Offer Student-Athletes Opportunities to Learn, Compete, and Succeed*, NCAA RECRUITING FACTS (Aug. 2014), <https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf>; Zak Cheney-Rice, *Here's What Happens to the 98% of College Athletes Who Don't Go Pro*, MIC (Mar. 19, 2014), <https://www.mic.com/articles/85789/here-s-what-happens-to-the-98-of-college-athletes-who-don-t-go-pro>.