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Senate Hearings on Name, Image, and Likeness Rights for Student-Athletes Reveal Broad Support for Federal NIL Legislation, but Much Disagreement Remains on the Scope of That Legislation

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The Senate Committee on Commerce, Science, and Transportation held two hearings this June to address federal legislative proposals that would enable college athletes to monetize their name, image, and likeness (“NIL”). The written testimony submitted prior to the hearings, as well as the live testimony, also touched on related topics, such as efforts to improve health and safety standards for student-athletes, enhancing scholarship protections and academic outcomes, increasing equity in student-athlete experiences, and how NIL legislation may affect smaller institutions compared to those with larger revenue streams. The hearings took place against the backdrop of a rapidly-evolving NIL landscape, driven largely by a swell of states that have passed, or are considering, legislation that would deliver NIL rights to student-athletes. The authors are tracking NIL legislative developments [here](#).

With legislation in six states slated to go into effect on July 1, 2021, the growing patchwork of NIL laws has prompted a general consensus among Congress, the NCAA, educational institutions, student-athletes, and other stakeholders that a federal law is necessary to establish uniform standards that would allow college athletes to earn compensation from use of their NIL while maintaining a level playing field between institutions across state lines. Opinions diverge, however, on the appropriate scope of such a law. Republicans generally support narrowly-tailored NIL rules, often coupled with more protection for the NCAA (e.g. antitrust protection), while Democrats tend to favor more broad-reaching legislation that would address related issues like healthcare and safety standards for student-athletes.

On June 9, 2021, the Senate Committee heard from Dr. Mark Emmert, President of the NCAA, along with college coaches, administrators, and sports law experts who expressed concerns that the current state-by-state approach could create an imbalance in recruiting opportunities between states that have clear NIL rules and those that do not. Dr. Wayne A. I. Frederick, President of Howard University, [discussed](#) the need for a uniform system to protect smaller institutions with fewer resources, while Mark Few, Head Coach of men’s basketball at Gonzaga University [highlighted](#) the challenges that schools face in navigating a recruiting process with different rules across state lines. Finally, Michael McCann, Professor of Law and Director of the Sports and Entertainment Law Institute at the University of New Hampshire Franklin Pierce School of Law, [urged](#) the Committee to, at the moment, focus on NIL rather than accompanying issues, like healthcare.

The second hearing on June 17, 2021 centered on the student-athlete perspective. The Committee heard from Kaira Brown, a track and field athlete at Vanderbilt University, Christina Chenault, a former UCLA track and field athlete, Sari Cureton, a former Georgetown University basketball player, and Martin McNair, the father of Maryland football player Jordan McNair who died in 2018 after suffering a heat stroke during summer training. In their [written submissions](#) and live testimony, these witnesses emphasized the importance of NIL rights, discussed disparities among men’s and women’s sports, and urged senators to adopt baseline standards for health and safety, including increased mental health resources for student-athletes. As Ms. Chenault [wrote](#), “[t]his issue not only disproportionately affects athletes from low-income households, but affects all athletes at a psychological level.”

Despite a bipartisan consensus that federal legislation is needed, it has become increasingly clear that disagreement regarding the scope of potential NIL legislation persists. Notably, several Republican senators were absent from the June 17 hearing, dashing hopes that a federal bill would pass before July 1, 2021. Also bearing heavily on the discussion is the United States Supreme Court's June 21, 2021 decision in [NCAA v. Alston et al.](#), which affirmed the Ninth Circuit's holding that NCAA rules limiting the amount of **educational benefits** a school can offer student-athletes violate antitrust law. Finally, hope that the NCAA itself will take action on new NIL rules before July 1 has waned. As the authors previously [discussed](#), the NCAA halted its vote on NIL laws in January of this year, and recently moved the vote to next Monday, June 28 – just two days before several state laws become effective.

It is becoming increasingly likely that the NCAA will take a hands-off approach, as [urged by some conference commissioners](#). Under this approach, the NCAA would jettison the 30-page NIL proposal that has been under consideration for the better part of a year and instead defer to institutions to comply with applicable state law or set their own standards consistent with a rather skeletal NCAA NIL bylaw. Under this new approach, institutions in states without NIL laws would be required to develop and publish an NIL policy on their own. While the commissioners' proposed NCAA bylaw does not provide much guidance on what those institution-developed policies must look like (other than to say that the retention of attorneys, agents, and advisors for NIL purposes should be addressed), it does make clear that institutions may not allow: (1) payments/the provision of benefits to any individual by the institution or any booster or any person or entity acting on behalf of the institution; or (2) payments/the provision of benefits to any individual in exchange for as an inducement for athletic performance or attendance at the member institution. In other words: no pay for play and no recruiting inducements. The proposed rule also clarifies that any institutional policy would become inapplicable if it conflicted with or was not permitted by a later-passed NIL statute in its jurisdiction.

As the NCAA deals with the ripple effects of the ruling in *Alston* and federal legislators wrestle with the politics of student-athlete rights, institutions should be tracking state developments and outlining what an appropriate NIL policy might look like on their campus.

Saul Ewing Arnstein & Lehr will continue to monitor these developments. If you have questions about NIL legislation, this alert, or related issues, please reach out to your regular attorney contact or the authors.

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