Matt Dacey

College Athletes' Privacy Rights and Concerns under FERPA in the NIL Age

Privacy Law Seminar

Professor Doris Brogan

Fall 2021 Semester

TABLE OF CONTENTS

I. INTRODUCTION

The National College Athletic Association (NCAA) has long reigned supreme as the primary governing body for collegiate athletics in the United States. The NCAA governs nearly 1,100 colleges and universities, dividing them into three divisions.[1] For example, Division I schools are seen as the most popular and usually attract the most athletically inclined athletes. However, the NCAA not only serves as a governing body, it also doubles as a massive revenue-generating business. In 2019, the NCAA reported $18.9 billion in total generated revenue across all NCAA athletic departments with Division I schools accounting for 96% of all NCAA-generated revenues.[2] Additionally in the same year, the NCAA reported $18.8 billion in total spending on athletics.[3] Given the popularity and lucrative nature of collegiate sports, one may wonder where and to whom $18.8 billion is being spent. NCAA coaches were reported to collectively receive $3.7 billion in 2019[4] while NCAA president, Mark Emmert, received a $2.9 million dollar salary for the 2019-2020 calendar year.[5] Evidently, big pay days were given to individuals holding high-end positions but, under old NCAA rules, collegiate athletes themselves could not receive compensation for their efforts on the fields, diamonds, pitches, or courts they played on.

Under the previous NCAA regime, athletes were prohibited from earning money from their name, image, and likeness (NIL) through endorsing or promoting commercial products or

---

[1] NCAA, *Our Three Divisions*, https://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions (last visited Dec. 10, 2021).
[2] NCAA, *Finances of Intercollegiate Athletics*, https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics?division=d2, (last visited Dec. 10, 2021).
[3] *Id*.
[4] *Id*
[5] https://thespun.com/college-football/mark-emmert-salary-millions-ncaa-nil-reform-supreme-court Dan Lyons, *Report: How Much NCAA President Mark Emmert Made In 2019*, SPORTS ILLUSTRATED: THE SPUN (July 20, 2021, 10:47 AM), https://thespun.com/college-football/mark-emmert-salary-millions-ncaa-nil-reform-supreme-court.

services without the risk of losing years of competition eligibility.[6] The NCAA believed student-athletes were not similar to professionals and were bound to the idea of "amateurism".[7] In short, the NCAA limited student-athlete compensation to scholarships and university-approved stipends, and athletes could not accept money from any source outside the university.[8] However, in 2021, the collegiate athlete compensation landscape experienced an incredible turn of events that completely changed NCAA operations. On March 31, the Supreme Court heard oral arguments for a headline case that would eventually decide the landscape for the future NCAA athlete compensation marketplace. *National Collegiate Athletic Association v. Alston*, 594 U.S. 45, (2021) pitted the NCAA against former men's Division I football and men's and women's Division I basketball student athletes. The plaintiffs in *Alston* asserted that the NCAA's "current, interconnected set of…rules…limit the compensation they may receive in exchange for their athletic services."[9] Most notably, the plaintiffs argued that NCAA restrictions were a restraint on trade[10] and the Supreme Court agreed by stating the NCAA's rules amounted to a monopoly on student-athlete labor.[11] In short, the Supreme Court unanimously held that restrictions on education-related benefits awarded to NCAA athletes violated antitrust laws.[12] This decision prompted the NCAA to suspend all former rules which barred athletes from profiting from their NIL, and on June 30, 2021, the NCAA adopted an interim NIL policy which allows all NCAA

---

[6] SIX STAR PRO NUTRITION, *Name, Image, and Likeness Rights: What You Need To Know*, https://www.sixstarpro.com/training/name-image-likeness-rights-what-you-need-to-know/ (last visited Dec. 10, 2021).
[7] Kate McInerney, *What is NIL? NCAA rules are changing regarding athlete pay. Here's what it means.*, BOS. GLOBE, Jul. 2, 2021.
[8] *Id*.
[9] *National Collegiate Athletic Association v. Alston*, 594 U.S. 45, (2021).
[10] *Id*. at 14.
[11] *Id*.
[12] *National Collegiate Athletic Association v. Alston*, INDEPENDENT NEWS AND ANALYSIS ON THE U.S. SUPREME COURT: SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/national-collegiate-athletic-association-v-alston/ (last visited Dec. 10, 2021).

college athletes to benefit from their name, image and likeness without risking their amateur athlete status.[13] According to the NCAA, "The temporary policy will remain in place until federal legislation or new NCAA rules are adopted. With the NIL interim policy, schools and conferences may choose to adopt their own additional policies."[14]

Many collegiate athletes have rushed to take advantage of this new era and have capitalized on utilizing their NIL rights to garner additional compensation. Some athletes have struck deals to promote or endorse different products and companies[15], while others have opted to create their own merchandise or online content. Additionally, NCAA member schools have reached school or program-wide agreements with third parties to help support student athletes.[16] Opportunities are now nearly endless for college athletes to profit from their NIL, but since the NCAA has not passed its own regulations to handle the NIL issue, the nation's states have been free to decide how schools within their borders may approach this new development. In effect, athletes from schools in one state may be more limited than athletes from schools in another state based on how a state determines how athletes may exploit their personal brands. Moreover, some states may offer more legal protection to collegiate athletes than others when seeking in NIL engagements. Further, on top of state-by-state restrictions, institutions can also limit the types of engagements, process by which NIL agreements can be made by students, as well as business categories student-athletes may interact with for NIL opportunities. To combat potential issues in

[13] Michelle Brutlag Hosick, *NCAA adopts interim name, image, and likeness policy*, NCAA (Jun. 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy.
[14] *Id*.
[15] Jenna Lemoncelli, *Inside the life of Olivia Dunne: The LSU gymnast cashing in big on NIL movement*, N.Y. POST, Oct. 8, 2021, https://nypost.com/2021/10/08/inside-the-life-of-olivia-dunne-the-lsu-gymnast-whose-cashing-in-big-on-nil-movement/.
[16] JohnWallStreet, *MMA Gym's Miami Deal Locks Up College Players' Content Forever*, SPORTICO (Jul. 30, 2021, 5:55 AM), https://www.sportico.com/leagues/college-sports/2021/american-top-team-miami-1234635562/.

legal disparities between state policies, arguments have been made for blanket or uniform NIL policies to be created and adopted nationwide.

Uniform federal laws have yet to be enacted in the wake of the *Alston* ruling, but multiple attempts to develop an agreed upon NIL scheme have been introduced. In May 2021, the Uniform Law Commission (ULC) drafted the College Athlete Name, Image, and Likeness Issues Act which introduced a framework for states without NIL laws to consider that allows collegiate athletes to earn compensation for the use of their NIL while also providing institutions, athletic associations, and conferences with reasonable protections.[17] The Student Athlete Level Playing Field Act was introduced to the House of Representatives in April 2021 and offers a basic structure for a nationwide federal law of how NIL agreements should be handled by both athletes and institutions while providing some exceptions that prohibit athletes from pursuing certain types of endorsement contracts.[18] Although major headway has been made in the NCAA NIL landscape and a new realm of collegiate athlete autonomy has been created, there are still many obstacles for the legal field to examine. One major consideration federal lawmakers, states, and institutions should acknowledge is the privacy of our country's amateur athletes. As young adults who might not be able to afford legal counsel, NCAA student-athletes may not know the legal ramifications of contracting with third party entities especially if the object of the agreement is centered around online engagement. Thus, college athletes' privacy rights must be weighed heavily in NIL interactions and the disclosure, collection, distribution, or sale of athlete personal information should be subject to their knowledge or consent.

---

[17] Katie Robinson, *ULC Approves Seven New Acts at 2021 Annual Meeting*, UNIF. L. COMM'N (Jul. 7, 2021, 5:29 PM), https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=b468cc65-2316-4da1-bfca-69ca718521ae&CommunityKey=d4b8f588-4c2f-4db1-90e9-48b1184ca39a&tab=digestviewer.

[18] Student Athlete Level Playing Field Act, H.R. 2841, 117th Cong. (2021).

This paper will explain the background of substantive law leading up to and recently following the *Alston* decision, introduce potential privacy concerns student-athletes may experience when navigating the current NCAA NIL marketplace, discuss how the Family Educational Rights and Privacy Act aims to treat collegiate and high school athletes seeking NIL opportunities, and opine how future NIL legislation should integrate other current domestic and foreign privacy law to better protect NCAA athletes.

II. BACKGROUND

A. The *Alston* Ruling's Effects

Before the *Alston* ruling, student-athletes risked losing years of competition eligibility if they received benefits through means outside NCAA regulations. The NCAA long limited student-athletes to be compensated only through education benefits such as scholarships and stipends.[19] Specifically, if an athlete received money or other benefits from a source outside the university or against previous NCAA rules, that athlete was subject to losing years of competition eligibility.[20] Today, the NCAA's new interim NIL policy now allows collegiate student-athletes to use their name, image, and likeness for commercial and promotional opportunities without losing their eligibility.[21] This rule change was sparked by *National Collegiate Athletic Association v. Alston*, 594 U.S. 45, (2021).[22] The main contention in *Alston* involved the NCAA's appeal to the Supreme Court to uphold all of its restrictions regarding athlete compensation and rule that those restrictions did not violate antitrust laws. Ultimately, the

[19] *See* SIX STAR PRO NUTRITION, *supra* note 6.
[20] *See* McInerney, *supra* note 7.
[21] ATLANTIC 10 CONFERENCE, *Name, Image, and Likeness (NIL) Frequently Asked Questions*, https://atlantic10.com/sports/2021/8/16/A10_0816211511.aspx, (last visited Dec. 10, 2021).
[22] *Alston*, 594 U.S. 45, (2021).

court struck down the NCAA's limits on education-related benefits schools may offer to student-athletes.[23]

In its discussion, the court began its analysis by highlighting the history of NCAA athlete compensation. In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and "cash for incidental expenses such as laundry."[24] In 1974, the NCAA began permitting paid professionals in one sport to compete on an amateur basis in another.[25] Additionally, in 2014, the NCAA "announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance."[26] The court then began to emphasize the NCAA's gargantuan business operations and pointed to the large number of annually generated revenues from collegiate sports. Most notably, the court illustrated the popularity and money-making nature of the NCAA March Madness basketball tournament (creates $1.1 billion annually[27]) and the FBS College Football Playoff (worth around $470 million annually).[28]

The plaintiffs in *Alston* alleged the NCAA's "current, interconnected set of…rules…limit the compensation they may receive in exchange for their athletic services."[29] Specifically, the plaintiffs argued the NCAA rules violated the Sherman Act, which states "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade…is declared to be illegal."[30] When deciding if the NCAA rules violated the Sherman Act, the court used a "rule

[23] *Id*. at 2.
[24] *Id*.
[25] *Id.* at 5.
[26] *Id.* at 6.
[27] *Id.* at 7.
[28] *Id*.
[29] *Id*. at 8.
[30] 15 U.S.C. § 1.

of reason" analysis which requires the court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition."[31]

The court declared that the rules allowed the NCAA to effectively enjoy a monopoly control on the student-athlete labor market by restricting the level of wages and quantity of student-athlete labor.[32] That is, the court acknowledged that NCAA member schools compete vigorously to recruit and secure student-athletes' verbal and signed commitments but the athletes are still subject to the NCAA limits on what compensation schools may offer to athletes who enroll.[33] Significantly, the court expressed that both parties agreed the NCAA rules, in effect, decrease the compensation student-athletes would receive compared to estimated wages in a competitive market.[34] In fact, the NCAA conceded that its student-athletes have nowhere else to sell their labor.[35] Justice Kavanaugh's colorful concurrence further exemplified these facts and stated, "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 is not above the law."[36]

The court then noted whether an antitrust violation exists necessarily depends on a careful analysis of market realities[37] while also restating the NCAA's contention that the organization and its member schools were not "commercial enterprises".[38] In spite of this argument, the court opined that "the economic significance of the NCAA's nonprofit character is questionable at best" given that "the NCAA and its member institutions are in fact organized to

[31] *Alston*, 594 U.S. 45, at 9.
[32] *Id*. at 14.
[33] *Id*.
[34] *Id*.
[35] *Id*. at 18.
[36] *Id*. at 40.
[37] *Id.* at 21.
[38] *Id.*

maximize revenues."[39] Further, the court was unwilling to give the NCAA exemption from the Sherman Act simply because its operations happen to fall at the intersection of higher education, sports, and money.[40] Accordingly, the court advanced their position that the NCAA's restraints were "patently and inexplicably stricter than is necessary" to achieve the procompetitive benefits the league aims to accomplish.[41]

Ultimately, the court enjoined only restraints on education-related benefits - such as those limiting scholarships for graduate school, payments for tutoring, and the like.[42] The court allowed the injunction only after finding that relaxing restrictions would not blur the distinction between college and professional sports and thus impair consumer demand of collegiate sports as educational and noneducational awards would not impair consumer interest in any way.[43] The NCAA and its member schools were then left to agree on how to regulate issuing education-related benefits, cash payments, and other awards.[44] However, the NCAA was still free to limit its members from providing compensation unrelated to legitimate educational activities and to decide what benefits do and do not relate to education.[45] For example, the NCAA is allowed to forbid in-kind benefits unrelated to a student's education.[46] The *Alston* ruling expedited a new age of college athletics, and in the months since, collegiate athletes from across the country have taken advantage of their new freedoms.

[39] *Id.* at 22.
[40] *Id.*
[41] *Id.* at 29.
[42] *Id*. at 31, 33.
[43] *Id.*
[44] *Id*.
[45] *Id.* at 33.
[46] *Id.* at 34.

B. Current NCAA Athlete NIL Engagements

Student-athletes may now seek opportunities to earn compensation through the use of their NIL. In the wake of the *Alston* ruling, and since the NCAA adopted its interim NIL policy, the current NIL landscape has been an incredibly hot market for athletes who were poised to benefit from their personal brands. Depending on the number of followers a certain athlete has on social media, popular collegiate athletes could charge between an estimated range of about $100 up to more than $700 per post on platforms such as Instagram.[47] Further, social media influencers sometimes employ formulas to calculate potential earnings on brand deals.[48] Following this idea, college athletes could contract for payment from endorsements based on the number of engagements they have on a certain post or take a percentage of total sales of a certain product they promote through an exclusive promotion code.[49]

Athletes who have considerable social media followings have garnered incredible amounts of attention while others have taken advantage of niche markets that relate to their personal interests or hobbies.[50] For example, Olivia Dunne, a sophomore women's gymnast at Louisiana State University, is the most followed collegiate athlete in America and boasts over five million followers across her multiple social media channels.[51] Dunne has signed exclusive NIL deals with brands such as activewear outfitter Vuori[52], American Eagle, protein and

---

[47] Petal, *How Much Money Does an Instagram Influencer Make?*, https://www.petalcard.com/blog/money-instagram-influencer-make, (last visited on Dec. 10, 2021).
[48] *Id.*
[49] Braveen Kumar, *6 Ways to Make Money on Instagram (Whether you have 1K or 100K Followers)*, SHOPIFY: SHOPIFY BLOG (Jul. 22, 2021), https://www.shopify.com/blog/make-money-on-instagram.
[50] Brett Wagner, *Lexi Sun ventures into new NIL opportunity, this time partnering with one of nation's biggest jewelry stores*, LINCOLN J. STAR, Aug. 17, 2021, https://journalstar.com/sports/huskers/volleyball/lexi-sun-ventures-into-new-nil-opportunity-this-time-partnering-with-one-of-nations-biggest/article_d200e9b5-90a2-5867-86fa-83bf873d1acf.html.
[51] *See* Lemoncelli, *supra* note 15.
[52] Kristi Dosh, *LSU Gymnast Olivia Dunne Announces First NIL Brand Deal Is With Activewear Brand Vuori*, FORBES (Sep. 14, 2021, 9:00 AM), https://www.forbes.com/sites/kristidosh/2021/09/14/lsu-gymnast-olivia-dunne-announces-first-nil-brand-deal-is-with-activewear-brand-vuori/?sh=658c58762c78.

supplements company PlantFuel, and educational software study tool Bartleby.[53] Another set of female athletes who are becoming increasingly popular in the NIL space are Haley and Hanna Cavinder. The Cavinder twins are both women's basketball players at Fresno State University and rose to fame after gaining more than three million followers on their TikTok account. The Cavinders signed their first NIL agreement with Boost Mobile[54], have added Six Star Pro Nutrition to their NIL portfolio, plus an exclusive line of underwear and loungewear with PSD Underwear.[55] In total, the Cavinders are expected to eclipse $600,000[56] in estimated annual earnings while Dunne is projected to earn north of one million dollars annually from NIL engagements.[57]

Other notable developments include University of Oklahoma football quarterback Spencer Rattler's NIL deal with video message app Cameo[58] and high school basketball phenom Mikey Williams' partnerships with video game developer 2K Sports[59] and Puma.[60] Cameo, a video recording app in which creators send personalized video messages to users for profit, allows student-athletes like Rattler to engage in a symbiotic relationship with users who are fans of or follow the athletes. Cameo not only lets collegiate athletes to connect with fans online in a

---

[53] *See* Lemoncelli, *supra* note 15.
[54] Cassandra Negley, *Cavinder twins sign endorsement with Boost Mobile on NIL day, showing female athletes have plenty to gain*, YAHOO!: YAHOO! SPORTS (Jul. 1, 2021), https://sports.yahoo.com/ncaa-nil-fresno-state-cavinder-twins-boost-mobile-endorsement-female-athletes-benefit-103459408.html.
[55] Robert Kuwada, *Underwear deal adds to eye-popping income for Fresno State's Cavinder twins*, NEWSBREAK: THE FRESNO BEE (Oct. 15, 2021), https://www.newsbreak.com/news/2403336612017/underwear-deal-adds-to-eye-popping-income-for-fresno-state-s-cavinder-twins.
[56] *Id*.
[57] *See* Lemoncelli, *supra* note 15.
[58] Mason Young, *Oklahoma's Spencer Rattler joins Cameo, other Sooners open for business thanks to new NIL powers*, Tulsa World (Aug. 8, 2021), https://tulsaworld.com/sports/college/ou/oklahomas-spencer-rattler-joins-cameo-other-sooners-open-for-business-thanks-to-new-nil-powers/article_b5447f84-da94-11eb-9bfb-cfdac77fd81f.html.
[59] Langston Wertz Jr., *Hey, isn't that Charlotte basketball star Mikey Williams in an NBA 2K commercial?*, CHARLOTTE OBSERVER, Sept. 10, 2021, https://www.charlotteobserver.com/sports/high-school/article254144373.html.
[60] Ben Pickman, *High School Star Mikey Williams Signs Endorsement Deal With Puma*, SPORTS ILLUSTRATED (Oct. 28, 2021), https://www.si.com/nba/2021/10/28/mikey-williams-shoe-deal-puma.

more personal fashion, but also enables athletes to earn money for their time and effort creating and sending personalized content to users. Williams, a high school basketball star from North Carolina, is one of the few popular high-school athletes to take advantage of NIL law. Even though North Carolina's state policy does not allow high schoolers to profit from their NIL[61], because Williams attends Vertical Academy, his basketball team is "not sanctioned by any high school sports association and Williams does not have to abide by North Carolina NIL regulations.[62] As a result, Williams signed with renowned sports agency, Excel Sports Management, as a high school junior and has utilized his 3.3 million Instagram followers to appear in a national promotional TV commercial for the NBA 2K22 video game[63] and become the youngest athlete to sign an exclusive shoe deal with Puma.[64]

The majority of NIL agreements thus far have involved solely individual athletes, or in the case of the Cavinder twins, athletes within the same immediate family. However, third party companies are able to offer NIL opportunities to athletes from an institution or sport-wide angle as well. For example, American Top Team, a mixed martial arts gym in South Florida, and the University of Miami agreed to offer NIL endorsement contracts to all 90 members of the varsity football team.[65] As part of the deal, each athlete is required to promote the gym weekly on social media in exchange for a monthly check worth $500.[66] The Florida Panthers offered endorsement deals to every female athlete at nearby Florida Atlantic University in which each athlete is able to receive tickets to Panthers home games and other merchandise in exchange for promoting the

[61] Braly Keller, *SCHOOL NIL: STATE-BY-STATE REGULATIONS FOR NAME, IMAGE AND LIKENESS RIGHTS*, OPENDORSE (Sep. 24, 2021), https://opendorse.com/blog/nil-high-school/.
[62] Langston Wertz Jr., *5-star basketball recruit Mikey Williams is staying in Charlotte, but he's changing teams*, CHARLOTTE OBSERVER, Jul. 13, 2021, https://www.charlotteobserver.com/sports/high-school/article252763713.html.
[63] *See* Wertz Jr., *supra* note 59.
[64] *See* Pickman, *supra* note 60.
[65] *See* JohnWallStreet, *supra* note 16.
[66] *Id*.

NHL franchise on social media and at in-person community events.[67] In addition, the two athletes who generate the most attention to the club will receive four-figure bonuses.[68] Another female athletes surrounds SmartyStreets, a Utah-based tech company. SmartyStreets offered all female athletes at Brigham Young University (BYU) up to $6,000 annually in return for social media posts, attendance to company events, and wearing company merchandise to class and BYU sporting events.[69] As part of the agreement, SmartyStreets is also funding upgrades to BYU female athlete equipment and athletic facilities.[70] Lastly, all Michigan State University football and men's basketball athletes will enjoy a $500 monthly stipend in exchange for promoting United Wholesale Mortgage on their social media pages.[71]

All these recent NIL engagements are a direct result of the *Alston* ruling and would have been completely illegal under the previous NCAA NIL regime. When given an inch to market themselves and profit from newly enacted regulations, collegiate athletes have taken a mile to fully reap the benefits now available to them. However, given that the new NIL landscape is still in its infancy, states and other lawmaking entities have taken steps to enact or propose their own policies to shape how NIL can be governed now and in the future.

C. State Specific Laws and Proposed Bills

In light of the *Alston* ruling, the NCAA has issued only an interim policy to manage athlete's NIL governance. Because neither the NCAA nor the federal government has not passed

---

[67] Dan Murphy, *Florida Panthers offer NIL deals to all female athletes at Florida Atlantic University*, ESPN (Sep. 28, 2021), https://www.espn.com/nhl/story/_/id/32171119/florida-panthers-offers-nil-deals-all-female-athletes-florida-atlantic-university.

[68] *Id.*

[69] Caleb Turner, *SmartyStreets enters into NIL deal with all female athletes at BYU*, UNIVERSE SPORTS (Sep. 21, 2021), https://universe.byu.edu/2021/09/21/smartystreets-enters-into-nil-deal-with-all-female-athletes-at-byu/.

[70] *Id.*

[71] Kenny Jordan, *Michigan State Football, Men's Basketball Reach NIL Deal*, SPORTS ILLUSTRATED: FANNATION (Sep. 8, 2021), https://www.si.com/college/michiganstate/other-sports/former-michigan-state-walk-on-mat-ishbia-reaches-nil-agreement-msu-football-basketball-mel-tucker-tom-izzo.

overarching NIL regulations, states have been free to establish their own laws to govern how institutions within their borders are able to handle collegiate athletes NIL interactions. Some states, anticipating impending NIL rule changes, enacted, and passed laws prior to *Alston*'s oral arguments while others waited until after the case was heard to develop their NIL law. Still, some states are patiently waiting to introduce and pass NIL laws until federal bills or other lawmaking entities promulgate uniform NIL policies to follow. Whatever the case may be, absent guidance by federal law or without the NCAA further advancing its interim NIL policy, states have now stepped in to unilaterally to develop their own specific NIL rules.

The first state law passed regarding the new college sports NIL policy was California's Senate Bill 206, also known as the Fair Pay to Play Act. The Fair Pay to Play Act was passed in 2019 before the *Alston* hearings and prohibits "California postsecondary educational institutions except community colleges, and every athletic association, conference, or other group or organization with authority over intercollegiate athletics, from providing a prospective intercollegiate student athlete with compensation in relation to the athlete's name, image, or likeness, or preventing a student participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness."[72] The bill further prohibits "…the revocation of a student's scholarship as a result of earning compensation…"[73] However, the Fair Pay to Play Act does contains some limitations such as hindering an athlete's ability to "enter into a contract providing compensation to the athlete for use of the athlete's (NIL) if a provision of the contract is in conflict with a provision of the athlete's team contract."[74] This means that an athlete in California may not be able to contract with a company

[72] Fair Pay to Play Act, Cal. Educ. Code § 67456 (2019).
[73] *Id*.
[74] *Id*.

if a provision of their NIL agreement conflicts with a general university or student-athlete NIL policy.

Florida Senate Bill 646, or the Intercollegiate Athlete Compensation and Rights Act, was approved by Governor Marco Rubio in June 2020 and "authorizes an intercollegiate athlete at a postsecondary educational institution to earn compensation for the use of her or his name, image, or likeness, and prohibits a postsecondary institution from preventing an athlete from earning NIL compensation."[75] The Florida NIL law gets even clearer in its restrictions to postsecondary institutions, as it mimics the language of the Sherman Act when it reads, "…A postsecondary educational institution may not adopt or maintain a contract, rule, regulation, standard, or other requirement that prevents or unduly restricts an intercollegiate athlete from earning compensation for the use of her or his name, image, or likeness."[76] By incorporating similar language to the Sherman Act, the Intercollegiate Athlete Compensation and Rights Act enables Florida to employ more scrutinous reviews of potential policy violations by state universities. One more example of a state specific NIL law is Missouri's House Bill No. 297 which passed in July 2021 and modified provisions to higher education institutions. Under Missouri's NIL bill, "No postsecondary educational institution shall uphold any rule, requirement, standard, or other limitation that prevents a student of that institution from fully participating in intercollegiate athletics without penalty and earning compensation as a result of the use of the student's name, image, likeness rights, or athletic reputation."[77]

[75] Intercollegiate Athlete Compensation and Rights Act, Fla. Stat. § 1006.74.
[76] *Id.* §1006.74(1)(b).
[77] H.B. 297, 101st Gen. Assemb., 1st Reg. Sess., (Mo. 2021).

As of October 2021, two states have passed their own NIL laws while seven other states have laws that will take effect between 2022 and 2025.[78] Conversely, no federal laws regarding collegiate athletes NIL have been passed by either house of Congress. The House Subcommittee on Consumer Protection and Commerce held a hearing on the issues surrounding collegiate athletes monetizing their NIL but several entities who gave testimony, such as the National College Players Association (NCAP) and Central Intercollegiate Athletic Association (CIAA), were adamant that Congress has no place in determining NIL legal boundaries.[79] Despite animosity towards federal NIL legislation, several drafts of federal law have been proposed to serve as uniform NIL legal frameworks for the future.

In May 2021, the Uniform Law Commission proposed a 16-page draft of its College Athlete Name, Image, and Likeness Issues Act at the organization's annual meeting.[80] The proposed act covers several layers of NIL issue ranging from restrictions on NIL activity, required disclosures, prohibited conduct, and civil remedies.[81] The ULC's proposition would serve as a blanket template for states to consider when drafting or deciding to pass new NIL legislation. Additionally, the Student Athlete Level Playing Field Act was introduced to the 117th Congress and approaches the issue from a contractual agreement standpoint, covering aspects of the NIL agreement process like contract enforcement and prohibiting unfair and deceptive contracting practices against student athletes.[82] This proposed federal law would apply to and aim to join all states under one uniform NIL policy.

---

[78] Thomas Di Blasio, *Most States Pass "Name, Image, and Likeness" Laws for Student Athletes*, MULTISTATE: EDUCATION, EMPLOYMENT & LABOR (Sep. 21, 2021), https://www.multistate.us/insider/2021/9/21/most-states-pass-name-image-and-likeness-laws-for-student-athletes.
[79] Maria Carrasco, *Congress Weighs In on College Athletes Leveraging Their Brand*, INSIDE HIGHER ED (Oct. 1, 2021), https://www.insidehighered.com/news/2021/10/01/congress-holds-hearing-creating-federal-nil-law.
[80] *See* Robinson, *supra* note 17.
[81] UNIF. L. COMM'N., COLLEGE ATHLETE NAME, IMAGE, AND LIKENESS ISSUES ACT, (2021).
[82] Student Athlete Level Playing Field Act, H.R. 2841, 117th Cong. (2021).

As more state laws are passed and federal bills are proposed, the NIL legal framework continues to change. Once more athletes become involved in the space, analysis of the law and protections awarded to athletes should continue to be monitored as different interpretations of and interactions with the law arise. Especially in a more digital age, the NIL marketplace's infancy simultaneously coincides with rising individual privacy concerns. Due to institutional and state legal disclosure requirements, and the nature of NIL contract terms, athletes should be concerned with how their personal and private information is being protected when engaging in NIL opportunities. To become educated about available privacy rights when utilizing their NIL for profit, collegiate athletes should understand past examples of collegiate athletics privacy issues and how the Family Educational Rights and Privacy Act (FERPA) can offer them specific protections.

III. APPLICABLE PRIVACY LAW AND CONCERNS

A. State and Institution Specific NIL Law Disclosure Requirements

As mentioned earlier, states have developed specific NIL laws for their institutions to employ. Almost all states which have passed NIL legislation have adopted some sort of disclosure policy not only to vet business deals student-athletes seek to acquire, but also to monitor and confirm an athlete's engagement does not violate NCAA or institution-specific rules. Recall California's Fair Pay to Play Act, which states an athlete "shall disclose the contract to an official of the institution…"[83] Similarly, Florida's Intercollegiate Athlete Compensation and Rights Act states an athlete "…who enters into a contract for compensation for the use of her or his name, image, or likeness shall disclose the contract to the postsecondary educational

[83] Intercollegiate Athlete Compensation and Rights Act, Fla. Stat. § 1006.74(e)(2).

institution at which she or he is enrolled…"[84] To be exact, only two states of the 29 which have passed NIL law do not require athletes to disclose their NIL contracts to their institutions.[85]

Depending on the extent of a state's NIL law, schools may develop their own NIL disclosure policies to which student-athletes must adhere. For example, Villanova University's policy states that student-athletes who wish to utilize their NIL for profit "*must* disclose the contract at least seven days prior to the execution of the contract to the athletic department for a compliance review."[86] Similarly, student athletes at the University of Kentucky "*must* disclose any proposed contract or agreement between a student-athlete and third party 7 days prior to the proposed activity to the Athletics Compliance Office."[87] Conversely, Stanford University athletes are required to disclose any NIL agreements to the university but are only "*encouraged* to provide any draft agreement and/or final agreement to Stanford…" and are "*encouraged* to refrain from finalizing agreements until after Stanford has completed its review for conflicts."[88] Clearly, policy language may differ between schools and impose different requirements onto a school's athletes.

In addition to their school's disclosure policies, and when conducting personal business outside of school or team activity, a student-athlete may want to withhold certain information from their school's compliance officials and potential NIL suitors. If a contract, for example a deal asking for social media promotion, asks to receive an athlete's personal or social media account information, the athlete may be weary to divulge their account's username or password,

---

[84] *Id*. § 1006.74(2)(i).
[85] *See* Di Blasio, *supra* note 78.
[86] VILLANOVA UNIVERSITY ATHLETICS COMPLIANCE OFFICE, *Policy on Name, Image, and Likeness (NIL)*, (Sep. 8, 2021), https://villanova.com/documents/2021/9/9/VU_NIL_POLICY_revised_9_8_21.pdf.
[87] UNIVERSITY OF KENTUCKY ATHLETICS DEPARTMENT, *UK Athletics Name, Image, & Likeness Policy for Student-Athletes*, (Jun. 30, 2021), https://ukathletics.com/documents/2021/6/30/UK_Athletics_NIL_Policy_for_SAs_6_30_21.pdf.
[88] STANFORD ATHLETICS, *Stanford Athletics Name, Image, and Likeness Policy*, (Sep. 1, 2021), https://gostanford.com/news/2021/9/1/stanford-athletics-name-image-likeness-policy.aspx.

or relinquish control of their account to their school or company for various reasons. Another caution for athletes to be aware of is relinquishing NIL rights in perpetuity. Doing so may irrevocably allow third parties to use an athlete's NIL forever. Instead, athletes should validate their NIL agreements to include defined and set term lengths.[89] Some data created in the NIL marketing process might be subject to a social media platform's policy but extracting that information and processing an athlete's personal data for other third-party marketing purposes may not be something an athlete consents to.[90] Examples of past privacy issues should give a clear warning and idea of potential NIL issues for student-athletes to avoid.

B. Past Athlete Privacy Concerns

Past examples of athlete data collection have sparked controversy. Although not as a product of NIL agreements, but similar to possible NIL privacy concerns, collecting collegiate athlete data for sports performance purposes has been seen as unethical. In 2016, the University of Michigan signed an exclusive apparel contract with Nike worth $170 million.[91] As part of the agreement, Nike was allowed to collect personal data from Michigan athletes through certain wearable technology devices such as heart rate monitors, GPS trackers, and other instruments that logged biological activities.[92] Although contracts between institutions and apparel brands are extremely common in collegiate sports, the Nike agreement with Michigan drew harsh criticism as the agreement gave Nike broad rights to "utilize" the information it collected.[93] Privacy

---

[89] Alexander Burridge, *Contract Basics for Every Student-Athlete NIL Deal*, JDSUPRA (Aug. 18, 2021), https://www.jdsupra.com/legalnews/contract-basics-for-every-student-3793825/.

[90] Hester Bates, *The Legal Issues That Influencers and Marketers Must Get Right*, THE DRUM: OPEN MIC (Feb. 28, 2020), https://www.thedrum.com/profile/influencer/news/the-legal-issues-that-influencers-and-marketers-must-get-right.

[91] Marc Tracy, *With Wearable Tech Deals, New Player Data Is Up for Grabs*, N.Y. TIMES, Sep. 9, 2016, https://www.nytimes.com/2016/09/11/sports/ncaafootball/wearable-technology-nike-privacy-college-football.html.

[92] *Id.*

[93] *Id.*

experts who analyzed the case stated that even though Nike's data collection process had to follow "all applicable laws", it was still a possibility that the meta data collected, if matched to specific athletes, could reveal intimate details about the athlete's daily activity and location.[94] Not only were the effects of the contract possibly detrimental to athlete privacy, the university itself was questioned about whether it fully understood the terms or ramifications of the deal.[95] Relating these issues to the current NIL space, it could be possible that contracts between third parties and universities that offer student-athletes benefits for using their NIL may also allow those third parties to utilize athlete data for their own purposes. Similar to the University of Michigan agreement with Nike, these deals are also subject to the university's due diligence in protecting their athletes' privacy rights. Conversely, as part of an individual NIL agreement, companies may wish to receive or gain access to an athlete's data and information to utilize on their own accord.

Closely related to utilizing athlete personal data without consent is the tort of appropriation. As described in the Restatement of Torts, "one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."[96] Analyzing the appropriation tort's definition in the scope of NIL interactions, it could be reasoned that an athlete could sue for appropriation if a third-party utilized the athlete's name, image, or likeness to advertise the defendant's business or product, or for some similar commercial purpose.[97] However, the tort's application is not limited to commercial purposes so long as a defendant makes use of the plaintiff's name or likeness for his own purposes and

[94] *Id.*
[95] *Id.*
[96] Restatement (Second) of Torts § Section 652(c) (1977).
[97] *Id.*

benefit.[98] Appropriation could be applicable if a company agreed or did not agree to use an athlete's NIL for a specific purpose, but then used the athlete's NIL outside of the agreed upon use or without the athlete's approval entirely. For example, in *Jordan v. Dominick's Finer Foods*, 115 F. Supp. 3d 950, (N.D. Ill. 2015)[99], famous NBA and Chicago Bulls star Michael Jordan sued a local Chicago supermarket for infringing his personal intellectual property and image. Jordan claimed the supermarket misappropriated his image after the supermarket created a promotional ad for a steak product featuring Jordan's iconic "jumpman" logo and the Bulls' red and black colors.[100] Dominick's had an established policy requiring that all uses of others' intellectual property be submitted in advance to its legal department, however since the company did not receive Jordan's express permission to use or mimic his personal logo, the court ruled that the supermarket infringed on Jordan's highly lucrative image.

To draw a current parallel, recall Olivia Dunne's exclusive partnership with women's activewear brand Vuori. Hypothetically, Dunne could have contracted with Vuori to only post several endorsements on her various social media channels, however, if Vuori was to gain access to Dunne's posts and use a photograph of Dunne on their website, Vuori may be liable for appropriating Dunne's NIL. In this scenario, not only was Dunne's personal privacy violated when her photographs were usurped by the company, but Vuori may have also committed a privacy tort against Dunne causing further distress. Although this scenario is just imaginary, athletes engaging in NIL interactions should be considerate of a third party's motives when

[98] *Id*.
[99] *Jordan v. Dominick's Finer Foods*, 115 F. Supp. 3d 950, (N.D. Ill. 2015).

[100] Frederick J. Sperling, *Famous Athlete Cases Offer Right Of Publicity Lessons*, SCHIFF HARDIN (Sep. 4, 2020), https://www.schiffhardin.com/insights/publications/2020/famous-athlete-cases-offer-right-of-publicity-lessons.

understanding a contract's terms and should be cautious to concede any rights to disclose information without consent.

C. Privacy Rights Awarded to Student-Athletes Under the Family Educational Rights and Privacy Act and Institutional Disclosure Policies

NCAA athletes, as students at post-secondary institutions, are able to enjoy the plethora of privacy rights awarded by the Family Educational Rights and Privacy Act (FERPA) (the Act). FERPA was signed into law in 1974, applies to every school that receives funding under an applicable program through the U.S. Department of Education, and governs the protection of student education records.[101] FERPA initially gives a child's parents' privacy rights with respect to education records but the rights transfer to the child once he or she turns 18 years old or attends a school past the high school level.[102] According to § 99.30, FERPA explicitly states that a "parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records…"[103] Under the Act, personally identifiable information (PII) includes but is not limited to:

> "The student's name; the name of the student's parent or other family members; the address of the student or student's family; a personal identifier, such as the student's social security number, student number, or biometric record; other indirect identifiers, such as the student's date of birth; other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to

[101] U.S. Dept. of Educ., *Family Educational Rights and Privacy Act (FERPA)*, https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html, (Aug. 25, 2021).
[102] *Id*.
[103] Family Educational Rights and Privacy, C.F.R. § 99 (1988) [hereinafter FERPA].

identify the student with reasonable certainty; and information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates."[104]

Additionally, education records are defined as records that are "directly related to a student or maintained by an educational agency or institution or by a party acting for the agency or institution"[105] but does not include "records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are made or maintained by a… professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity."[106]

Further, the written consent given by either a parent or an eligible student must "specify the records that may be disclosed; state the purpose of the disclosure; and identify the party or class of parties to whom the disclosure may be made."[107] However, a school may disclose PII from a student's education record without consent if the disclosure meets an exception.[108] One exception allows non-consented disclosures to organizations "conducting studies for, or on behalf of, educational agencies or institutions to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction."[109] Here, the institution may only disclose students' PII without consent if "the information is destroyed when no longer needed for the purposes for which the study was conducted…" and when the institution enters into an agreement with an organization that requires the organization to "use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in

[104] FERPA § 99.30.
[105] *Id.*
[106] *Id*.
[107] FERPA § 99.30.
[108] FERPA § 99.31 (a).
[109] FERPA § 99.31 (a)(6).

the written agreement."[110] If a third party requests access to a student's PII, the institution must record "the parties who requested or received personally identifiable information from the education records and the legitimate interests the parties had in requesting or obtaining the information."[111] But, an educational agency or institution may only disclose PII from an education record on the condition that "the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student."[112] Further, the officers, employees, and agents of the parties who receive the information may only use the information for the purposes for which the disclosure was made.[113]

Beyond knowing the different state NIL laws, institution specific policies, and applicable federal law that could interact with NIL engagements, collegiate athletes should be educated in the various levels of law and protections available for them to utilize. Moreover, knowing the scenarios for which FERPA could apply to potential NIL interactions could best serve college athletes seeking to protect their PII and any other valuable personal data. Should an athlete suspect their rights to be violated, the athlete may file a complaint with the Student Privacy Policy Office (SPPO) which serves within the U.S. Department of Education to protect student privacy.[114]

IV. ANALYSIS

A. How FERPA Intersects with NIL Agreements

As stated previously, many institutions require athletes to disclose terms of or entire NIL engagements to the institution's athletics compliance department for review. Given the various

[110] FERPA § 99.31(a)(6)(iii)(C)(2).
[111] FERPA § 99.32(a)(3)(ii).
[112] FERPA § 99.33(a)(1).
[113] FERPA § 99.33(a)(2).
[114] *File a Complaint*, U.S. DEPT. OF EDUC.: STUDENT PRIVACY POLICY OFFICE, https://studentprivacy.ed.gov/file-a-complaint., (last visited Dec. 10, 2021).

disclosure rights FERPA offers NCAA athletes, it is no question that certain PII may be subject to the law when disclosed to an athlete's institution as part of the approval process for NIL deals. Due to these disclosures, concerns may rise as to what institutions, and the greater public at large, should be allowed to know concerning college athlete NIL activity. Athletes may wish not only to protect their PII, but also preclude school officials to tally accrued NIL profit for recruiting purposes or hide an endorsement deal's financial terms from teammates to preserve team chemistry. According to legal and industry professionals, these disclosures could be considered education records under FERPA depending on the angle of interpretation.

LeRoy Rooker, a former director of the Department of Education's Family Policy Compliance Office, believes that NIL deals would fall within FERPA's scope of protection to student-athletes.[115] According to Rooker, "Once a copy of (an endorsement contract) is given to and maintained by the institution, it becomes an 'education record,' because the document fits that broad definition, and it doesn't fit under any of the exceptions."[116] Under FERPA, NIL deals could be considered to constitute education records if the documents are deemed to be "directly related to a student or maintained by an educational agency or institution."[117] However, some legal professionals interpret the law in a way that would produce a different outcome. Frank LoMonte, director of the University of Florida's Brechner Center for Freedom of Information, said that while schools may be inclined to claim a FERPA-related exemption for an athlete's NIL disclosure, they shouldn't be.[118] According to LoMonte, "FERPA has been interpreted to say that, if you hold a job that can only be held by virtue of being a student, like a graduate teaching

[115] Daniel Libit, *'Damn if I Know': College Athlete Pay Rules Clouded by Disclosure Limits*, SPORTICO (Jun. 2, 2021), https://www.sportico.com/leagues/college-sports/2021/ncaa-nil-disclosure-debate-1234631006/.
[116] *Id.*
[117] FERPA § 99.3.
[118] *See* Libit, *supra* note 115.

assistant, then your employment records are part of your federally protected 'education record." Therefore, records from jobs such as conducting NIL activities, which can only be held by student-athletes, would then be a part of a student's education records under FERPA. However, LoMonte further explained that he does not believe an NIL contract would be considered an education record under the law because "the position of an 'endorser' is not a position exclusively reserved for students."[119] LoMonte then pointed to professional athletes, social media influencers, and even working professionals such as doctors as examples of individuals who could be "endorsers".[120]

If an NIL contract is deemed an education record under FERPA, the athlete would be able to exercise their disclosure rights under section 99.30. But, in this scenario, an institution could still disclose an athlete's PII under section 99.32(a)(1) if the institution does not "disclose the information to any other party without the prior consent of the parent or eligible student."[121] Here, an athlete will likely see the most possible protection of their personally identifiable information when engaging in NIL opportunities. The athlete would be able to feel safe when complying with school disclosure mandates, and also feel comfortably protected should a third party request their PII to be released from the school. Under FERPA, without proper consent from the athlete, the institution would be barred from disclosing the athlete's PII to any requesting third party unless a glaring exception applied.

In the opposite scenario, if an athlete's NIL contract is not deemed to be an education record, the student's PII will not receive protection from disclosure under FERPA. To restate the law, education records do not include "records on a student who is 18 years of age or older, or is

[119] *Id*.
[120] *Id*.
[121] FERPA § 99.32(a)(1).

attending an institution of postsecondary education, that are made or maintained by a… professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity."[122] NCAA athletes, who are assumingly 18 years of age or older, may seek professional representation to navigate the NIL landscape. For example, Olivia Dunne has signed with WME Sports to be her exclusive NIL marketing agency.[123] Per their institution's NIL policy, not only do athletes have to disclose their relationship or intent to enter into a relationship with an agent or advisor, if they do choose to sign with professional representation, their future or current NIL agreement records may not fall under FERPA's definition of an education record. An NIL contract agreed upon between an athlete and a third party, but under the supervision or handling of a professional marketing or agency representative, may be akin to a "record on a student attending a postsecondary institution that is made or maintained by a professional acting in his or her professional capacity."[124] Therefore, if an athlete hires an NIL agent, or another professional who would be acting in their professional capacity when handling current or student records, that student may be at risk of losing certain disclosure and privacy rights under FERPA.

Although Rooker and LoMonte take different approaches to interpreting FERPA, LoMonte has noted that, "judges have typically sided with schools in public record disputes over the parameters of student or school official privacy."[125] However, there is record of courts interpreting FERPA in both directions when deciding what is and what is not an education record.

[122] FERPA § 99.3.
[123] *See* Dosh, *supra* note 52.
[124] FERPA § 99.3.
[125] *See* Libit, *supra* note 115.

In *BRV, Inc. v. Superior Court*, 143 Cal.App. 4th 742, (2006), the California Court of Appeals offered its opinion as to what records apply as education records under FERPA.[126] In *BRV*, the plaintiff sought publication of reports that analyzed allegations of sexual harassment and misconduct against female students by a school district's superintendent. The school district received 13 letters alleging the superintendent verbally abused students and sexually harassed female students. A private investigator then conducted 27 interviews of current and former students, and school district employees, and compiled summaries of those interviews.[127] The investigator then submitted the summaries as a lengthy report to the school district.[128] In agreement with the superintendent and upon his resignation, the school district agreed not to release any documents from the superintendent's personal file without his consent or as required by law.[129] When BRV, investigating the superintendent, requested the school district to deliver copies of the investigator's reports, the school district released other information about the superintendent but did not release the investigator's reports. The school district citied a FERPA exception defense as the investigator's reports on the superintendent contained his personally identifiable information.

In determining if the investigator's reports on the superintendent constituted education records under FERPA and thus granted the school district power to withhold the reports, the court explained that the statute's (FERPA) language, although certainly broad, "does not encompass every document that is related to a student and… is kept by the school in any fashion."[130] The court agreed with the Supreme Court's interpretation that the statute (FERPA)

[126] *BRV, Inc. v. Superior Court*, 143 Cal.App. 4th 742, (2006).
[127] *Id*. at 749.
[128] *Id*.
[129] *Id*.
[130] *Id*. at 754.

was directed at "institutional records maintained in the normal course of business by a single, central custodian of the school."[131] Examples of education records, according to the court, included registration forms, class schedules, grade transcripts, discipline reports, and the like.[132] The court ultimately decided that the investigator's reports did not fit inside the definition of education records under FERPA and prompted the disclosure of the reports for the purpose of the investigation.[133]

Considering LoMonte's remarks and the *BRV* court's opinion, it is possible courts may determine college athlete NIL agreements do not fall under FERPA's definition for education records. One could argue NIL agreements, akin to reports linked to sexual assault in schools, may not be considered records produced "in the normal course of business by a single, central custodian of the school" and are outside the scope of general academics-related documents such as the examples given by the California Court of Appeals in *BRV*. However, other cases interpret FERPA's definition of education records in the opposite way, taking a broader approach to the definition's language.

In *State ex rel. ESPN v. Ohio State Univ.*, 132 Ohio St.3d 212, (2012), popular sports media conglomerate ESPN requested information from Ohio State University (OSU) in relation to OSU football players' involvement in receiving illegal benefits in exchange for tattoos.[134] OSU denied the request for records citing FERPA as support.[135] ESPN then filed a writ of mandamus against OSU, arguing that FERPA is inapplicable to the records it requested and OCU must be compelled to release them.[136] The court declared that the statute's (FERPA) plain

[131] *Id*.
[132] *Id*.
[133] *Id.*
[134] *State ex rel. ESPN v. Ohio State Univ.*, 132 Ohio St.3d 212, (2012).
[135] *Id.* at 214.
[136] *Id.* at 214, 218.

language does not restrict the term "education records" to records related to "academic performance, financial aid, or scholastic performance."[137] The court emphasized that education records need only "contain information directly related to a student" and be "maintained by an educational agency or institution" or a person acting for the institution.[138] Taking the plain language approach, the records here, insofar as they contain information identifying student-athletes, are directly related to the students and fall under FERPA's definition for education records.[139] Ultimately, ESPN's request was denied and Ohio State properly withheld the student-athletes' identifying information. But, although the majority of the requested records were properly redacted before being provided to ESPN, ESPN was entitled under FERPA to access to redacted copies of some records that were completely withheld.[140]

Using a plain language approach, courts could also determine that collegiate athlete NIL agreements constitute education records and deserve privacy protection under FERPA. Broadly construed, so long as the records are directly related to students, FERPA protects disclosure of those documents unless consent is given. From a plain language approach, since NIL agreements are centered on college athletes' names, images, and likenesses, it would make sense for those contracts to deserve protection as education records even if the engagements themselves are viewed as "nonacademic in nature."[141] However, although student-athletes may be warranted protection under FERPA, athletes should still be cautious of engagements or third parties that may infringe on their rights.

[137] *Id*. at 218.
[138] *Id*.
[139] *Id.* at 219.
[140] *Id*. at 220.
[141] *Id.* at 219.

B. Examples of NIL Activity That May Infringe Athletes' Privacy

College athletes engaging in NIL opportunities are finding various ways to market themselves. Typical endorsement or promotional contracts with brands and large companies see the majority of media coverage and attention, but athletes are also engaging with fans and the greater public in other ways to extend their personal reach as far as possible. One third party looking to capitalize on the NIL space is video recording app Cameo. Cameo allows creators to record personalized video messages and send those messages to users for profit. Creators can set their own price and can record videos as short as 30 seconds or up to the site's 3 minute maximum. One notable name that has turned to Cameo for NIL engagements is University of Oklahoma football quarterback Spencer Rattler.[142] Projected to be a high NFL draft pick in 2022, Rattler has been the subject of many NIL deals and was the betting favorite to win the Heisman Trophy at the start of the 2021 college football season.[143] Rattler, who boasts nearly 400,000 Instagram followers, charges $125 for an individual to receive a video while companies or brands seeking an endorsement on Cameo are asked to pay upwards of $2,500 for a video from the Sooners' quarterback.[144] While Rattler is able to profit from recording videos of himself for fans or others, he might not be aware of the personal information, whether it be in video or print form, Cameo may be collecting from him.

According to its company privacy policy, Cameo collects information from users and creators directly and automatically when they visit the site, and some of this information may be considered "personal information" under various applicable laws.[145] More specifically, Cameo

[142] Justin Martinez, *'The time is now': How OU quarterback Spencer Rattler is making the most of NIL opportunity*, THE OKLAHOMAN (Jul. 22, 2021, 9:46 AM), https://www.oklahoman.com/story/sports/2021/07/01/spencer-rattler-ou-quarterback-joins-cameo-nil-era-begins/7835273002/.
[143] *Id*.
[144] *Id*.
[145] CAMEO, *Privacy Policy* (Aug. 17, 2021), https://www.cameo.com/privacy#section2.

expressly states that the company "collects your name and email address and the other information that you provide, such as a telephone number, when you register or login, update, or add information or content to your account."[146] Cameo also collects "certain information relating to any social media platform account or Apple ID that you use to login to or link to your Cameo account (such as your username, bio, and number of followers).[147] Further, Cameo also stores payment information such as credit or debit card details.[148] When creating content on the app, Cameo collects submitted content such as "videos, reviews, photos, emails, texts, social media posts, or other communication", and as a result, "others may access it, use it, and share it."[149] In addition to the information the company collects from its users and creators, Cameo also may share that information with third party business partners.[150] In relation to NIL activity, Cameo may share videos from creators who are verified NCAA athletes and user information about a purchase (including the user's name, the date and price of a request, and the date the request was fulfilled) to an athlete's NCAA member institution.[151] Aside from its data collection practices, Cameo also tracks its users through usage technologies. The company may actively or passively collect information such as the date and time of a user's visit to the site and the precise location data from a user's device when using the app.[152]

NCAA athletes, from both a user and a creator's perspective, must be extremely cautious when engaging with Cameo; the plethora of information Cameo collects is astounding and the company's privacy policy is laden with concerns. An athlete who chooses to sign up as a Cameo creator may unknowingly be submitting their personal information to an exceptionally large

[146] *Id*.
[147] *Id*.
[148] *Id*.
[149] *Id.*
[150] *Id*.
[151] *Id*.
[152] *Id*.

audit by the company in which the only consideration offered to the athlete is the opportunity to better connect with fans and receive payments for the videos the athlete records. Although the opportunity to profit from one's NIL through Cameo may be easier and more accessible than seeking an endorsement deal, athletes should weigh the benefits of their choice against the possible negatives that may evolve from it. Further, even if an athlete decided to create content though Cameo, it is unknown if the athlete's content could be protected under FERPA. If the athlete signs up as an individual creator on their own accord, it is unlikely any video created would be subject to the statute. Unless a university itself created a Cameo account and then allowed its athletes to record videos from the school-owned account, videos created by individual athletes outside of university control would likely not be considered records "directly related to a student or maintained by an educational agency."[153] The university would likely need to be directly involved with the creation or maintenance of the videos in order for the content to be considered education records under FERPA and worthy of the disclosure and privacy protections.

Another NIL business sector that may infringe upon college athletes' privacy rights is the video game industry. In 2009, a former college quarterback brought suit against the NCAA, video game publisher EA Sports, and the College Licensing Company alleging the parties infringed student athletes' publicity rights by using the athletes' names and likenesses in the popular EA Sports *NCAA Football* video game franchise.[154] In *Keller v. Electronic Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013)., the athletes argued that playable characters in the video games wore the same numbers as the athletes in real life, exhibited extremely similar physical appearances to

[153] FERPA § 99.3.
[154] *Keller v. Electronic Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013).

the student-athletes, and displayed the athletes' actual age, height, and weight information.[155] EA Sports eventually discontinued the video game franchise in 2013, but the video game developer is rumored to rerelease the franchise in 2023 as a result of the new NCAA NIL policy.[156] EA Sports is again working with the College Licensing Company to obtain licensing from more than 100 universities to use official logos, uniform designs, mascots, school-owned band recordings, and stadium architecture in the game.[157] Now, since college athletes are able to profit from their NIL, it is possible EA Sports may request schools to release information on their school's football players to be used in the game.

The return of the beloved game franchise has been well received from a large portion of sports media and NCAA athletes themselves, as student-athletes are excited not only to potentially receive compensation for offering their name, image, and likeness for the game, but also simply because they get to be represented and portrayed in a popular video game series. Although the prospect of playing EA Sports *NCAA Football* using one's own school and potentially controlling oneself in a video game does seem enticing, athletes should still consider the tradeoff of leveraging their NIL for profit in this scenario. It is likely EA Sports will want to receive official headshot pictures of athletes to use for player profiles within the game and could include other information such as an athlete's age, height, weight, and possibly birthplace or hometown. Popularity and notoriety are sure to be the fruits of such an engagement but providing such personal information may not be worth the reward for some athletes. Upon a possible request by EA Sports to NCAA institutions to disclose athlete PII to use within their games,

---

[155] Leah M. Chamberlin, Note, *Student Athletes and the Deprivation of Rights of Privacy and Publicity - Are Fantasy Sports Leagues Infringing Upon the Rights of College Athletes? If So, What Constitutes a Viable Solution?*, 88 U. DET. MERCY L. REV. 555 (2011).
[156] Brian Mazique, *EA Sports College Football Release Date and Details Leaked: Report*, FORBES (Mar. 11, 2021, 6:18 PM), https://www.forbes.com/sites/brianmazique/2021/03/11/ea-sports-college-football-release-date-and-details-leaked-report/?sh=7bcccf7e5891.
[157] *Id*.

FERPA dictates that athletes will have the ability to refuse disclosure of PII to EA Sports unless consent is given. Athletes weary about having their personal image displayed in-game and stored in the developer's archives may refuse to disclose their picture but opt only to disclose the PII they are comfortable sharing in order to still be included in the game. As the new *NCAA College Football* game release date approaches, it will be interesting to witness how both institutions and collegiate football players interact with game developers seeking personal information and if athletes will be willing to disclose PII in order to become enshrined in video game history.

V. CONCLUSIONS

In this new age of college athletics, athletes are able to take advantage of the unprecedented opportunity to profit from their name, image, and likeness. However, aside from the NCAA interim NIL policy, state specific NIL laws, and institutional policies, there is no uniform federal legislation that handles collegiate athlete disclosures and protects personally identifiable information. New and introduced legislation surrounding college athletes' privacy rights should consider other foreign and domestic legislation for data collection and personal privacy and be focused heavily on NIL interactions to protect the disclosure, collection, distribution, and sale of athlete personal information subject to their knowledge or consent.

Although introduced legislation has attempted to tackle the issue of athlete disclosures, the NCAA and the federal government should look to other foreign laws for inspiration. The first example of major foreign legislation is the European Union's General Data Protection Regulation (GDPR). The GDPR lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data.[158] The GDPR defines personal data as "any information relating to an identified or

[158] 2016 O.J. (L 119) [hereinafter GDPR].

identifiable natural person", or for purposes of the regulation, a "data subject". Data collection, or "processing", is defined as "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, or disclosure, among other means."[159] Lastly, a "controller" within the regulation is defined as a "natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data."[160]

When personal data relating to the data subject is collected, the GDPR mandates a controller to provide the data subject with the purposes of the processing for which the personal data are intended[161], the legitimate interests pursued by the controller or by a third party[162], the recipients or categories of recipients of the personal data[163], and among others, the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing.[164] Additionally, where the controller intends to further process the personal data for a purpose other than that for which the personal data were collected, the controller shall provide the data subject prior to that further processing with information on that other purpose.[165] Further, and more related to NCAA NIL engagements, the GDPR states "where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning him or her for such marketing."[166]

[159] GDPR § 106.
[160] GDPR § 107.
[161] GDPR § 8.
[162] GDPR § 36.
[163] GDPR § 41.
[164] *Id.*
[165] *Id.*
[166] GDPR § 45.

Another foreign law that could provide insight into how the NCAA or federal legislation can approach athlete privacy in NIL engagements is India's Personal Data Protection Bill (PDPB) which was enacted in 2019. Among other goals, the PDPB provides individuals with personal data privacy protection, specifies the flow and usage of personal data, creates a relationship of trust between persons and entities processing the personal data, and protects the rights of individuals whose personal data are processed.[167] The PDPB immediately states that "no personal data shall be processed by any person, except for any specific, clear, and lawful purpose"[168] and "personal data shall be collected only to the extent that is necessary for the purposes of processing of such personal data."[169] Like the GDPR, when personal data is collected, the PDPB gives the data principal (the person who's information is being collected) "notice to the purposes for which the personal data is to be processed, the right of the data principal to withdraw his consent, the basis for such processing, and the source of such collection."[170] Further, the PDPB specifies that consent given by the data principal must be "free, informed, specific, clear, and capable of being withdrawn."[171] However, the PDPB does state that personal data can be processed without consent under certain exceptions. The exception most applicable to NCAA NIL engagements is if there is any public interest in processing data.[172] Under the PDPB, the data principle is awarded notable rights including a summary of processing activities undertaken with respect to the personal data of the data principal[173] and, where the data principal requests any personal data to be erased, all relevant parties to the processing of the data principal's information will be notified of the requested erasure

[167] Personal Data Protection Bill, 2019, Bill No. 373 of 2019, (Dec. 11, 2019), India. [hereinafter PDPB].
[168] PDPB § 2(4).
[169] PDPB § 2 (6).
[170] PDPB § 2(7)(1)(a-f).
[171] PDPB § 2(11)(2)(a-e).
[172] PDPB § 3(14)(1)(c).
[173] PDPB § 5(17)(1)(c).

"especially where such action may have an impact on the rights and interests of the data principal or on decisions made regarding them."[174]

New and introduced NIL legislation can follow ideas stemming from India's PDPB. Federal legislation could require schools to obtain consent that satisfies the five-part PDPB consent standard, allow college athletes to receive a summary of how their data was processed, and force relevant parties to erase athletes' PII when requested, especially in cases where using such data may have an impact on the interests or rights of the athlete. In action, when an athlete's data is collected, their affirmative disclosure and consent will be the product of a multi-step process, the athlete will be able to know exactly what is happening with their personal data, and especially in cases where an NIL engagement contravenes their rights or interests, athletes would feel safe requesting their information to be destroyed.

Implementing language similar to the GDPR and PDPB into proposed NIL legislation would present a substantial framework and a wide range of awarded protections to athletes. When personally identifiable information is collected, athletes would feel safe knowing an incredible amount of information can be provided to them including who is collecting their PII and where it is being sent, the purposes and summaries of the collection, and the right to request their information to be erased. More specifically, when personal information is collected for NIL marketing purposes, or if the data processing has an impact on an athlete's rights and interests, athletes would be able to object to the processing of their PII. The NCAA and the states who have yet to enact NIL legislation should feel inspired to view the GDPR and PDPB as examples that relate to the biggest issues facing NIL student-athlete privacy legal landscape. If and when the NCAA, or the rest of the nation's states, decide to implement their final NIL policies, college

[174] PDPB § 5(18)(4).

athletes' privacy rights must be weighed heavily in NIL interactions and the disclosure, collection, distribution, or sale of athlete personal information should be subject to a vast array of protections and statutory bars as inspired by other foreign legislation.