

MEMORANDUM

To: Dale Higer and Gabe Feldman
From: Harvey Perlman and Lane Kneedler
Date: January 29, 2021~~January 7, 2021~~
Re: Proposal for the College Student-Athlete Name, Image and Likeness Act

We make this proposal to operationalize a college student-athlete's interest in receiving compensation for the use of his or her name, image, and likeness ("NIL") within the context of the collegiate model of intercollegiate athletics. These student-athletes are not professional athletes who are largely driven to maximize their personal income. Within a collegiate model, an effort should be made to preserve the athletes' focus on an education and the values of commitment to a team and to the institution that supports them. Accepting that there are strong forces in favor of allowing student-athletes to benefit from the use of their NIL, our proposal attempts to authorize that benefit and yet preserve the values of the collegiate model.

A few, extraordinarily talented college student-athletes obviously will command significant sponsorship opportunities independent of the success of their team or the institution in which they are enrolled. Most college student-athletes, however, are likely to achieve sponsorships only from businesses and other activities that are associated with, or supportive of, the institution in which they are enrolled. We also should recognize that the quarterback generally will command more sponsorship interest than the offensive lineman, and yet the quarterback's success, and accordingly the sponsorship revenue he can command, are heavily dependent on his teammates and the passion of the institution's fan base. Thus, fairness to the student-athlete, on which the argument for NIL compensation is based, requires that these other factors be taken into account. Moreover, one of the goals of intercollegiate athletics is to instill the values of teamwork and the recognition that oftentimes one must sacrifice for the good of others in order to achieve success.

We certainly are concerned about fairness to the college student-athlete who is able to monetize his or her NIL, but we also are concerned about fairness to others— e.g., teammates of that student-athlete without whose hard work and sacrifice the student-athlete might not have been able to generate NIL revenue. Most intercollegiate sports are team sports and even those with individual scoring depend on a team culture of encouraging success. (One of us ran track in college, and although most events are individual events, there was a sense that all track athletes were part of a "team" and

pushed each other to excel, especially when who won a meet was determined by which “team” won the most points for individual “team” member performances.) We should recognize this “team” concept in the distribution of NIL revenues, not only for its educational value but to assure that institutions are able to manage team dynamics. It is one thing to create a team culture when some players are more visible than others; it is quite another challenge if one or more of the team is enjoying significant income from the team’s effort.

We believe the institution, with its investment in coaching, facilities, scholarships, and other support creates an allegiance by fans that drives sponsorship revenue. We do not argue that the institution should share in a student-athlete’s NIL revenue, other than the benefits that flow from producing and promoting the games/events themselves. We do argue, however, that it would be appropriate to allow student-athletes in less visible sports, with less sponsorship opportunities, to share in the revenue generated by more visible athletes and teams. We recognize the argument that revenue sports already underwrite the less visible sports. It also is true, however, that the institutional support, such as scholarships, travel, etc., for non-revenue sports is far less generous than that for revenue sports.

Putting these thoughts and concerns together, and trying to find a solution to them, has led us to make the following proposal for inclusion in our draft. We formally offer it for committee consideration. We recognize that many details still may need to be addressed to make this proposal workable. Obviously, the amounts and percentages in this draft are our initial ideas but they all are subject to committee discussion and adjustment. But we strongly urge the committee to adopt the central core of our proposal.

Another concern expressed by many familiar with student-athletes is that a sudden infusion of wealth, generated from NIL activities, may be sufficiently disruptive or detrimental to the athlete’s well-being. We all are familiar with the stories of athletes who have not been able to handle their sudden income when turning professional. This problem we fear will be intensified for college student-athletes, some of whom may only be a year out of high school and most of whom will not be of adult age. We have added a bracketed section, Section 103, for the committee’s consideration although the rest of the proposal stands independently.

The Proposal

[add to current “Definitions section:]

“NIL compensation” or “NIL compensation payment” means a payment made by a third party for the use of the NIL rights of a college student-athlete.

Section [101]. NIL Trust

(a) Each institution in this state that sponsors an intercollegiate athletic program shall establish an NIL Trust for the purpose of receiving any NIL compensation payment to its college student-athletes. The Trust:

(1) May be administered by the institution or by a person that is not affiliated with the institution and is experienced in trust administration.

(2) Shall be administered in accordance with the laws of this state.

(3) May charge a reasonable trust administration fee for managing payments to and distributions from the NIL Trust that is no greater than such fees normally charged by private sector trust companies that are in the vicinity of, and are not affiliated with, the institution.

(b) The institution shall appoint a student athlete advisory committee, consisting of student-athletes representing revenue-producing and non-revenue intercollegiate sports programs at the institution, with the authority to advise and monitor the administration of the NIL Trust.

Section [102]. NIL Compensation

(a) Each contract for the licensing of NIL rights by a college student-athlete shall provide that any NIL compensation paid for the use of that student-athlete's NIL rights shall be payable to the NIL Trust at the Institution in which that student-athlete is enrolled.

(b) Upon receipt of any NIL compensation generated by a student-athlete, the NIL Trust shall within a reasonable time pay any fees owed by the student-athlete to a professional service provider related to that student-athlete's NIL activity.

(c) The NIL Trust shall allocate the remaining NIL compensation generated by a student-athlete during any calendar year in accordance with the following priority:

(1) The first up to \$5,000 earned during each calendar year to the student-athlete who generated the NIL compensation.

(2) Any remaining NIL compensation in excess of the \$5000 during each calendar year as follows:

(i) Fifty percent to the student-athlete who generated the NIL compensation.

(ii) Thirty percent in equal amounts to each other student-athlete at that institution who was a member of that student-athlete's sports program during that calendar year.

(iii) Twenty percent in equal amounts to each other student-athlete who was a member of an intercollegiate athletic program at that institution during that calendar year.

(d) The NIL Trust may distribute NIL compensation in accordance with subsection (c) in periodic payments or in a lump sum provided that [, subject to Section [103] of this [act]], distributions shall be made within 12 months of receipt by the Trust.

(e) In no event shall any institution use any funds in the NIL Trust established pursuant to Section [101] of this [act] in any manner other than as provided in this Section and shall not use such funds as a substitute for scholarships, grants-in-aid, other financial aid, or funding that otherwise would be provided to a student-athlete by the institution or any affiliated foundation or person.

[Section [103]. Deferral of Income

Notwithstanding Section 102 of this [act] no student-athlete shall receive in NIL distributions more than \$5,000 per year. Any amount earned by a student-athlete in excess of that amount shall be held in the Trust, credited to the student athlete, and distributed to the student athlete within 30 days of his departure from the institution either by graduation, transfer, or exhaustion of eligibility.]

Section [104]. Characterization of Trust distributions

The distribution of NIL compensation payments to a college student-athlete, other than the college student-athlete who generated the NIL compensation, shall be considered to be a scholarship payment in excess of any scholarship awarded to the student-athlete by the institution. Such payment shall not be considered by any athletic association as violating any limitation on the number of scholarships or the amount of scholarships authorized by the association's rules.

Comment

This section may need careful examination by someone familiar with the income tax laws. Currently any amount of scholarship that exceeds tuition, room, and board, is taxable to the student athlete. For example, the amount that increases a scholarship to "cost of attendance" is taxable. We assume that the student-athlete who generates the NIL compensation, regardless of his scholarship status, will be taxable on any payment of that compensation as earned income. It is not clear to us, however, whether NIL distributions paid to team members and other athletes would be earned income or scholarships. The purpose of this section is to characterize them as scholarships with the hope that they would remain free of tax to the extent they were paid to student-athletes who were not already at the full scholarship level.