

Maryland Joins Student-Athlete Compensation Debate with Jordan McNair Safe and Fair Play Act

BY BERNARD G. DENNIS, III AND GREGG E. CLIFTON

THIS JANUARY, JUST days after the National Collegiate Athletic Association (NCAA) indefinitely postponed a vote on implementing internal rules changes, legislators re-introduced a revised version of the Jordan McNair Safe and Fair Play Act (“the Act”)¹—a bipartisan bill that would make Maryland the seventh state to pass legislation permitting college athletes to profit off of their name, image, and likeness (“NIL”). Several NCAA rules generally prohibit athletes from being compensated for anything more than their cost of attendance at an institution, including prohibiting compensation for endorsements or retaining an agent to market their reputation.² Seeking to address student-athlete safety and well-being in the wake of the tragic death of Jordan McNair,³ the Act’s sponsors sought broad protections for student-athlete physical, mental, and financial health and well-being. This article reviews the statutes passed by other states and the Maryland legislation from introduction through enactment during the 2021 legislative session.



I. Recent State Laws Permitting Student-Athlete Name, Image, and Likeness Compensation

A. California acts first

In September 2019, California amended its Student Athlete Bill of Rights,⁴ to permit student-athletes to market their NIL rights and obtain representation regarding their athletics participation.^{5,6} California became the first state to challenge the NCAA bylaws.

The California law requires that agents be licensed by the state and comply with the federal Sports Agent Responsibility and Trust Act (SPARTA), 15 U.S.C. § 7801, *et seq.*⁷ No organization may prohibit participation due to NIL compensation.⁸ Schools cannot revoke a scholarship because of NIL compensation or representation.⁹ Organizations are prohibited from penalizing schools due to student-athlete NIL compensation.¹⁰

However, California does not permit boundless compensation. Schools are prohibited from compensating student-athletes and prospective student-athletes for their NIL.¹¹ Additionally, the student-athlete cannot enter into a contract that conflicts with a school’s

contract and must disclose any NIL contract.¹² After January 1, 2020, schools cannot contract or modify existing contracts which prohibit a student-athlete’s NIL compensation outside official team activities.¹³ Aware of the potential disruption to college athletics, California delayed the law’s effectiveness until 2023.¹⁴

B. Florida and Colorado follow in early 2020

In March 2020, Florida enacted its own statute.¹⁵ Florida student-athletes may receive fair market value for their NIL from “a third party unaffiliated with the” school and permits agents solely to market NIL rights.¹⁶ Similar to California, agents and attorneys must be licensed by the state.¹⁷ Schools cannot unduly restrict compensation and cannot alter scholarships or eligibility due to compensation.¹⁸

Like California, a student-athlete must disclose any contract and cannot conflict with a school’s contract.¹⁹ As new provision, NIL contracts cannot be longer than the student-athlete’s collegiate participation.²⁰ Also new, schools must provide financial and

¹ A prior version of the Act died in committee during the 2020 legislative session. See S. SB518, 2020 Leg., 441st Sess., First Reading 9-11 (Jan. 30, 2020), <https://mgaleg.maryland.gov/2020RS/bills/sb/sb0518f.pdf>.

² See 2020-21 NCAA Division I Manual, Bylaws 12.1.2(g) (losing amateur status for agent contract); 12.1.2.1.6 (prohibiting reputation benefits); 12.3.1 (prohibiting agent contract to market reputation); 12.4.1.1 (prohibiting athletic reputation compensation); 12.4.4 (prohibiting using NIL to promote a student-athlete’s own business); 12.5.2.1-2 (prohibiting student-athletes from promoting commercial products); 15.2.7 (assessing employment because of athletic reputation against scholarship limits).

³ In 2018, as a member of the University of Maryland football team, McNair collapsed after an offseason workout and died soon after. McNair’s death led to investigations into the institution. See Report to the University System of Maryland of an Independent Investigation of the University of Maryland Football Program (Oct. 23, 2018), <https://htv-prod-media.s3.amazonaws.com/files/report-to-usm-independent-investigation-umd-football-10-23-2018-1540848730.pdf>.

⁴ Cal. Ed. Code §§ 67450, *et seq.*

⁵ See Cal. Ed. Code § 67456.

⁶ Gregg E. Clifton, *The California Legislature Has Spoken-Will Governor Newsom Make Senate Bill 206 Law?* Collegiate & Professional Sports Law Blog (Sept. 12, 2019), <https://www.collegeandprosportslaw.com/amateur-sports/the-california-legislation-has-spoken-will-governor-newsom-make-senate-bill-206-law/>.

⁷ § 67456(c).

⁸ § 67456(a).

⁹ § 67456(d).

¹⁰ § 67456(a)(3)

¹¹ § 67456(b)

¹² § 67456(e)

¹³ § 67456(f)

¹⁴ § 67456(h).

¹⁵ Fla. Stat. § 1006.74

¹⁶ § 1006.74(2)(a), (d)

¹⁷ § 1006.74(d)

¹⁸ § 1006.74(2)(b).

¹⁹ § 1006.74(h)-(i)

²⁰ § 1006.74(j)

life skills workshops.²¹ Florida put significant pressure on the NCAA to act by implementing its law July 1, 2021.²²

Also in March, Colorado approved NIL compensation and agents for NIL rights.²³ Neither schools nor athletic conferences can prohibit compensation or prevent participation due to compensation.²⁴ Agents representing student-athletes must be licensed attorneys.²⁵

As in California and Florida, student-athletes must disclose any contract and cannot conflict with their school.²⁶ Disclosures must be made the earlier of 72 hours after entering into the contract or before the next event.²⁷ Colorado's statute is not effective until 2023.²⁸

C. Nebraska, New Jersey, and Michigan add new wrinkles to NIL statutes

In July 2020, Nebraska passed the Nebraska Fair Pay to Play Act.²⁹ Nebraska permits student-athletes to obtain representation and NIL compensation without penalty.³⁰ Contracts cannot conflict with team contracts, and teams cannot prohibit compensation outside official team activities.³¹ Nebraska



Student-athletes must disclose contracts in writing but can keep them confidential.

also prohibits endorsements during official team activities.³² Student-athletes must disclose contracts in writing but can keep them confidential.³³

Nebraska also establishes a civil cause of action for actual damages and attorneys' fees against non-compliant schools.³⁴ Nebraska's statute is effective July 1, 2023 or sooner if a school chooses.³⁵ Once in effect, no new contract provision can conflict with the statute.³⁶

In September 2020, New Jersey enacted the New Jersey Fair Play Act.³⁷ Similar to other states, New Jersey permits NIL compensation and representation.³⁸ However, New Jersey prohibits student-athletes from endorsing specific industries and products.³⁹ Attorneys must be New Jersey licensed, and agents must comply with SPARTA.⁴⁰

New Jersey requires school contracts to compensate student-athletes if their NIL is used for marketing.⁴¹ New Jersey has the furthest future applicable date—2026.⁴²

In January, Michigan enacted its own NIL

compensation laws.⁴³ Like other states, Michigan permits NIL compensation and representation without penalty.⁴⁴ Agents must be Michigan licensed.⁴⁵

Michigan prohibits conflicting apparel contracts.⁴⁶ Michigan also requires disclosure of agreements prior to finalizing to allow the school to review, and the student-athlete to renegotiate, any conflicts.⁴⁷ Michigan also clarifies that student-athletes are not authorized to use the intellectual property of Michigan schools, conferences, and other organizations.⁴⁸

Michigan also recognized federal and NCAA efforts to enact country-wide standards.⁴⁹ Michigan requires reporting about NCAA and federal progress.⁵⁰ Michigan delays its statute's effective date to December 21, 2022 and requires each institution to report on its preparedness to implement the law six-months before.⁵¹

II. Maryland's Approach

A. The introduced bill

As initially introduced, the Act ambitiously addressed not only NIL rights but further

student-athlete protections including scholarships, transferring, misconduct protections, and healthcare.⁵² Cross-filed in the house and senate, Delegate Brooke E. Lierman (Baltimore City) and Senators Justin Ready (Carroll County) and Chris West (Baltimore County) introduced the Act.

Regarding NIL rights, the Act permits student-athletes to receive NIL compensation and engage an agent or attorney without limitation to eligibility or scholarships.⁵³ Any representative must either be a licensed Maryland attorney or an agent under the Maryland Uniform Athlete Agents Act.⁵⁴ Agents must also comply with SPARTA.⁵⁵ NIL contracts must be disclosed and cannot conflict with a school, provided a school's contract does not restrict NIL compensation outside official team activities.⁵⁶ Like Florida, the Act's sponsors proposed implementing these provisions by July 1, 2021.⁵⁷

Beyond NIL compensation, the Act requires Maryland schools to issue athletic or

²¹ § 1006.74(k).

²² See § 1006.74.

²³ C.R.S. 23-16-301.

²⁴ 23-16301(2).

²⁵ 23-16301(4).

²⁶ 23-16301(3).

²⁷ *Id.*

²⁸ C.R.S. 23-16-301.

²⁹ R.R.S. Neb. §§ 48-3601, *et seq.*

³⁰ § 48-3603; §48-3606.

³¹ § 48-3605.

³² §48-3605(1)(a).

³³ § 48-3604.

³⁴ § 48-3608.

³⁵ § 48-3609.

³⁶ § 48-3607.

³⁷ Gregg E. Clifton and Nicholas A. Plinio, *New Jersey Grants Name, Image, Likeness Rights to Collegiate Student-Athletes*, Collegiate & Professional Sports Blog (Sept. 15, 2020) <https://www.collegeandprosportslaw.com/uncategorized/new-jersey-grants-name-image-likeness-rights-to-collegiate-student-athletes/>.

³⁸ N.J. Stat. § 18A:3B-87(a).

³⁹ § 18A:3b-87(b).

⁴⁰ § 18A:3B-87(a)(3).

⁴¹ § 18A:3B-89(d).

⁴² 2020 N.J. ALS 83 § 5 ("This act shall take effect immediately and shall first be applicable in the fifth academic year following the date of enactment.") (enacted Sept. 14, 2020).

⁴³ Gregg E. Clifton, *UPDATE: Michigan Joins Growing Number of States Granting Name, Image, Likeness Rights to Collegiate Student-Athletes*, Collegiate and Professional Sports Blog (Jan. 1, 2021) <https://www.collegeandprosportslaw.com/collegiate-sports/update-michigan-joins-growing-number-of-states-granting-name-image-likeness-rights-to-collegiate-student-athletes/>.

⁴⁴ M.C.L.S. §§ 390.1731-1732; 390.1334-35.

⁴⁵ § 390.1735(3).

⁴⁶ § 390.1736.

⁴⁷ § 390.1737.

⁴⁸ § 390.1740(2).

⁴⁹ For a broader discussion of the several federal proposals introduced in the U.S. Senate, see Nicholas A. Plinio and Gregg E. Clifton, *Student-Athlete Name, Image, and Likeness Rights: What to Expect in 2021 and Beyond*, New Jersey Lawyer 14-18 (No. 328 Feb. 2021).

⁵⁰ § 390.1739(1)(a)-(b).

⁵¹ § 390.1741; § 390.1739(1)(c).

⁵² See Caroline L. Boice, Public Institutions of Higher Education — Student Athletes (Jordan McNair Safe and Fair Play Act, HB125 Fiscal and Policy Note, Dep't. of Legislative Servs. (Jan. 25, 2021) https://mgaleg.maryland.gov/2021RS/notes/bil_0005/hb0125.pdf.

⁵³ H.D. HB125, 2021 Leg., 442nd Sess. First Reading 9-10 (Jan. 13, 2021) <https://mgaleg.maryland.gov/2021RS/bills/hb/hb0125f.pdf>; S. SB439, 2021 Leg., 442nd Sess., First Reading 9-10 (Jan. 10, 2021) <https://mgaleg.maryland.gov/2021RS/bills/sb/sb0439f.pdf>.

⁵⁴ *Id.* at 10.

⁵⁵ *Id.*

⁵⁶ *Id.* at 10-11.

⁵⁷ *Id.* at 11.

academic scholarships to all student athletes no shorter than five years or until achieving an undergraduate degree, unless revoked for cause.⁵⁸ The scholarship protections extend to incapacitating injuries related to competition or even exhaustion of eligibility.⁵⁹ Additionally, schools must provide treatment or insurance for two-years to injured student-athletes.⁶⁰ Schools are also prohibited from impeding a student-athlete's desire to transfer.⁶¹

Like Florida, the Act requires schools to provide financial and life skills workshops.⁶² Further, schools must implement guidelines regarding serious sports-related conditions; exercise and supervision guidelines for student-athletes with potentially life-threatening health conditions; return-to-play protocols for injured student-athletes; and guidelines to prevent sexual misconduct against student-athletes.⁶³ Also, athletic directors may be suspended for three years if they fail to bring and keep their institutions in compliance with Title IX of the Federal Education Amendments of 1972.⁶⁴ Schools must provide student-athletes notice of their rights Title IX rights and post notices in the athletic department.⁶⁵

B. Committee debate and objections

During committee hearings, the Act received support from local, state, and national organizations including the Prince George's County Executive,⁶⁶ the Jordan McNair Foundation Inc.,⁶⁷ the American Federation of State, County and Municipal Employees Union,⁶⁸ and the National College Players Association—an organization that co-sponsored California's law.⁶⁹

The University System of Maryland Board of Regents (USM) opposed the proposed legislation.⁷⁰ Specifically regarding the NIL provisions, USM raised concerns about Maryland potentially conflicting with NCAA rule changes and federal legislation.⁷¹ USM expressed worries that NIL compensation would pit institutions in competition with student-athletes for sponsorships.⁷² USM also worried about the financial burden the scholarship and healthcare guarantees would place on individual institutions.⁷³

Representatives from two Maryland schools also noted their objections. Brian Barrio, Director of Athletics, Physical Education,

and Recreation at the University of Maryland, Baltimore County, expressed concern about Maryland engaging in the “patchwork” approach of single-state legislation to address a national problem and the potential harm to UMBC student-athlete eligibility.⁷⁴ Tuajuanda C. Jordan, President of St. Mary's College of Maryland, noted concerns about the costs and burdens of scholarship requirements on NCAA Division III institutions prohibited from providing athletic scholarships.⁷⁵

C. Enactment

After debate, both chambers passed revised bills.⁷⁶ As revised, the Act still requires institutions to implement student-athlete safety protocols and report any health and safety changes to the General Assembly.⁷⁷ The revisions struck the provisions ensuring scholarships and healthcare.⁷⁸

The revised bill also changed the NIL compensation provisions. The revisions permit student-athletes to advertise during team activities if pre-approved.⁷⁹ Although a student-athlete remains prohibited from entering into a conflicting NIL contract, the institution is no longer required to disclose the relevant conflicting contract provisions.⁸⁰ This change is a departure from other NIL statutes.

Like Michigan, other revisions make clear that NIL compensation is not authorization for use of an institution's intellectual property.⁸¹ The revisions delay the effective date of the NIL provisions until July 2023.⁸²

On May 18, Governor Larry Hogan signed the Act into law, adding Maryland to those states officially pressuring the NCAA for change.⁸³ The NCAA has not reset its vote on proposed NIL rule changes. On March 31, the United States Supreme Court heard oral arguments on challenges to the NCAA's compensation restrictions.⁸⁴ An opinion is expected in June. Given the current landscape, it is almost certain that student-athletes will soon be able to market their NIL rights. How soon and the details remain unclear. The Jordan McNair Safe and Fair Play Act ensures change for Maryland student-athletes will be sooner rather than later.

⁵⁸ *Id.* at 3-4.

⁵⁹ *Id.*

⁶⁰ *Id.* at 5.

⁶¹ *Id.*

⁶² *Id.* at 4-5.

⁶³ *Id.* at 6.

⁶⁴ *Id.* at 7.

⁶⁵ *Id.* at 7-8

⁶⁶ *Public Institutions of Higher Education – Student Athletes (Jordan McNair Safe and Fair Play Act): Hearing on HB125 Before H.D. Appropriations Comm.*, 442nd Sess. (Jan. 27, 2021) (statement of Ron Young, Prince George's Cnty. Intergovernmental Affairs Office), https://mgaleg.maryland.gov/cmte_testimony/2021/app/1h51B4XShnur9_e4lOjktkDFKZ18Z-MC8v.pdf.

⁶⁷ *Id.* (statement of Martin McNair, Founder The Jordan McNair Foundation), https://mgaleg.maryland.gov/cmte_testimony/2021/app/1OQXNtvRQyhpXWpKRSRsMEQFp62fwmJL.pdf.

⁶⁸ *Id.* (statement of Ramogi Huma, NCPA Executive Director), https://mgaleg.maryland.gov/cmte_testimony/2021/app/1ddSRhGc05LYX7OBkrOMfT3K8CVk8vXdxQ.pdf; *Public Institutions of Higher Education – Student Athletes (Jordan McNair Safe and Fair Play Act): Hearing on SB439 Before S. Educ., Health, & Envtl. Affairs Comm.*, 442nd Sess. (Feb. 25, 2021) (statement of Lance Kilpatrick, Political and Legislative Dir., AFSCME Md. Council 3), https://mgaleg.maryland.gov/cmte_testimony/2021/ehe/1v0yZbuYqhxizfXPAMTGTNjr_cq2kguzF.pdf.

⁶⁹ *Hearing on HB125*, (statement of Ramogi Huma, NCPA Executive Director), https://mgaleg.maryland.gov/cmte_testimony/2021/app/1ddSRhGc05LYX7OBkrOMfT3K8CVk8vXdxQ.pdf.

⁷⁰ *Id.* (statement of Robert Page, USM Assoc. Vice Chancellor for Fin. Affairs), https://mgaleg.maryland.gov/cmte_testimony/2021/app/1KWMSFzT6O0glSKDI4RqedjZ4AqrSblxq.pdf; *Hearing on SB439* (statement of Robert Page, USM Assoc. Vice Chancellor for Fin. Affairs), https://mgaleg.maryland.gov/cmte_testimony/2021/ehe/1u5sY2Co5SeAEChhvHh-pRUdw-N2lWnNB.pdf.

⁷¹ *Id.* at 1-2.

⁷² *Id.* at 3.

⁷³ *Id.* at 2-3.

⁷⁴ *Hearing on HB125* (statement of Brian Barrio, UMBC Director of Athletics), https://mgaleg.maryland.gov/cmte_testimony/2021/app/658_01272021_12311-537.pdf.

⁷⁵ *Hearing on SB439* (statement of Tuajuanda C. Jordan, PhD, President St. Mary's College of Maryland), https://mgaleg.maryland.gov/cmte_testimony/2021/app/1ng3a56GRjcwj5BN-Ea4miZ1ddOMBLmbDL.pdf.

⁷⁶ See H.D. HB125, 2021 Leg., 442nd Sess. Third Reading (Feb. 26, 2021), <https://mgaleg.maryland.gov/2021RS/bills/hb/hb0125t.pdf>; S. SB439, 2021 Leg., 442nd Sess., Third Reading (Mar. 12, 2021) <https://mgaleg.maryland.gov/2021RS/bills/sb/sb0439t.pdf>.

⁷⁷ *Id.* at 9-10.

⁷⁸ *Id.*

⁷⁹ *Id.* at 12.

⁸⁰ *Id.* at 12-13.

⁸¹ *Id.* at 13.

⁸² *Id.*

⁸³ State legislators in Alabama, Arizona, Arkansas, Georgia, Louisiana, Mississippi, Missouri, Montana, New Mexico, South Carolina, Tennessee, and Texas also passed NIL bills during their respective 2021 legislative sessions. See Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation* (Apr. 21, 2021), <https://opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/>.

⁸⁴ See *Nat'l Collegiate Athletic Assoc. v. Alston*, No. 20-512, Docket, <https://www.supremecourt.gov/docket/docketfiles/html/public/20-512.html>.

⁸⁵ For further discussion of the *Alston* case, see Gregg E. Clifton and John G. Long, *Supreme Court Grants Certiorari to Consider NCAA's Request to Review Ninth Circuit Anti-Trust Ruling*, Collegiate and Professional Sports Blog (Dec. 17, 2020), <https://www.collegeandprosportslaw.com/uncategorized/supreme-court-grants-certiorari-to-consider-ncaas-request-to-review-ninth-circuit-anti-trust-ruling/>.