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MAY - JUNE 2023

NAME, IMAGE, AND LIKENESS ("NIL") INSTITUTIONAL REPORT

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"With NIL comes many new opportunities and challenges for college sports. The LEAD1 NIL Institutional Report helps our members navigate through these changes."

*- Tom McMillen, President and Chief Executive Officer
of LEAD1 Association*

The Impact of Monetizing NIL on the Transfer Portal

By *Richard Giller and Josh Goldberg, of Greenspoon Marder*

Since its debut on October 15, 2018, the NCAA transfer portal has become the collegiate equivalent of a free agency bonanza for student-athletes. The spring college football transfer portal window opened for a 15-day period from April 15 to April 30. Each sport has multiple different fall and spring transfer windows. Through the transfer process, college athletes are afforded some freedom of mobility by being allowed to seek out other options for athletic or educational reasons. However, over the past year or so, another factor has played a role in influencing whether a college athlete enters the transfer portal: the ability to explore maximizing the monetization of their NIL at a different school.

Undergraduate student-athletes generally have a one-time transfer exception, allowing athletes who have not previously transferred from one four-year institution the ability to transfer to another institution. In April 2021, the NCAA Board of Directors ratified the adoption of a rule that allowed first-time transferring athletes to become immediately eligible to compete in the upcoming season for their new school. Before that time, NCAA rules mandated that transferring athletes had to sit out an entire season before being eligible to play for their new school. Since the one-time transfer rule was adopted two years ago, the number of transfers has skyrocketed.

For the 2023-2024 season, the NCAA also approved exceptions for two-time transfer student-athletes to play without risking sitting out a year. There are three reasons a student-athlete may qualify for a two-time transfer waiver: (1) reasons related to the student-athlete's physical or mental health and well-being; (2) exigent circumstances out the student-athlete's control (e.g., physical or sexual assault or

discrimination based on a protected class); or (3) assertions involving diagnosed education impacting disabilities. The transfer portal, along with the one-time and two-time transfer rules, apply to four-year undergraduate student transfers. Graduate student-athlete transfers are eligible to play immediately.

The transfer portal is a relatively simple process: a student-athlete enters his or her name in the portal (a private database) through their school's compliance office and, once that occurs, other schools are allowed to contact that student-athlete. For those student-athletes who enter their name in the portal, their current school is no longer obligated to honor the athletic scholarship they had given to them, even if the student-athlete withdraws their name from the portal and decides to return to their original school. In August 2022, the NCAA also adopted a transfer rule guaranteeing the transferring student-athletes' scholarship and financial aid through graduation at their next school.

Some people associated with student-athletes appear to be utilizing the transfer portal to shop athletes to the highest bidder—much like free agents in professional sports. Further, some student-athletes are getting advice to enter their name in the transfer portal as a form of leverage to demand more NIL money from NIL collectives or organizations at their current school. The combination of the transfer portal and the availability NIL deals are clearly having an impact on college sports. According to the website www.outkick.com, in January 2023, Alabama football head coach Nick Saban told a group of high school football coaches that “we lost 10 players and one starter to the [transfer] portal this year. One of them wanted \$500,000 and for us to get his girlfriend into law school at Alabama and pay for it. I showed him the door.” Coach Saban's attitude is not unique.

Existing recruiting rules prohibit coaches, schools, and players from communicating with and recruiting a student-athlete enrolled at another NCAA institution prior to that student-athlete's name appearing in the NCAA transfer portal. Such conduct constitutes “tampering” much like how professional teams are prohibited from communicating with players on other teams before that player is a free agent. Yet, tampering with college athletes appears to be happening behind closed doors prior to an athlete officially entering the portal.

When the NCAA amended its immediate transfer eligibility requirements in April 2021—right before the new NIL rules took effect on July 1, 2021—its intention was obviously not to create an open marketplace for NIL deals and a bidding frenzy for transfers, but the NCAA may have been somewhat naïve to not have anticipated the impact NIL would have on the number of transferring student-athletes. So far, it appears that only a small percentage of student-athletes who enter the transfer portal do so strictly because of more lucrative NIL deals at another school. Transfers appear to be more motivated by other factors, such as becoming a starter, or working with a different coaching staff, or being closer to home, or a myriad of other reasons beyond just more NIL money.

Since NIL has emerged in college sports, the NCAA has only publicly addressed a single NIL-related recruiting and transfer inducement violation. This raises the question whether the NCAA should amend its one-time transfer portal rules and multiple-time transfer exceptions to try and curb tampering or should the association implement stricter punishments for such conduct?

While some have suggested that the NCAA should revert to the old days when a student-athlete who wanted

to transfer was both at the mercy of vindictive coaches, boosters, or school administrators at his first school and who were forced to sit out a year before being eligible to play at his new school. Both seem punitive and unjust. However, to do so would likely present legal issues as to whether a student-athlete could legally challenge a reversion back to sitting out a year as a restraint on trade. This is especially true if college-athletes are deemed to be employees of their respective schools down the line which could occur based on pending litigation.

According to information released last year by the NCAA, only 54 percent of FBS transfers wound up enrolling at a new school. Approximately 5 percent of portal entrants withdrew their names from the portal and 41 percent either stayed in the portal, enrolled at a non-NCAA school, or they simply left their sport entirely.¹ But, as we all know, and as discussed below, statistics can be misleading.

While the transfer portal can be beneficial for student-athletes looking for a better situation, some believe that it has also become a crux and easy-out for student-athletes to jump ship at the first sight of adversity. One of the other complaints about the transfer portal—one that is unrelated to NIL deals—is that student-athletes who seek to transfer after their freshman or sophomore year are not “paying their dues” and putting in the time necessary to develop as 18- and 19-year-olds, while sitting and learning behind upperclassman. Only a small percentage of freshman and sophomore athletes across all sports have the ability to make meaningful impacts, but a certain number of those top, highly recruited, players also believe that they should get more playing time, or starting, or receiving more NIL money, which leads to them entering the transfer portal. It is,

however, illuminating how often coaches, who switch schools for more lucrative deals all of the time, are quick to criticize student-athletes for entering the transfer portal or seeking more NIL, without any self-reflection about the coach’s right to walk out on a school or a contract for greener pastures.

According to the NCAA’s database, in 2021 and 2022, around 61 percent of FBS student-athletes who entered the transfer portal reported to have enrolled at a new NCAA member school. While the data makes it seem as if there is a huge issue in which 39 percent of the other student-athletes are out of options, many of those student-athletes are likely walk-ons without a scholarship or graduate-students (the NCAA does not provide a breakdown of scholarship-only players who enter the transfer portal and their respective outcomes). While the issue of student-athletes not being able to find a new college is an issue, it is most likely not as big of an issue as the 39 percent figure that many pundits tout. Although, by following social media announcements, there are still many notable college football players (on scholarship) who enter the portal, and are left in the dust with no options and that should change.

So how does the NCAA create a transfer portal system that protects the interests of student-athletes—sometimes protecting them from themselves (as a decent percentage are left without options after giving up a full academic scholarship)—while also preserving the true meaning and integrity of freedom of movement and monetizing a player’s NIL? A potential solution to the aforementioned issues would be for the NCAA to allow student-athletes to enter the transfer portal without any repercussions if the transfer process is not successful by requiring schools to honor their scholarship offers despite a player attempting to transfer.

In much the same way a college bas-

ketball player is allowed to declare himself eligible for the NBA draft and still return to school if he goes undrafted—so long as the player did not hire a basketball agent or “act” as a professional—a student-athlete who enters the transfer portal in any sport and who is not picked up by another school, should not be forced to forego the scholarship they received from their original school and be left without options. In other words, a student-athlete should not be penalized and miss out on receiving a college education and a diploma if they dip their toe in the college “free agency pool” without success. That does not, of course, mean that a player who attempts but fails to transfer will or has to be welcomed back by his coaches and teammates with open arms as if nothing happened, but they should not lose the ability to at least fulfill the potential of the first part of the “student-athlete” moniker.

Further, if college-athletes end up deemed employees, in which they are under an employment contract and compensated through their respective institutions, separate of NIL, a baseline NCAA student-athlete employment contract should have the least restrictive measures in place and afford student-athletes freedom of mobility to transfer schools without penalty. Although it could be reasonable to put anti-tampering measures in place, like pro-sports leagues, in order to counter inducements from outside organizations, whether that be coaches, boosters, or collectives attempting to have a student-athlete transfer prior to the student-athlete entering their name in the portal.

¹ <https://www.on3.com/news/college-football-fbs-ncaa-transfer-portal-46-percent-entries-did-not-land-new-school/>