

# State NIL Laws Aim To Shield Colleges That Defy NCAA

By **Christina Stylianou and Gregg Clifton** (June 2, 2023)

While federal legislators have failed to propose any new potential name, image and likeness legislation, multiple states have moved forward on such legislation — a trend that appears to signify a specific new objective and direction for college sports.

Six states — Arkansas, Oklahoma, Missouri, New York, Texas and Colorado — have recently proposed and, in some cases, enacted amendments to their NIL laws that feature novel provisions aimed at creating recruiting advantages for their respective in-state universities.

The six laws differ from one another and from prior legislation in a variety of interesting ways. Nonetheless, each would allow schools to participate in student-athletes' NIL deal negotiations, in direct contradiction of National Collegiate Athletic Association guidance from October 2022.

The Arkansas and Oklahoma laws, and possibly those from Texas, Missouri and New York, also further create causes of action that would benefit their universities through varied approaches.

## Arkansas

In Arkansas, the recently passed Act 589 has amended the Arkansas Student-Athlete Publicity Rights Act in several ways. Most notably, the new iteration of the state's NIL law:

1. Allows certain high school athletes who have been accepted into, or signed a national letter of intent or other written agreement to enroll at, an institution of higher education in Arkansas to profit from their publicity rights.

The prior version of the law did not provide any NIL rights to high school athletes.

2. Allows an Arkansas institution of higher education, its supporting foundations or its authorized entities to "identify, create, facilitate, and otherwise enable opportunities" for a student-athlete to be compensated for the commercial use of their publicity rights.

The amendment also permits 501(c)(3) charitable organizations to enter into NIL deals with student-athletes.

3. Creates a cause of action for Arkansas institutions of higher education against any person or entity, regardless of residence, who compensates or promises to compensate an enrolled or prospective student-athlete for their publicity rights with the purpose of inducing that student-athlete to transfer to another institution.

The protections in item 2 contradict the NCAA's October guidance, which provides that universities may not directly negotiate NIL deals on behalf of a student-athlete with interested brands and entities.



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The addition of rights for 501(c)(3) organizations seems to target a memo circulated by the NCAA in March of this year, which reminded universities that NCAA guidance prohibits institutions, as well as entities acting on behalf of the institution, from compensating student-athletes for their publicity rights.

Both the March NCAA memo and the new Arkansas protection appear to address a new model of booster group or collective that has recently emerged. These groups function as registered nonprofit organizations and fundraising arms of their universities' respective athletic departments. Examples of these include the 12th Man Foundation at Texas A&M University and ONEArkansas NIL at the University of Arkansas.

This use of state law in conflict with NCAA rules has become a common tactic to bend the NCAA toward more favorable policies for the state and its institutions. Indeed, the NCAA in 2021 finally allowed student-athletes to profit from their NIL rights as a result of the pressure placed on it by similar conflicting case law.

Since then, we have seen more proposed legislation by various states, such as California and South Carolina, that conflicts with NCAA guidelines on paying student-athletes for participating in school sports. And the Oklahoma, Texas, Colorado, Missouri and New York legislation discussed below employ the same tactic for NIL rights.

## **Oklahoma**

In Oklahoma, S.B. 840 has similar ambitions to the new Arkansas law. S.B. 840 amends the state's prior NIL law to:

1. Allow a student-athlete to be represented by anyone in the negotiation of NIL contracts, not just by registered athlete agents or attorneys admitted to practice in the state as had been previously required by the law. The amendment requires, however, that all such professional representation agreements be in writing and be disclosed to the university.

Interestingly, the amendment makes it the responsibility of the agent to ensure that the student-athlete disclosed the relationship to the school.

2. Prohibit a university from representing, compensating or causing compensation to be directed to a student-athlete for his or her name, image or likeness. The amendment removes this same prohibition, however, for entities "whose purpose includes supporting or benefiting the postsecondary institution or its athletic programs."

3. Not allow a collegiate athletic association, such as the NCAA, to prohibit universities from "identifying, facilitating, enabling, or supporting opportunities for a student athlete to earn compensation for the student athlete's name, image or likeness activities."

It also does not allow a collegiate athletic association to prohibit universities from establishing agreements with third-party entities to act on its behalf to identify, facilitate, enable or support student-athlete NIL activities.

4. Authorize universities to impose reasonable restrictions on a student-athlete's NIL activities to prevent them from interfering with team activities or the university's operations.

5. Authorize universities to require a student-athlete to take courses or receive other education or training in contracts, financial literacy or any other subject the university

deems necessary to prepare the student-athlete to engage in NIL activities.

Just as in the Arkansas law, the changes to the Oklahoma NIL law heavily focus on allowing the universities greater involvement in student-athletes' NIL negotiations, while at the same time freeing collectives and other supportive entities affiliated with the universities to directly enter such deals with student-athletes. Oklahoma, however, directs this effort specifically at the NCAA by prohibiting it from banning university activity in this area.

Interestingly, the Oklahoma law reaches even further in its efforts to limit NCAA regulation and enforcement in the state with the following two provisions:

- A collegiate athletic association shall not and shall not authorize its member institutions to entertain a complaint, open an investigation, or take any other adverse action against a postsecondary institution for engaging in any activity protected in the Student Athlete Name, Image and Likeness Rights Act or for involvement in student athlete name, image or likeness activities; or
- Penalize a postsecondary institution from participation in intercollegiate athletics because an individual or entity whose purpose includes supporting or benefiting the postsecondary institution or its athletic programs violates the collegiate athletic association's rules or regulations with regard to student athlete name, image or likeness activities.

This is an extremely broad effort to shield universities from potential NCAA action for involvement in NIL activity whether the activity is done by the universities themselves or through affiliated collectives, even going as far as to prohibit investigations into such activity. The provisions severely restrict the NCAA's regulation enforcement capabilities in Oklahoma and would, theoretically, create a cause of action for universities against the NCAA if the NCAA attempts to enforce its conflicting NIL regulations.

The new Texas legislation appears to attempt a similar tactic, albeit in softer language, and the Missouri and New York legislation seem to adopt much of this same type of language

The Oklahoma state Legislature overrode Gov. Kevin Stitt's veto of S.B. 840, and the bill will take immediate effect.

### **Missouri and New York**

Oklahoma's bill may have inspired similar legislation in other states. For instance, Missouri H.B. 417 and New York A.B. 7107A — the most recent bills of the six discussed here — both authorize universities to identify, facilitate, support or otherwise assist with opportunities for a student-athlete to profit from their name, image and likeness, similarly to legislation in other states.

These bills also actively deny the NCAA the ability to interfere with or take action against the schools and student-athletes for their NIL-related activities, going as far as to adopt Oklahoma's prohibition on NCAA investigations into such activity.

Missouri's H.B. 417 passed in early May but awaits signature into law, while New York's bill, introduced May 11, is making its way through the state Legislature.

## **Texas**

At the same time, Texas and Colorado are also changing their respective NIL laws in ways that echo the language in the Arkansas and Oklahoma laws. In Texas, H.B. 2804 amends the state's current NIL law to:

1. Prohibit an athletic association or conference from enforcing a contract term or rule that bars a university from participating in intercollegiate athletics or penalizes the university or the university's athletic program for engaging in an activity authorized by this potential new iteration of the state's NIL law.
2. Exclude recognition by a university of a third-party entity that compensates a student-athlete for the use of their NIL or the entity's donors from what the proposed legislation would deem impermissible compensation by a university of a student-athlete. Such recognition would include the university's provision of priority status or other similar items of de minimis value or items the university provides to its donors.
3. Allow universities, third-party entities acting on behalf of universities or employees of the universities to

identify, create, facilitate, or otherwise assist with opportunities for a currently enrolled student athlete to earn compensation from a third party for the use of the student athlete's name, image or likeness.

However, the school, entity or the school's employees may not serve as the student-athlete's agent, receive compensation for facilitating such deals, attempt to influence the student-athlete's choice of professional representation in connection with such opportunities, or attempt to diminish the student-athlete's opportunities from competing third parties.

4. Allow 501(c)(3) charitable organizations to compensate student-athletes for the use of their name, image or likeness.
5. Provide that, as long as a third-party entity is a separate legal entity from a university and the university does not own or control the entity, then an activity of the entity that compensates a student-athlete for the use of their name, image or likeness is not to be construed as an act of the university.
5. Disclaim the creation of a cause of action against universities and their officers and employees relating to a student-athlete's name, image or likeness.

## **Colorado**

Colorado's S.B. 23-293 provides that:

1. A university may "identify, create, solicit, facilitate, and otherwise enable opportunities" for a student-athlete to earn compensation for the use of their name, image or likeness, as long as the university obtains the consent of the student-athlete to do so; and
2. A 501(c)(3) charitable organization may compensate a student-athlete for the use of their name, image or likeness.

Both the Texas and Colorado bills have passed in their state legislatures and await signature

into law.

## **Looking Forward**

In the continued absence of any detailed NCAA regulation or enforcement, or any unifying federal NIL legislation — though it is worth mentioning that it was announced recently that new federal legislation should be introduced shortly<sup>[1]</sup> — the states are overwhelmingly continuing to turn to their own legislatures to fill in the legal gaps, and doing so in increasingly creative ways. Certainly, the results of the introduced bills above will shed some light on the path of college athletics going forward.

For the moment, the recent proposals reveal a pattern of states creating greater protections for their universities by allowing universities to insert themselves into student-athletes' NIL deals and developing recruiting advantages by enabling supportive foundations, like collectives or 501(c)(3)s, to directly compensate student-athletes.

But perhaps most interesting to watch will be the enactment and enforcement of the legislative provisions that dictate what the NCAA can and cannot do about universities' NIL activity within their states.

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[1] The office of Sen. Lindsey Graham released a drafted NIL bill for circulation on May 19. See <https://www.on3.com/nil/news/lindsey-graham-draft-legislation-bill-senator-south-carolina-nil-clearinghouse-ncaa/>. A discussion draft of a similar U.S. House of Representatives bill was released on May 23 by Rep. Gus Bilirakis, R-Fla. See <https://www.cbssports.com/college-football/news/house-subcommittee-considering-federal-regulatory-body-to-oversee-nil-rights-for-college-athletes/amp/>.