

Legislative Analysis



COLLEGE ATHLETE COMPENSATION

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House Bill 5217 as enacted
Public Act 366 of 2020
Sponsor: Rep. Brandt Iden

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5218 as enacted
Public Act 367 of 2020
Sponsor: Rep. Joe Tate

1st House Committee: Oversight
2nd House Committee: Ways and Means
Senate Committee: Regulatory Reform
Complete to 4-2-21

BRIEF SUMMARY: House Bill 5217 allows college athletes to earn compensation for the use of their name, image, or likeness rights. House Bill 5218 repeals provisions in two acts that House Bill 5217 renders moot.

FISCAL IMPACT: The bills would have a negligible fiscal impact on community colleges and universities and could decrease costs or revenues for local units of government. (See **Fiscal Information**, below, for a detailed discussion.)

THE APPARENT PROBLEM:

A college student who is great at math or who plays an instrument in the marching band of a college or university may use that fact to highlight his or her skills when seeking a job as a math tutor or providing music lessons. However, a college athlete looking to make extra money by offering private lessons in his or her sport is prohibited under National Collegiate Athletic Association (NCAA) regulations, which member colleges and universities voluntarily agree to abide by. The same regulations prohibit individual athletes from receiving many forms of compensation, gifts, or transportation or entering into contracts to promote goods or services. Noncompliance can lead to sanctions being levied against the athlete's school by the NCAA. In addition, state law makes it a criminal offense for athlete agents to engage in certain conduct regarding a student athlete. A booster or other person may be sued by a college or university if the person's actions result in the institution's being harmed; a player's suspension, forfeiture of games, or the loss of eligibility to participate in postseason tournaments or bowls would be examples of harm.

To some, this system is antiquated and unfair. Colleges and universities, especially upper-tier sports programs such as basketball and football, have the potential to generate millions of dollars a year in revenue for their institutions. The student athlete, by comparison, who spends a great deal of time training, practicing, and traveling to events, cannot even accept a token honorarium or a small fee for signing an autograph. Legislation was offered to remove restrictions placed on college athletes regarding use of their own name, image, or likeness.

THE CONTENT OF THE BILLS:

House Bill 5217 creates a new act to prohibit certain actions by a *postsecondary educational institution* and an athletic association or conference.

Postsecondary educational institution means a public or private institution in Michigan that offers a degree or course of study beyond the twelfth grade and receives state or federal funding of any kind. [As the term is defined, the act does not apply to Hillsdale College.]

Colleges and universities

The new act prohibits a postsecondary educational institution from upholding any rule, requirement, standard, or other limitation that prevents a student of the institution from fully participating in intercollegiate athletics based on his or her earning compensation as a result of his or her use of his or her name, image, or likeness rights (“NIL”). A student’s scholarship eligibility or renewal may not be affected by his or her earning such compensation.

For purposes of the new act, an athletics grant-in-aid or stipend scholarship from an institution in which a student is enrolled does not constitute compensation for use of the student’s NIL, and the institution cannot revoke or reduce such aid or stipend scholarship as a result of the student’s earning compensation under the act.

The act does not limit the right of an institution to establish and enforce any of the following:

- Academic standards, requirements, regulations, or obligations for its students.
- Team rules of conduct or other rules of conduct.
- Standards or policies regarding the governance or operation of or participation in intercollegiate varsity athletics.
- Disciplinary rules and standards generally applicable to all students of the institution.

Athletic associations or conferences

An athletic association, conference, or other group or organization with authority over intercollegiate athletics (which includes, among others, the National Collegiate Athletic Association (NCAA)) cannot do any of the following:

- Prevent a student of a postsecondary educational institution from fully participating in intercollegiate athletics based on his or her earning compensation from his or her use of his or her NIL.
- Prevent an institution from fully participating in intercollegiate athletics without penalty based on a student’s use of his or her NIL.
- Prevent an institution from fully participating in intercollegiate athletics without penalty as a result of a student’s obtaining professional representation in relation to contracts or legal matters regarding his or her opportunities to earn compensation for his or her use of his or her NIL, including representation provided by an athlete agent or financial advisor or legal representation provided by an attorney, each of whom must be licensed by the state of Michigan.

College or university, athletic association, or conference

A postsecondary educational institution, athletic association or conference, or other group or organization with authority over intercollegiate athletics is prohibited from doing any of the following:

- Providing a prospective college athlete who will attend an institution with compensation in relation to the athlete's NIL.
- Preventing a student who is a Michigan resident and who participates in intercollegiate athletics from obtaining professional representation in relation to contracts or legal matters, including representation provided by an athlete agent or legal representation provided by an attorney, regarding opportunities to be compensated for use of the student's NIL.
- Interfering with or preventing a student from fully participating in intercollegiate athletics based on the student's obtaining professional representation in relation to contracts or legal matters regarding his or her opportunities to earn compensation for his or her use of his or her NIL, including representation provided by an athlete agent or financial advisor or legal representation provided by an attorney, each of whom must be licensed by the state of Michigan.

The act does not require any of these entities to identify, create, facilitate, negotiate, or otherwise enable opportunities for a student to earn compensation for his or her use of his or her own NIL.

College athletes

A student may not enter into an apparel contract providing compensation to him or her for use of his or her NIL that requires the student to display a sponsor's apparel, or otherwise advertise for a sponsor, during official team activities if the provision conflicts with a provision of the student's institution's team contract.

A student intending to enter into a verbal or written opportunity or contract that could provide compensation for use of his or her NIL must disclose the proposed opportunity or contract to a designated official of the institution that he or she attends, for review by the institution, at least seven days before committing to the opportunity or contract.

If the institution identifies a conflict between the proposed opportunity or contract and any existing agreements with it, the institution must communicate that conflict to the student so the student can negotiate a revision of the opportunity or contract so as to avoid the conflict, subject to additional review and approval by the institution in accordance with this provision.

An institution's athletic program team contract cannot prevent a student from receiving compensation for using his or her NIL for a commercial purpose when the student is not engaged in official team activities.

The above provisions do not apply to a contract entered into, modified, or renewed on or before December 31, 2022.

In addition, the act does not establish or bestow the right of a student to use the name, trademarks, services marks, logos, symbols, or any other intellectual property, whether registered or not, of a postsecondary educational institution, athletic association or conference,

or other group or organization with authority over intercollegiate athletics, in furtherance of the student's use of his or her NIL.

Nonprofit trade associations

By December 31, 2020, and by December 31, 2021, any nonprofit trade association representing Michigan colleges or universities must provide for each of those respective years a written summary of both of the following to the chairs of the appropriations committees of the House and Senate and the chair of the House Committee on Ways and Means:

- Progress made by the NCAA toward the development of a national policy, including updates to relevant bylaws and rules, on student athlete compensation for NIL, as directed by NCAA's board of governors on October 29, 2019.
- Congressional action on legislation on student athlete compensation for NIL, including the proposed Congressional Advisory Commission on Intercollegiate Athletics Act of 2019, as proposed by H.R. 5528 of the 116th Congress.

By June 30, 2022, any nonprofit trade association representing a Michigan college or university must provide to the chairs of the appropriations committees of the House and Senate and the chair of the House Committee on Ways and Means a written summary of the preparedness of the association's respective member institutions toward implementation of the act. [The House Committee on Ways and Means ceased to exist at the end of the 2019-20 legislative session.]

Miscellaneous provisions

A legal settlement arising under the act does not permit noncompliance with the act.

The provisions of the new act take effect December 31, 2022, except for those described in "Nonprofit trade associations," above, which took effect January 4, 2021.

MCL 390.1731 to 390.1741

House Bill 5218 repealed two sections of law in the Michigan Penal Code and the Revised Judicature Act that were rendered moot by provisions of House Bill 5217, as follows:

Section 411e of the Michigan Penal Code prohibited certain conduct on the part of an athlete agent and established criminal penalties for a violation. Under the section, an athlete agent could not:

- Induce a student athlete to enter into an agent contract or professional sport services contract before the student athlete's eligibility for collegiate athletics expired.
- Enter into an agreement whereby the athlete agent gives, offers, or promises anything of value to an employee of an institution of higher education in return for the referral of a student athlete by that employee.

Section 2968 of the Revised Judicature Act allowed colleges and universities to bring a civil action against a person who gave or promised to give improper gifts or services to a student athlete, prospective student athlete, or his or her immediate family if the action resulted in an injury to the college or university.

The bill took effect January 4, 2021.

FISCAL INFORMATION:

House Bill 5217 would have no fiscal impact on community colleges and universities. The bill states that postsecondary institutions cannot provide financial incentives to college athletes to attend the institution based on the newly granted name, image, or likeness rights. There may be some internal administrative costs to comply with the rules established in the bill, but these costs should be negligible.

House Bill 5218 would have a negligible fiscal impact on community colleges and universities with athletic departments. Since the bill repeals the financial penalties if someone is found responsible for violating the terms found in section 2968 of the Revised Judicature Act, community colleges and universities would no longer receive the penalties listed or recovered attorney fees and costs of litigation. This potential loss would be negligible.

The bill could also result in decreased costs for local units of government related to county jails and local misdemeanor probation supervision. Costs of local incarceration in county jails and local misdemeanor probation supervision vary by jurisdiction. The decrease in costs for locals would depend on the number of individuals who would no longer be charged under provisions of section 411e of the Michigan Penal Code. There could also be a decrease in penal fine revenues which would decrease funding for local libraries, the constitutionally designated recipients of those revenues.

ARGUMENTS:

For:

House Bill 5217 is not a “pay to play” bill; student athletes will not be receiving wages for participating in a sport. The issue it addresses is whether a student athlete should have the right to receive compensation from third parties for the use of his or her name, image, and/or likeness.

Not all college athletes receive scholarships or stipends generous enough to make ends meet and may need to seek outside employment. Meanwhile, the athletes add value, and possibly revenue, to the institutions they represent. However, under longtime NCAA regulations, a student athlete and even his or her school could be sanctioned for something as minor as posting flyers offering private coaching if, to document his or her qualifications, the athlete mentions membership on a particular sports team. Even accepting a meal or a ride from an agent or sports booster may trigger sanctions.

To many, restrictions imposed by the NCAA and/or state laws on student athletes’ profiting from their own names, images, or likenesses are archaic and unfair. Doing a commercial for a toothpaste, charging for speaking events, or signing autographs does not necessarily tarnish the spirit of amateur competition or interfere with playing college sports.

A person’s name, image, and likeness belong to the individual, and the individual should be able to explore opportunities to benefit from his or her skill and achievements. This is especially true for those in sports with a high risk for injury. Some opt to leave college early rather than risk an injury that could end dreams of being able to play professionally and the opportunity to benefit financially from their name, image, or likeness. The ability to earn some

money through sponsorships while in college may lessen the draw of going pro and may result in more student athletes staying in college to finish their degrees.

Further, few college athletes transition to a professional career, and even professional careers are cut short by injuries. Capitalizing on their name, image, or likeness while in college may be the only chance for some to earn money based on their athletic achievements.

For:

The NCAA Board of Governors voted unanimously on April 29, 2020, to allow each of its three divisions to adopt name, image, and likeness rules that would allow student athletes to receive third-party compensation for use of their names, images, and/or likenesses.¹ It is expected that the new NIL rules for each of the divisions will be adopted by the summer of 2021 and in play by the start of the 2021-2022 academic year.

However, adoption of more relaxed rules regarding NIL by the NCAA does not eliminate the need for the bill package. The NCAA board's ruling, which includes "guardrails" requiring restrictions on NIL activities and adherence to principles adopted in October, 2019, has drawn criticism for being vague.² In addition, the Supreme Court agreed on December 16, 2020, to hear a consolidated case brought by college athletes against the NCAA. Arguments began March 31, 2021, with a decision expected by July.³ At issue is whether the NCAA rules regarding student athlete compensation used in determining eligibility of college athletes violate federal antitrust law.

Since most of the provisions of HB 5217 would take effect at the end of 2022, there should be sufficient opportunity to "tweak" the legislation if needed in response to the final rules adopted by the NCAA divisions or the ruling in the Supreme Court case or to conform to any federal legislation on the issue adopted in the interim.

For:

House Bill 5218 repeals the criminal penalties imposed on athlete agents and the statutory authority for an institution to sue any person whose conduct causes harm to the institution. Both of these provisions are rendered moot with the enactment of HB 5217. Reportedly, laws prohibiting certain conduct on the part of athlete agents can be difficult to prove and expensive to prosecute, and few cases nationally have been successfully prosecuted. Colleges and universities should still have some recourse from egregious behavior, as the common law principle of interference with prospective advantage should still allow an institution to sue a person deemed to have caused it harm. That principle would just no longer be codified in these provisions. Further, these statutory restrictions may no longer be fitting once the NCAA adopts new rules regarding third-party compensation for a student athlete's use of his or her name, image, or likeness.

Against:

Certainly, rules and regulations regarding if, and in what manner, a college athlete should be able to profit financially from his or her own name, image, or likeness should be reviewed to

¹ <https://www.ncaa.com/news/ncaa/article/2020-04-29/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and>

² <https://www.si.com/college/2020/04/30/ncaa-nil-changes-congress-reaction>

³ *National Collegiate Athletic Association v Alston*, No. 20-512 (2020)

see what makes sense today. However, due to the nature of collegiate competition, the discussion and solutions need to be on the national, not state, level. A patchwork of state laws would complicate matters and make it difficult for all involved—student athletes, families, agents, institutions—especially when recruiting, transfers, agents, etc., cross state lines. For example, unless federal legislation is adopted to create a uniform national standard regarding NIL activities that would preempt certain state provisions, a situation could be created in which one state could adopt laws for student athletes and agents so attractive as to draw all top-tier recruits to universities and colleges in that state. Reportedly, discussion is ongoing among members of Congress, and legislation may be forthcoming that could preserve the collegiate system, avoid the chaos of conflicting state approaches, and be fairer to student athletes.⁴

Most importantly, young adults, and even their families, may not recognize unscrupulous agents and scam artists who do not have the student athlete’s best interests at heart. The laws and regulations repealed by House Bill 5218 were meant to provide protection from exploitation and corruption for the student athlete and the institution. Whichever direction is taken by the state, the NCAA, courts, and the federal government, that protection and focusing on obtaining a college education should remain at the forefront.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

⁴ <https://www.thelantern.com/2020/02/gonzalez-emmert-among-speakers-at-senate-hearing-on-name-image-likeness-rights/>