STETSON BUSINESS LAW REVIEW

SCORING EQUALITY: PROTECTING STUDENT-ATHLETE PARENTS WHERE THE NCAA FALLS BEHIND

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I. INTRODUCTION

Between the Name, Image, and Likeness (NIL) changes, College Football Playoff restructuring, and player pay, the National College Athletics Association (NCAA) has come under fire for a wide range of issues in the past few years. Most recently, the NCAA is facing backlash after the National Labor Relations Board (NLRB) ruled in favor of the Dartmouth men's basketball team to declare that student-athletes are employees of the school.[1] All 15 members of the Dartmouth team signed a petition in 2023 to join a union which would enable the student-athletes to collectively bargain for salary, working conditions, and other forms of fair practices.[2] This ruling opens the door for greater conversations on a different issue: enabling student-athlete parents to take care of their children they have while in school.

The average college student-athlete is worried about getting to practice on time, getting their school assignments turned in, and making sure that everyday tasks are completed. A college student-athlete who is also a *parent* is concerned not only about these aspects of daily life, but also feeding their family, potentially having to work another job, and all the other stresses that come with being a parent in modern society. More than 5 million students attending colleges and universities in the United States are parents.[3] Even more challenging, student-parents are also far

[1] Parker Purifoy, *Dartmouth Union Vote Sparks New Student Athlete Bargaining Ideas*, BLOOMBERG LAW (March 27, 2024, 5:20 AM), https://news.bloomberglaw.com/daily-labor-report/dartmouth-union-vote-sparks-new-student-athlete-bargaining-ideas.
[2] *Id.*
[3] Jon Marcus, *College is Hard Enough – Try Doing it While Raising Kids*, NPR (APRIL 18, 2024, 5:00 AM), https://www.npr.org/2024/04/18/1243709966/college-student-parents-child-care-costs.

less likely to graduate compared to their peers.[4] Fewer than four in ten students graduate with a degree within six years, compared to six in ten students who do not have children.[5]

Although there are no statistics published on how many student-athletes are parents, there is demographical data establishing that there were 540,505 students participating in college sports in 2024 year.[6] Out of those students, over 56% of participants identified as male and almost 44% identified as female.[7] Comparing to the number of student parents currently enrolled in college or a university, at least a portion of these students are also student-athletes. The NCAA published survey results from eighty-five existing intercollegiate student-athlete pregnancy policies in 2023, indicating that 85% of Division I, 94% of Division II, and over 98% of Division III schools lack any written policies to aid school athletics programs' responses to student-athlete pregnancy and related concerns.[8] While the number of student-athlete parents is likely small, this does not lessen the significance and burden that parenthood can have on this population of students. A smaller group may mean less support, less research, and less visibility.

This article will examile how the NCAA has failed to address the needs of student-athlete parents. It will also utilize this lens to evaluate how the NCAA is on a path to delegitimizing itself as it continues to stumble and dodge action on continued issues. As with Name, Image, and Likeness, transfer portals, and player revenue sharing, the NCAA is falling further behind the curve to addressing student needs across a multitude of areas. This article will consider policy alternatives to addressing student-athlete parent needs that circumvent the NCAA because there

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[4] *Id.*
[5] *Id.*
[6] STATISTA, *Number of NCAA Student Athletes in the United States in 2022, by Gender*, https://www.statista.com/statistics/1098761/student-athletes-by-gender/ (last visited Mar. 29, 2025).
[7] *Id.*
[8] NCAA, *Pregnant and Parenting Student-Athletes Resources and Model Policies*, 1,9 https://s3.amazonaws.com/ncaa.org/documents/2021/1/18/PregnancyToolkit.pdf (last visited Mar. 29, 2025).

will be no further action taken by the association. Considering the avenues of federal law changes through the Family Medical Leave Act, creation of state legislation, and player unionization and collective bargaining for rights, it will be established that action can be taken without the NCAA in the instance of student-athlete parental rights. With that in mind, the NCAA is wearing out its use and is in desperate need of an overhaul for the good of its student-athletes.

II. THE HISTORY OF NCAA POLICY ACTIONS

A. Background

The NCAA structure is made up of different legislative bodies comprised from three different divisions of participating schools: Divisions I, II, and III.[9] Member schools are broken into divisions depending on school size, and NCAA rules vary between the three divisions.[10] While the number of member schools is roughly similar, Division I schools have the highest undergraduate enrollment and the smallest ratio of student-athletes to other students.[11] These statistics are important because the larger the university, the higher the likelihood of support that can be given to student-athletes. Most notably out of the NCAA structure, however, is the notion that member schools develop and approve any legislation for their own divisions, and NCAA bylaws are approved within each division.[12] A Board of Governors also oversees the entirety of the NCAA and is the highest-ranking body within the association. Although the Board of Governors approves the annual budget, formulates policies and procedures for the NCAA

[9] NCAA, *Governance*, https://www.ncaa.org/sports/2021/2/9/governance.aspx (last visited Mar. 29, 2025).
[10] NCAA, *Our Three Divisions*, https://www.ncaa.org/sports/2016/1/7/about-resources-media-center-ncaa-101-our-three-divisions.aspx (last visited Mar. 29, 2025).
[11] *Id.*
[12] *Id.*

Constitution, and consults with division leaders, the board does not implement policies at a division level.[13]

The overall structure and governance of the Association are important when determining where to place any blame for the NCAA's shortcomings. A divided structure provides for different treatment across each division, which is obvious from scholarship opportunities to the lack of national branding for schools outside of Division I.[14] What some may consider stereotypical universities: Auburn, University of Florida, and the University of Georgia, are all Division I schools. These schools generally are those that the average American thinks of when picturing a student-athlete, largely because these programs are on television and are routinely promoted significantly more than their other division peers.

Recruiters who push students into all three divisions describe the differences largely as Division I schools having the largest emphasis on student-athletes making their sport the center of their collegiate life, Division II as a "balanced approach" between school and athletics, and Division III as heavier on academics (and with no scholarships specifically for athletes allowed).[15] These differences illustrate a glaring problem: Division III schools have significantly less resources available for their student-athletes, and institutions outside of Division I are less likely to be able to support other changes to circumvent NCAA bylaws implementation. This could be as simple as considering student-athletes as employees of their school. The association itself, when promoting how it supports college athletics, makes note to mention Division I and II

[13] NCAA, NCAA ASS'N-WIDE COMM., DESCRIPTIONS AND MEMBERS (2025), https://ncaaorg.s3.amazonaws.com/champion-magazine/HowNCAAWorks/AW_HowNCAAWorks.pdf.
[14] McKenna Mills, *The Trials and Tribulations of a Division III Athlete*, THE LINFIELD REV. (February 14, 2023), https://thelinfieldreview.com/31640/sports/the-trials-and-tribulations-of-a-division-iii-athlete/.
[15] NCSA College Recruiting, *The Differences Between NCAA Divisions*, https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions (last visited Mar. 29, 2025).

schools may provide unlimited meals to their student-athletes.[16] Most notably, however, is the lack of Division III support anywhere within the association's list.[17] Further, the NCAA finances a Student Assistance Fund with more than $87 million specifically for Division I athletes' "essential needs," which the association describes as for "flying home for a family emergency to buying a winter coat."[18] This fund is not available for Division II or Division III athletes.

These considerations are illustrations of how schools outside of Division I are largely forgotten by the public and how dangerous this can be when considering policy alternatives to address student-athlete parental support or any other policy changes the association implements at the three-division levels. Even the policy proposals discussed here can have detrimental implications for Division II and III schools, who will not have the resources to either bargain with student-athletes or implement changes to state or federal law. This emphasizes the negative impact recent NCAA changes can have, and what should be considered when evaluating the effectiveness of the association.

B. Current Policy

A student-athlete competing in an NCAA sport is granted five years of eligibility under NCAA Bylaw 12.8.[19] This is translated to "four seasons of intercollegiate competition in any one sport" as sanctioned by the NCAA within all its member schools.[20] If a student-athlete is granted an eligibility extension, they can compete for a total of six years and within five seasons. However, these extensions must be applied for by the students and their member institutions to

[16] NCAA, *How We Support College Athletes*, https://www.ncaa.org/sports/2015/12/1/about-resources-media-center-ncaa-101-how-we-support-college-athletes.aspx. (last visited Mar. 29, 2025).
[17] *Id.*
[18] *Id.*
[19] NCAA, *Division I Legislation: Athletics Eligibility Requirements*, https://web3.ncaa.org/lsdbi/search/bylawView?id=731 1 (last visited April 28, 2025).
[20] *Id.*

then be approved either by the institution itself, the Committee on Student-Athlete Reinstatement, or a higher committee within the association.[21] To confuse the issue further, each exception to the five-year rule is governed by a different approving entity.[22]

The NCAA has addressed student-athlete parents in only one bylaw as an eligibility extension. For Division I schools, NCAA Bylaw 12.8.1.5 provides a "Pregnancy Exception" stating, "A member institution may approve a one-year extension of the five-year period of eligibility for a female student-athlete for reasons of pregnancy."[23] For Division II and Division III, there exists 14.2.2.2: "A member institution may approve a two-semester or three-quarter extension of this 10-semester/15-quarter period of eligibility for a female student-athlete for reasons of pregnancy."[24] The Pregnancy Exception within the Division I Bylaws are separate from the "Hardship Waiver" which relates to injury or illness that a student-athlete may suffer from.[25] Instead, it is adjacent to work experience, study abroad, and "athletics activities" including the Olympics and World Cup, exceptions.[26]

The location of the Pregnancy Exception within the NCAA Bylaws is pertinent to the thought process of the association in how the bylaw was developed and considered. Most importantly, the 12.8.1.5 and 14.2.2.2 exceptions are intentionally exclusive only to female student-athletes. Because the Division I Pregnancy Exception is placed not within the bounds of the medical exceptions, but rather those that may take a student-athlete away from their activities for a period of time, the NCAA considers this Pregnancy Exception to be a delay of activity, rather than a

[21] *Id.*
[22] *Id.*
[23] *Id*.
[24] NCAA, *Chapter 4: Case Studies & Media Studies*, https://s3.amazonaws.com/ncaa.org/documents/2021/1/18/Case_Studies_Ch_4.pdf. (2021).
[25] NCAA, *Division I Legislation: Athletics Eligibility Requirements*, https://web3.ncaa.org/lsdbi/search/bylawView?id=731. (2021).
[26] *Id*.

medical necessity. This creates a glaring problem: male student-athletes are unable to take advantage of the same eligibility extension, even though they likely must take time off to care for their new family as well.

This problem of inequity did not go unnoticed by the student-athlete population. The case of *Butler v. NCAA* represents the attempt at litigating the inequity of the Association's Pregnancy Exception.[27] In *Butler*, a senior at the University of Kansas (KU) sued the NCAA claiming his rights under Title IX of the Education Amendments Act of 1972 were violated and that he deserved equal protection under Title IX as female student-athletes.[28] Butler sought a temporary restraining order to be permitted to continue his final season at KU.[29] He had planned to attend a state university with his girlfriend, until she became pregnant and Butler chose to forgo his football opportunity for the first year to work to take care of their child.[30] When Butler started participating in the football program, he applied for the eligibility extension in his final year.[31] The NCAA denied the extension and subsequent appeals, and Butler was notified that he was ineligible to continue.[32] The Kansas District Court found that Butler did not establish a substantial likelihood of success on the merits, citing other caselaw that denied six weeks of paid leave to fathers and did not violate the equal protection clause.[33]

Unfortunately, *Butler v. NCAA* was only on the merits of obtaining a temporary restraining order and did not go further in the Kansas District Court or any other court. However, *Butler* lays the foundation for the NCAA to continue with the current bylaw as it stands and draws a line

[27] *Butler v. NCAA*, U.S. Dist. LEXIS 61632 (2006).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

between "reasons of pregnancy" and "reasons of maternity or paternity."[34] The argument for simply amending the Association's bylaw to include biological fathers, as well as the reasons of pregnancy versus maternity or paternity has been explored previously.[35] Given the lack of action by the NCAA since the *Butler* decision, it is time for an alternative to be identified and further protections for student-athletes of all genders to be made available.

III. TURNING TIDES: ALTERNATIVE APPROACHES TO ADDRESS THE NCAA'S LACK OF ACTION

The idea of circumventing the NCAA's policy decisions is not an entirely novel one. In a 2021 case decided by the U.S. Supreme Court, the court affirmed that the NCAA was in violation of antitrust policies regarding student-athlete compensation.[36] *NCAA v. Alston* also contained a concurring opinion from Justice Kavanaugh stating his belief that the thread to not only student-athlete compensation, but also the overall presence of the NCAA in the competitive market, should potentially begin to be unraveled.[37] Justice Kavanaugh suggests potential avenues for student-athlete compensation to be resolved, proposing legislative changes and collective bargaining that player groups could conduct to achieve meaningful results.[38] Within the spirit of Justice Kavanaugh's concurrence, these ideas can be taken from unjust student-athlete compensation and applied to the injustice of inequitable treatment of student-athlete parents.

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[34] *Id.*
[35] *See* Spencer H. Larche, Pink-Shirting: *Should the NCAA Consider a Maternity and Paternity Waiver?*, 18 Marq. Sports L. Rev. 393 (2008), which advocates for the eligibility extension under the lens of *Butler*, in the wake of the *Butler* decision only a few years earlier at the time. *See also* Sarah McCarthy, *The Legal and Social Implications of the NCAA's Pregnancy Exception - Does the NCCAA Discriminate against Male Student-Athletes*, 14 Jeffrey S. Moorad Sports L.J. 327 (2007) which provides a commentary of the equal protection of male student-athletes under the NCAA Bylaws, and within the purview of the *Butler* decision from the year prior. Both law review articles explore the concept of equal protection under *Butler* and advocate for a policy change specifically drafted by the NCAA to address the problem. Unfortunately, the NCAA has established that it will not implement any policy changes in relation to student-athlete pregnancy, particularly almost two decades after *Butler* was decided.
[36] *NCAA v. Alston*, 594 U.S. 69 (2021).
[37] *Id.*
[38] *Id.*

Three alternatives are presented here as proposals to not only circumvent the NCAA's inadequate bylaws, but also to expand protections for student-athlete parents beyond merely providing one additional year of eligibility. The most direct alternative is to incorporate student-athletes into the Family Medical Leave Act and provide legislative protection at the federal level. This is achieved with the definition of "employee" and creates a discourse on the implications of considering student-athletes as university employees. The second alternative is to simply implement pregnancy-related protections at the state level. However, this would take the most amount of time and effort to achieve consistent protection across multiple states. The last alternative is to continue allowing student-athletes to unionize and collectively bargain for pregnancy-related protections, as Justice Kavanaugh's concurrence suggests.[39] This alternative is likely to face the most backlash from colleges and universities but empowers students to advocate for themselves. However, each alternative goes beyond an initial eligibility extension and instead builds a foundation for pregnancy-related protections for student-athletes at a higher level, enabling students to succeed instead of barely getting by. Ultimately, these alternatives show that the current NCAA Bylaws are ineffective and fail to address student needs in any capacity.

A. First Alternative: Federal Policy Changes & the FMLA

The simplest change outside of the NCAA amending their own bylaws is to institute a sweeping piece of legislation that can cover most, or all, student-athletes across the United States. However, the passage of legislation at the federal level can be influenced heavily by

[39] *Id.*

outside politics and inaction from Congress depending on the session.[40] A divided government can mean the inevitable failure of legislation from both sides of the political aisle and therefore is not a wholly reliable means to address pregnancy-related concerns of student-athletes. Despite these challenges, a change at the federal level would be the most effective means to protect student-athletes across all three divisions, as well as those student-athletes who may attend schools that are not a part of the NCAA's system.

The biggest concern for consideration is the vehicle by which to pass the federal legislation. Congress could create a new program designed specifically for student-athlete parents and house it within the U.S. Department of Education. However, an entirely new system would require funding and provisions to create the framework for operation. Further, the future of the department is currently unknown.[41] The lack of certainty would cause problems within the partisan system, and the proposal would die before it hits the first chamber for a vote. Instead, Congress should operate within a system that has already been created, a system that has been funded for over thirty years, and one that has helped countless American workers since its inception: the Family Medical Leave Act.[42]

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[40] Eric McDaniel, *Congress Wasn't Very Productive in 2023. Here are the 27 Bills it Passed*, (December 29, 2023, 5:53 AM) https://www.npr.org/2023/12/29/1222245114/congress-wasnt-very-productive-in-2023-here-are-the-27-bills-it-passed.

[41] Exec. Order No. 14242, 90 Fed. Reg. 13,679 (Mar 25, 2025) https://www.whitehouse.gov/presidential-actions/2025/03/improving-education-outcomes-by-empowering-parents-states-and-communities/

[42] U.S. Dept. of Labor, *US Department of Labor Highlights Federal Family, Medical Leave Protections as Nation Marks 30th Anniversary of Passage of Landmark Legislation*, https://www.dol.gov/newsroom/releases/whd/whd20230206-0 (last visited Apr. 21, 2025).

1. Background on the FMLA

The Family and Medical Leave Act (FMLA) was passed by Congress and signed into law in February 1933.[43] According to the United States Department of Labor, in charge of FMLA, "the [FMLA] provides eligible employees up to 12 workweeks of unpaid leave a year, and requires group health benefits to be maintained during the leave as if employees continued to work instead of taking leave."[44] The legislation also provides for employees to return to the same or an equivalent job at the time of their return.[45]

One of the primary uses of the FMLA is to provide unpaid time off to new parents to recover from childbirth and to bond with their newborn child.[46] While there are a few restrictions, including the requirement that leave for bonding with a newborn child must conclude with twelve months of birth or placement for adoption, the FMLA is designed to provide time for pregnancy-related concerns for both mothers and fathers.[47]

FMLA applies to all public agencies, including governmental entities at the local, state, and federal levels, which includes public education systems like schools.[48] It also covers employers in the private sector who employ fifty or more employees within certain parameters, including maintaining work for at least twenty workweeks in a year.[49] These standards can

[43] *Id.*
[44] U.S. Dept. of Labor*, FMLA Frequently Asked Questions*, https://www.dol.gov/agencies/whd/fmla/faq (last visited Apr. 21, 2025).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*

therefore apply to both schools in the public sector and private schools[50] This standard is likely easy to meet, as the average postsecondary education institution employs roughly 1,367 people.[51]

The FMLA has been amended three times over the thirty years since its initial passage.[52] These subsequent amendments, taking place in 2008 and 2009, address the extension of coverage for United States Servicemembers and airline flight crews.[53] The changes establish that Congress is willing and able to amend the FMLA to expand access to certain additional groups of people, especially those whose extenuating circumstances take them away from home or fall outside of the typical hourly requirement established in the 1993 version of the legislation.

2. Policy Implementation and Impact

Working within the framework of the current amended version of the FMLA, there is one primary roadblock in implementation for student-athletes. An "eligible employee," is defined in the FMLA as an employee who has been employed (1) for at least 12 months by their current employer; and (2) have worked at least 1,250 hours during that 12-month period.[54] There are three approaches to assimilating student-athletes into the current FMLA standards: (1) meeting the FMLA definition as-is; (2) developing the common law interpretation of "employee"; or (3) expanding the definition to create a separate standard for student-athletes.

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[50] *Id.*
[51] *College and Universities in the US – Employment (2006-2031)*, IBIS WORLD (MAR. 2025), https://www.ibisworld.com/united-states/employment/colleges-universities/1970/#:~:text=How%20many%20people%20does%20the,US%20business%20was%201%2C367.8%20employees.
[52] *The Family and Medical Leave Act of 1993, As Amended*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/whd/fmla/law (last visited Apr. 21, 2025).
[53] *Id.*
[54] *Id.*

i. Meeting the FMLA Definition as-is

The NCAA has outlined each division's rules and requirements for student-athlete participation in a manual updated and released each school year. To calculate the length of time for a student-athlete to work, the Division I manual will be used, because Division I has the highest ratio of athletic activities to academic activities and has the most concrete time requirements for each student-athlete.[55] Article 17 outlines playing and practice session time requirements for each sport the NCAA allows schools to offer.[56] Each sport has specific time requirements and restrictions, but generally practices are not required for longer than three hours a day, and at a maximum of six days a week.[57] Institutions must also limit the practice time of student-athletes to the season and a specified amount of pre-season time, which varies depending on the sport the student participates in.[58]

Although seasons may vary, football will be used as an example for calculating hours a student may "work" in a season. The NCAA defines the length of the playing season as running from the beginning of preseason practice until the end of the regular playing season, with extensions and exceptions for championship games in the post-season.[59] Calculating the preseason and regular playing season rounds to about eighteen weeks of official playing time. Assuming the maximum three hours a day for practice is used, and the maximum six days of practice and game days, a student-athlete playing football would complete around 324 hours of "work" time. This is significantly lower than the 1,250 hours required by the current FMLA,

[55] *See* NCAA, *Division I 2024-25 Manual*, https://web3.ncaa.org/lsdbi/reports/getReport/90008. (2025).
[56] *Id.* at 217.
[57] *Id.* at 259.
[58] *Id.*
[59] *Id.* at 220.

especially when confined only to the seasons the NCAA allows for practicing.[60] Within the current operating definition of the FMLA, a student-athlete would never be able to reach the required hours at the rate the NCAA permits.

ii. Common-law Interpretation of "Employee"

Another potential avenue to fit a student-athlete into the FMLA would be to utilize a court ruling to classify a student-athlete as a university employee for the purposes of the FMLA. The determination of whether student-athletes qualify as employees is well-litigated and has been explored by courts at both the state and federal level. Most recently, in July 2024 a New Mexico District Court ruled that student-athletes are not "public employees" under the New Mexico Whistleblower Protection Act.[61] The court in *Doe v. E.N.M. Univ. Bd. of Regents* outlines a three-prong test for determining whether the students were considered "public employees": (1) they must "perform an activity controlled by a public employer"; (2) a service to the employer is pursued "necessarily and primarily for the public employer's benefit"; and (3) "the person is paid for that service by fixed compensation or daily, hourly, or piecework basis."[62] In applying this test, public universities satisfy the first prong, although private universities would outright fail. The court evaluates the pay of service within the context of athletic scholarships, which the students argue is compensation for their services. However, the Internal Revenue Service weighed in on the issue of athletic scholarships, explaining that if scholarships

[60] *The Family and Medical Leave Act of 1993, as amended*, *Supra* note 52.
[61] *Doe v. E.N.M. Univ. Bd. of Regents*, No. 23-362 GBW/JHR, 2024 U.S. Dist. LEXIS 127202, at *15 (D. N.M. July 18, 2024). Student-athletes from Eastern New Mexico University (ENMU) submitted a whistleblower complaint against the husband of the former head coach of the ENMU Women's Basketball Team for sexual abuse. The question before the court was whether the students adequately alleged that they were "public employees" under the New Mexico Whistleblower Protection Act, which the students alleged was in violation due to retaliation from the university for submitting the complaint.
[62] *Id.* at *11-12.

were payment for services, they would be considered taxable income for student-athletes.[63] The third prong fails under this argument. Lastly, the court constituted extracurricular activities as being for the benefit of the student-athletes themselves and not the university primarily. Overall, the court found that student-athletes did not meet any aspect of the "public employee" definition within the test and therefore would not be protected under the whistleblower act.

The 7th Circuit Court of Appeals examines a similar question in the 2016 case *Berger v. NCAA*.[64] The *Berger* court shirks the idea of a multifactor test, explaining that the test "fail[s] to capture the true nature of the relationship" between an alleged employee and employer.[65] Instead, the court relies on the idea of the "tradition of amateurism in college sports" as a means of voluntary participation instead of "work" within the traditional definition.[66] The court held that "student-athletic 'play' is not 'work,' at least as the term is used in the FLSA."[67]

Considering both the *Doe* and the *Berger* court's evaluations of student-athlete employment, there are several glaring problems in the judicial analysis. Most importantly, both courts fail to consider the amount of money collegiate athletics generates. In 2023, the Southeastern Conference (SEC), one of the largest intercollegiate conferences under the NCAA, reported a total revenue of nearly $853 million.[68] In a concurring opinion in *Berger*, Circuit Judge Hamilton suggested that the court's reasoning might not extend to student-athletes at

[63] *Id.* at *13-14; *See* 26 U.S.C. § 117(c)(1).
[64] *See Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F. 3d 285, 288 (7th Cir. 2016). Two students argue that they are employees within the meaning of the Fair Labor Standards Act (FLSA) and allege they are entitled to a minimum wage under the FLSA.
[65] *Id.* at 291.
[66] *Id.* (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)).
[67] *Id.* at 293.
[68] Steve Berkowitz, *SEC Reported Nearly $853 Million in Revenue in 2023 Fiscal Year, New Tax Records Show*, USA TODAY (February 8, 2024, 3:00 PM), https://www.usatoday.com/story/sports/college/2024/02/08/sec-tax-records-853-million-revenue/72518816007/.

larger schools and conferences, such as the SEC.[69] The *Berger* decision involved plaintiffs from a Division III school, which did not permit scholarships and did not generate revenue from their sports.[70] This is a stark contrast to Division I schools especially, including those that are a part of large revenue-generating conferences like the SEC.

Applying the *Doe* court's three-prong test for public employees: (1) they must perform an activity controlled by a public employer; (2) a service to the employer is pursued "necessarily and primarily for the public employer's benefit"; and (3) the person is paid for that service by fixed compensation or daily, hourly, or piecework basis, there is room for a different basis for Division I schools.[71] The first is satisfied by public universities, which are the predominant population in Division I schools. Although the IRS has established that scholarships for athletics are not considered compensation, the Court in *Alston v. NCAA* opened the door for other methods of student-athlete compensation.[72] New alternatives to compensation outside of scholarships would upend models drawn by the *Doe* court and provide students with other means of university-sponsored compensation that may be more indirect.[73] The third prong can therefore be satisfied under the additional compensation provided under *Alston*. Lastly, the second prong develops an additional meaning in the face of $853 million in revenue from one conference

[69] *Berger*, 843 F. 3d at 293.
[70] *Id.*
[71] *Doe v. E.N.M. Univ. Bd. of Regents, No. 23-362 GBW/JHR, 2024 U.S. Dist. LEXIS 127202,* at *11-12 (D. N.M. July 18, 2024).
[72] *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69 (2021). The ruling in *Alston* limited the arguments the NCAA could make restricting student-athlete compensation, which is spreading a ripple effect of compensation issues that have arisen since the court affirmed in 2021. Most notable, Name, Image, and Likeness (NIL) compensation has been the source of contention, with universities soliciting NIL deals for their student-athletes as a means of compensation and potentially enticing would-be star athletes to bigger athletic programs.
[73] Milind Khurana, *Moneyball: The Landscape of College Athletics in the Wake of NCAA v. Alston*, 75 U. MIAMI L. REV. (2022).

within Division I.[74] In 2022, the NCAA reported nearly $17.5 billion in total athletic revenue across Division I institutions.[75] An extracurricular can quickly become "necessarily and primarily" for a school's benefit, especially in the face of large Division I schools that are profiting in the millions from the participation of student-athletes in big revenue-generating programs like basketball and football.[76]

While the common law definitions of employee and "public employee" may not incorporate student-athletes currently, there is room for interpretation as Division I conferences become larger and generate even more revenue. However, at this juncture it is unlikely that common law interpretations will develop at an efficient rate and there is no guarantee that courts will agree on a universal acceptance of student-athlete employees unless the U.S. Supreme Court grants certiorari to a related case.

iii. Expanding the Definition as an Exception

Understanding the pitfalls that both current inadequate FMLA language and common law interpretations offer, the only remaining alternative is to expand the definition within the FMLA language. The FMLA currently offers exceptions for military servicemembers and airline flight crews, both of which have non-traditional work hours that fluctuate and may put a member of the group outside of the protection of the FMLA.[77] The airline flight crew exception outlines

[74] Steve Berkowitz, *SEC Reported Nearly $853 Million in Revenue in 2023 Fiscal Year, New Tax Records Show*, USA TODAY (February 8, 2024, 3:00 PM), https://www.usatoday.com/story/sports/college/2024/02/08/sec-tax-records-853-million-revenue/72518816007/.
[75] NCAA, *Division I Athletics Finances 10-Year Trends from 2013 to 2022*, (Dec. 2023), https://ncaaorg.s3.amazonaws.com/research/Finances/2023RES_DI-RevExpReport_FINAL.pdf.
[76] *See Doe v. E.N.M. Univ. Bd. of Regents*, U.S. Dist. LEXIS 127202 (2024).
[77] Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601-2654 (2023).

the determination of who is included, the requirement to file paperwork with the Secretary of Labor, and the requirement of monthly guaranteed hours to qualify under the FMLA.[78]

Considering the framework established for the airline flight crew exception, it follows that the student-athlete exception should be crafted similarly. A proposed language and structure could fit within Section 101 as follows:

> Student-Athletes Participating in Intercollegiate Sports:
>
> Definition: For purposes of determining whether a student at a postsecondary institution is considered a student-athlete for employment purposes, a student-athlete is a school employee if:
>
> I. The student has been rostered to participate in an intercollegiate-level sport at a public or private university; and
> II. The student is receiving a scholarship in consideration for their participation in the school athletics program, whether partially or fully, or school-sponsored compensation commensurate with the student's athletic participation.
>
> File: Each postsecondary institution must keep on file the rosters of each participating student-athlete and file annually with the Secretary (in accordance with such regulations as the Secretary may prescribe) the roster list and scholarship status.

This proposed language accomplishes several aspects of concern. First, the definition of student-athlete draws a contrast between student-athletes and other students, narrowing the scope of coverage to only select students who are performing a service for the university. Second, the

[78] *Id.*

consideration of public and private universities is deliberate to include all schools the NCAA covers and fulfills the original intention of the FMLA, because a private university still employs at least fifty individuals. Third, compensation is not wholly limited to scholarships because Division III schools are not permitted to give scholarships to their student-athletes. Instead, compensation is covered by both scholarships, which can be given by Division I and II schools, and other compensation the school may sponsor, such as Name, Image, and Likeness (NIL) compensation that can be arranged by the school under the *Alston* ruling.[79]

Like mandatory filing requirements for airline flight crews, these filing requirements ensure accountability and transparency among postsecondary institutions. Filing the active rosters for each intercollegiate sport incentivizes schools to fill their rosters and compare outside compensation to other colleges and universities. A student-athlete who participates in FMLA to care for a recent newborn will be able to take advantage of the time off provided and can adequately care for their new family during their adjustment period after birth.

Overall, a change to the FMLA expanding the definition of employee to student-athletes is not without its own challenges. Primarily, the incorporation of student-athletes to university employees can be costly for schools, particularly schools in Division II and III which may not have the same resources as Division I. Conferences that may not net as much revenue as the SEC or other large conferences may also not have the revenue to provide outside compensation aside from scholarships, and may not have the name recognition to take advantage of NIL deals for their student-athletes. Also important to consider is the slippery slope effect incorporating student-athletes into the FMLA may have. Courts akin to *Doe* and *Berger* may change their

[79] *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69 (2021).

evaluation of student employment if federal legislation provides the opportunity to reference recent changes in definitions. The FMLA change may morph into amendments to the Fair Labor Standards Act, worker's compensation, or other employment-driven policies that student-athletes cannot currently take advantage of. While this may be positive for student-athletes, especially parents who are concerned with feeding their families and providing a hopeful future for their children, this could turn into a logistical nightmare for postsecondary institutions the further the idea of student employment snowballs.

Ultimately, the amended federal legislation's benefits to student-athletes may be outweighed by its burdens on colleges and universities. This is largely due to the amount of money an institution may be able to spend on lobbying efforts and the discretion the FMLA may give to grant leeway for institutions to implement the student-athlete employment changes. Without bright line legislation granting university employment status to student-athletes for *all* aspects, including the FMLA, the lopsided implementation may cause inequity problems and disastrous logistical issues as to what government programs student-athletes may take advantage of. There may be better ways to address the needs of student-athletes, especially parents, in a more precise course of action.

B. Second Alternative: State Policy Changes

Within the same realm of legislative proposals comes another avenue: state policy changes. While not implemented through nationwide sweeping action, state legislatures may still enact protections for their student-athletes to remain competitive with rival states' institutions. Change can be affected in a similar manner to Name, Image, and Likeness (NIL) legislation that has been implemented in several states across the country. One such example is within the state

of Florida, which preserves protections for student-athletes in controlling their own NIL deals, as well as enforces university infringement on NIL opportunities.[80]

In the framework of the Florida NIL laws, there lies the opportunity for the creation of pregnancy-related protections for student-athletes. This policy could protect student-athletes' activities as parents and provide students with the agency to control their participation during the first season following the birth of their child. Overall, the drawbacks for the implementation of state legislation are like federal action with the FMLA but may slip from the concentration of lobbying efforts as the impact is spread through individual states.

1. A Brief Case Study of Florida: NIL

In January 2021, the NCAA halted a vote to amend its rules relating to Name, Image, and Likeness (NIL) profits for student-athletes.[81] Following the *NCAA v. Alston* decision and just one day before the effective date of several state laws relating to NIL, the NCAA's Board of Directors approved an interim policy for NIL allowing all NCAA student-athletes to profit from their name, image, and likeness as athletes.[82] As of 2024, thirty-two states have passed NIL laws in some capacity, largely following the model from California's "Fair Pay to Play Act," which was the first state NIL legislation passed.[83] Beginning with the 2024-2025 school year, Division I student-athletes will have additional access to school assistance related to NIL opportunities.[84] Division I schools are permitted to identify NIL opportunities and facilitate deals between third

[80] Fla. Stat. § 1006.74 (2024).
[81] Amy L. Piccola, *Your Guide to Federal and State Laws on Name, Image and Likeness Rules for NCAA Athletes*, SAUL EWING: NIL LEGISLATION TRACKER, https://www.saul.com/nil-legislation-tracker (last visited Apr. 9, 2025).
[82] *Id.*
[83] *Id.*
[84] Michelle Brutlag Hosick, *Division I Board of Directors Ratifies Transfer, NIL Rule Changes*, NCAA (April 22, 2024, 5:18 PM), https://www.ncaa.org/news/2024/4/22/media-center-division-i-board-of-directors-ratifies-transfer-nil-rule-changes.aspx.

parties and student-athletes, although student-athletes are not obligated to accept school assistance.[85] The 2024 changes also enable universities to increase NIL-related support, but only for students who disclose their NIL arrangements to their school.[86]

At the state level, Florida is a model for the evolution of Name, Image, and Likeness (NIL) legislation in the wake of NCAA regulations. Like pregnancy-related accommodations (including eligibility and leave for newborn care), NIL regulations raise parallel legal questions about student-athletes' employment classification. NIL opens the door for compensation for student-athletes beyond the means of athletic scholarships that Division I and II schools can currently offer. Not only can schools locate NIL opportunities, but they can also facilitate negotiations between student-athletes and third parties, which can provide lucrative deals for students. This principle can be applied to pregnancy-related protections for student-athletes in a parallel fashion.

The State of Florida first passed legislation in June 2020 to allow college-level athletes in the state to earn compensation for their name, image, and likeness.[87] Since its initial passage, the NCAA actions created different guidance for colleges and universities, and the State of Florida evolved its NIL laws again. In February 2023 another NIL bill was passed, this time with pointed exclusions.[88] The new law blurred the lines between amateurism traditionally found in intercollegiate sports and professional sports.[89] The law also eliminated guardrails around third parties that were not affiliated with Florida universities, instead allowing schools to compensate

[85] *Id.*
[86] *Id.*
[87] Nicholas C. Patti, *Florida's Amended NIL Law: The Game is Changing (Again)*, PHELPS (March 7, 2023), https://www.phelps.com/insights/floridas-amended-nil-law-the-game-is-changing-again.html.
[88] *Id.*
[89] *Id.*

athletes for their name, image, or likeness.[90] Most importantly, the new legislation granted immunity to Florida postsecondary institutions and its staff, including coaches and athletic employees, which relieved schools from liability for any damages around student-athletes' NIL deals.[91]

The level of facilitation of NIL deals between Florida schools, student-athletes, and third parties creates a level of empowerment for student-athletes in controlling their agency for their own NIL opportunities. Furthermore, student-athletes can be compensated for their name, image, and likeness beyond what a school can offer for athletic scholarships. Ultimately, this newfound agency has a wide impact on the concept of amateurism in intercollegiate sports, potentially shifting college-level sports into a more professional atmosphere.[92]

The balance between NCAA guidance and its bylaws is increasingly challenged by state legislation, such as Florida's NIL laws, which empower student-athletes beyond what the NCAA was initially willing to permit. Compliance departments within colleges and universities must contend with NCAA Bylaws, federal laws, and new state laws, to keep their schools in accordance with its mandates.[93] The NCAA's power over colleges and universities, especially in the NIL arena, is slowly slipping as state legislation and litigation chip away at the actions the NCAA may take to keep schools compliant.[94] The case study of Florida demonstrates that when the state legislature disagrees with how the NCAA is handling an issue, it can provide its own parameters and protections for state student-athletes. Much like the NCAA is mishandling NIL

[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*

enforcement, it is likely the association will continue this trend on other sensitive topics like parent-related concerns for student-athletes.

2. Policy Implementation and Impact

Utilizing the Name, Image, and Likeness law from Florida as a general framework, pregnancy-related concerns for student-athletes can be crafted in a similar way. Sample language for a state-level policy might include:

> Intercollegiate athlete rights for pregnancy; rulemaking authority –
>
> The Legislature finds that intercollegiate athletics provide intercollegiate athletes with significant educational opportunities. However, participation in intercollegiate athletics should not infringe upon an intercollegiate athlete's ability to care for a newborn child during the course of an athlete's intercollegiate career. An intercollegiate athlete must have an equal opportunity to provide care for a newborn in the months following birth and be protected from unauthorized discrimination and appropriation of his/her right to parent in such a pivotal time of a newborn's life.
>
> (1) For the purpose of this section, the term "postsecondary educational institution" means a state university, a Florida College System institution, or a private college or university receiving aid under chapter 1009.
> (2) A postsecondary educational institution must provide a mother or father of a newborn with adequate time after birth, which must be no less than two months off from intercollegiate athletic practices, competitions, or other obligations.
> (3) A postsecondary educational institution may not discharge an athlete from its roster for reasons of pregnancy or participating in the post-birth time off as

designed by this section. An institution may, however, choose to not play an athlete during the season if the time off coincides with the regular season as defined by NCAA rules.

(4) An intercollegiate athlete must provide the postsecondary educational institution with at least three (3) months' notice, in order to give the institution ample time to make roster adjustments for the season as deemed necessary.

The proposed language achieves several goals. First, the legislation memorializes the right for a student-athlete to take needed time off to care for a newborn child and recognizes the importance the first two months have on child development. The proposed language strikes a balance between the needs of new parents and the roster requirements of state colleges and universities. The language enables a student-athlete to take two months to care for their newborn as needed, excusing the student from practice, competitions, and any other obligations the school may typically require for student-athletes. The proposal also limits a postsecondary institution from removing a student off its roster entirely, within the same frame as the Family Medical Leave Act requiring that the same or similar job be available to an employee upon return from leave. However, to not injure an institution entirely, the postsecondary institution may opt to withhold the student-athlete from participating in subsequent competitions if the student-athlete's leave is in the timeframe of the regular season. This is intentionally designed to protect colleges and universities from disproportionate impact compared to other state institutions, especially within the spirit of intercollegiate competition amongst state schools.

The implications of state legislation regarding pregnancy-related concerns are akin to the growing pains that states and the NCAA are currently experiencing with NIL. In Texas, state legislation is at odds with the 2023 NCAA provisions, increasing friction between schools and

the NCAA.[95] In a 2023 letter sent to member schools, the NCAA warned universities that directly facilitating NIL deals violated existing policies and could result in disciplinary action.[96] However, Texas state law prohibits the NCAA and its conferences from punishing member schools who utilize NIL activities, regardless of NCAA regulations.[97] Ultimately, this issue will likely be litigated and courts will have to decide whether NCAA regulations can trump state legislation.[98]

If state legislation were to be enacted to address student-athlete parent concerns, the timeline would likely be similar to Texas' NIL issues. States would begin to enact their own legislation across the country, and the NCAA would attempt to over-regulate student-athlete parents in an attempt to "get ahead" of further state action. However, the conflict between state law and NCAA regulations would be widened, and ultimately a court would likely have to decide the balance. Considering the NIL legislation, student-athlete parents may come out on top of the fray, able to have their own agency to parent their newborn. As the friction between the NCAA and combative state legislatures heats up, issues like student-athlete parents may be a means to once again regulate the NCAA and limit its dwindling power further.

C. Third Alternative: Player Unionization and Bargaining

Lastly, the concept of player unionization and collective bargaining has been an intense topic of discussion in 2024, especially in light of recent strides by Dartmouth student-athletes to

[95] Dan Murphy, *New NCAA Rules Conflict with Some State Laws over NIL Deals*, ESPN (June 27, 2023, 1:20 PM), https://www.espn.com/college-sports/story/_/id/37923337/new-ncaa-rules-conflict-some-state-laws-nil-deals.
[96] *Id.*
[97] *Id.*
[98] *Id.*

unionize college athletes.[99] As the most fluid in terms of ongoing action, final determinations on the legal and social impacts of player unions are yet to be seen any time in the near future.[100] With a significant amount of uncertainty as to the future of student-athlete unionization comes an opportunity for development with an impact larger than either federal or state legislation can provide.[101] Furthermore, player unionization provides the greatest opportunity for student advocacy. Collective Bargaining Agreements (CBAs) between player unions and post-secondary institutions would enable student-athletes to bargain for the issues that are their greatest needs. Whether this includes student-athlete parents, however, is unclear with such a small population of the collective group.

1. A Brief History of Player Unionization

The push for collegiate player unionization is not a new concept. In fact, only ten years prior, the argument was made for Northwestern University football players, with a very different outcome.[102] In Spring 2013, the quarterback for Northwestern University contacted the president of the College Athletes Players Association to discuss the rights of student-athletes.[103] Eventually, the Northwestern football players were granted an appearance at a hearing in front of the Chicago district office of the National Labor Relations Board (NLRB) to discuss unionizing.[104] The Chicago NLRB approved, and Northwestern University asked for the national NLRB to overturn the decision.[105] Ultimately, the NLRB overturned the Chicago district

[99] Parker Purifoy, *Dartmouth Union Vote Sparks New Student Athlete Bargaining Ideas*, BLOOMBERG LAW (March 27, 2024, 5:20 AM), https://news.bloomberglaw.com/daily-labor-report/dartmouth-union-vote-sparks-new-student-athlete-bargaining-ideas.
[100] *Id.*
[101] *Id.*
[102] ESPN, *Northwestern Football Union Timeline*, (August 17, 2015, 2:27 PM), https://www.espn.com/college-football/story/_/id/13456482/northwestern-football-union-line.
[103] *Id.*
[104] *Id.*
[105] *Id.*

decision and prevented the Northwestern players from forming a union.[106] However, attitudes towards collegiate sports and player unions have shifted in the last ten years, and the recent player union developments may have a different outcome.

In 2023, 512 student-athletes were surveyed about unionizing to collectively bargain for improved rights and protections.[107] 62% of student-athletes said yes, and 38% no.[108] Clearly, there is strong support for student-athletes to have the opportunity to unionize and collectively bargain for better compensation and more rights in an ever-growing market.[109] As the profits for large conferences increase, there appears to be a growing trend in allowing student-athletes to seize a piece of the profit that they are competing for.[110] The complicated history of previously broken-down union conversations left unanswered questions and an opportunity for a revitalization of the student-athlete union movement.

2. Policy Implementation and Impact

Although the implementation of this policy is not as clear-cut as either federal or state legislation, there are general principles that are followed.[111] The framework of a professional sports Collective Bargaining Agreement focuses on several notable issues: revenue sharing, salary caps, transfer rules, discipline, and standards for safety.[112] Within the negotiations during the collective bargaining process, certain issues are considered mandatory while others are

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[106] *Id.*
[107] Nick Niedzwiadek, *College Athletes Open to Unionization's Potential*, POLITICO (December 18, 2023, 10:00 AM), https://www.politico.com/newsletters/weekly-shift/2023/12/18/college-athletes-open-to-unionizations-potential-00132224.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] JUSTIA, https://www.justia.com/sports-law/collective-bargaining-agreements-in-sports-leagues/#:~:text=To%20curb%20their%20power%2C%20professional,and%20players%20agree%20to%20follow (last visited Mar. 30, 2025).
[112] *Id.*

permissive.[113] Mandatory issues are those that must be discussed during agreement negotiations and usually include issues like salary and disciplinary measures.[114] Permissive issues may also be negotiated during the bargaining process but do not have to be discussed.[115] Either side may decide at any time to refuse to address a permissive issue without jeopardizing any existing agreement or negotiation.[116]

In the face of NIL and other compensation necessities for student-athletes, student-athlete parent concerns would unlikely be a mandatory issue. Instead, student-athletes who are already parents, or who are planning to be, may push their union to include pregnancy-related conditions as a permissive issue for the union to bargain with during negotiations. This provides flexibility for the student-athlete union to advocate for parents in their group but would not destroy a current negotiation structure if the university refuses to discuss the issue.

Player empowerment with the ability to collectively bargain for rights may also come with the risk of player strikes while negotiations stall.[117] Several lockouts and strikes have occurred between a handful of different professional sports leagues, hindering playing seasons and coach-to-athlete communication while negotiations are ongoing.[118] Applied to intercollegiate sports, the risk exists for similar events to take place. Much like professional sports, many conferences in the NCAA rely on television deals related to the regular season.[119] Player strikes would cause similar financial effects akin to their professional counterparts, limiting the regular

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[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] JUSTIA, https://www.justia.com/sports-law/collective-bargaining-agreements-in-sports-leagues/#:~:text=To%20curb%20their%20power%2C%20professional,and%20players%20agree%20to%20follow (last visited Apr. 21, 2025).
[117] *Id.*
[118] *Id.*
[119] *See* GAMECHANGE, https://www.gogamechange.com/blog/college-sports-media-rights/#:~:text=Media (last visited Apr. 21, 2025).

season and effectuating a loss of revenue from ticket sales, television advertisements, and merchandise purchases.

The last consideration is whether student-athletes in a union would choose to advocate for student-athlete parent-related concerns. This portion of the student-athlete population is so small that there are no statistics regarding how many student-athletes are members of this group. Some student-athletes may opt to forgo competing while pregnant, eliminating a student from the visibility of their peers even further. These students may be more focused on working a second job to feed their family or may spend all their free time outside of sports commitments at home to provide childcare. This portion of student-athletes are unable to effectively advocate for themselves and must rely on the consideration of their fellow students to carry these goals forward.

3. The Logistics of Collective Bargaining

Another potential pitfall is the entity which a player union could negotiate with. Much like state legislation, CBAs with postsecondary institutions may conflict with NCAA regulations that contradict negotiated terms. A decision would have to be made either at the judicial level, or with a CBA involving the NCAA and similar Associations, which would force negotiations to last even longer than before. Considering the lack of collaborative action with the current NIL laws, it is unlikely that the NCAA, a state university, and student-athlete unions would quickly and efficiently agree on terms in the best interests of all parties.

An attempt to collectively bargain with the NCAA itself is ripe for other issues, including jurisdictional roadblocks.[120] Since the NCAA is comprised of public, private, and religious education institutions, there is no legal method to bind each school to the NLRB's jurisdiction in terms of collective bargaining.[121] If student-athletes at different postsecondary institutions made an effort to unionize collectively across multiple institutions to bargain with the NCAA, the NLRB's decision to validate that student-athletes' union may be moot depending on which schools are involved in the union.[122] Presented with this problem, there are potential solutions to address the multi-institution unions: bargaining at the conference level or bargaining at the individual school level. Each of these solutions are additionally impacted by how student-athletes maintain eligibility, as well as how enforcement can be upheld in these different approaches. Finally, consideration of how student-athletes would collectively bargain together: by sport, by gender, or as a unified group, must be given.

4. Collective Bargaining at a Division Level

First, it is important to examine collective bargaining at the highest level possible: NCAA Divisions individually. As previously explored, each division in the NCAA addresses the relationship between school and student-athletes differently.[123] Each division handles scholarships separately, and the emphasis on time spent between academic endeavors and athletic performance fluctuates depending on how much scholarship money is given to student-

[120] *Professional Sports Players' Unions Support College Athletes' Ability to Unionize*, DUANE MORRIS LLP (July 1, 2024), https://www.duanemorris.com/alerts/professional_sports_players_unions_support_college_athletes_ability_unionize_0724.html.
[121] *Id.*
[122] *Id.*
[123] *The Differences Between NCAA Divisions*, NCSA SPORTS, https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions (last visited Apr. 21, 2025).

athletes.[124] With this in mind, collective bargaining for the NCAA as a whole would not be feasible given the different needs of each division, and how committed a student-athlete is to their sport is predicated on which division their school is a part of.

To consider the needs of Division I as an example, out of 365 member schools of the division, 125 institutions are registered as private.[125] Although there is no current research on the contrast between private and public schools, there are some differences that are obvious. Most notably, public schools tend on average to be larger in the student population than their private school counterparts.[126] Additionally, smaller class sizes at private schools mean a smaller staff to student ratio which provides extra support for student-athletes.[127]

The differences in public versus private schools mean that institutions have different needs, and public versus private are only one example of the differences. When student-athletes want to collectively bargain, the goal is to address issues that are currently affecting the student-athlete population. In other words, student-athletes would likely only intend to bargain for issues that they care about, addressing the needs of the students that are around them. To collectively bargain at a division level requires an exorbitant amount of collaboration across not only universities but also state lines.

For example, a student who plays basketball at Clemson University in South Carolina is in the same division as a student who plays soccer at Yale University in Connecticut. Although they are in the same division, the Clemson student is at a university that has spent a large portion

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[124] *See Id.*
[125] *Division I Institutions*, NCAA, https://web3.ncaa.org/directory/memberList?type=12&division=I (last visited Apr. 21, 2025).
[126] *Public vs Private Colleges: What's the Difference & Which Is Right for You?,* CRIMSON EDUCATION (Dec. 3, 2024), *https://www.crimsoneducation.org/vn/blog/public-vs-private-colleges/.*
[127] *Id.*

of their athletic budget on world-class facilities, whereas Yale may not have allocated as much for their athletic teams. The Clemson student may then want to collectively bargain for a minimum number of coaching staff, as there are so many student-athletes at Clemson that the need is greater for more coaches. Conversely, the Yale student may desire a separate training facility for student-athletes. The needs of the student-athletes at each institution will vary widely, and students would have to carefully coordinate to achieve bargains that address the needs across the division.

Not only do universities within the division have different needs that must be addressed individually, but each university may also have their own eligibility standards for student-athletes to uphold throughout their college career.[128] The NCAA standards for eligibility are affected by training and academic requirements. Student-athletes have a minimum standard of academic achievement to maintain eligibility, which varies at the division level and at the individual institution level.[129]

Division I schools have a requirement for student-athletes to maintain a certain level of coursework to complete their degree in a timely manner.[130] Student-athletes in this division not only have to be enrolled in (and earn) at least six credit hours a semester, but they are also subject to minimum grade point average requirements set by their institution for graduation.[131] This standard stands as a stark contrast to Division II, which requires a minimum grade point average of a 2.0, as well as a minimum of nine-semester or eight-quarter credit hours a

[128] NCAA, *Staying on Track to Graduate,* NCAA, https://www.ncaa.org/sports/2021/2/10/student-athletes-current-staying-track-graduate.aspx (last visited Apr. 21, 2025).
[129] *Id.*
[130] *Id.*
[131] *Id.*

semester.[132] Division III has no minimum credit requirements to compete, but student-athletes must maintain a good academic standing with their institution and enroll in 12 hours a semester.[133]

While the eligibility differences draw a clear picture of each division's priorities for their student-athletes, it also creates a problem of equal standards both at the NCAA level and at the division level. Institutions are given discretion in their own minimum grade point average baseline, and the NCAA defers to each institution's graduation requirements to maintain eligibility. This places a certain level of power within the institution level and shows that the NCAA is willing to defer to an individual institution in certain circumstances. This may be evidence that collective bargaining, although likely unsuccessful at the NCAA and Division level, may achieve better results at the institution level. However, this comes with another problem: the variance in student-athlete populations that may choose to collectively bargain together.

5. Collective Bargaining at an Institutional Level

At an institutional level, there is greater flexibility for schools to make decisions that are in the best interests of their students if the NCAA allows it. A university can make decisions quicker than the bureaucratic methods that the NCAA currently implements and tailor those decisions to the needs of their student-athletes with a better understanding of their school's budget, population, and capacity than the NCAA or the division has. Most importantly, an institution has the manpower to speak with student-athletes directly and build personal

[132] *Id.*
[133] *Id.*

relationships with the student population- something that decisionmakers in a different city or state cannot accomplish.

With a better finger on the pulse of the student-athlete population, an obvious answer seems to be to allow universities to collectively bargain with their student-athletes. However, there are tradeoffs to this relationship that remain up-close and personal for both the university employees and the student-athletes who choose to participate in bargaining. Student-athletes bargaining with university employees put a face to the names behind the bargains and add an extra personal level to negotiations. Although both groups are likely to negotiate through a representative, common ground may be easier to find between the university and its student-athletes, as both aim to develop an understanding of student-athletes' needs.

However, this personal relationship may lead to emotional reactions when negotiations inevitably end with certain provisions that may not be satisfactory to one party. These reactions may leave the other party in a vulnerable state: open to protests, online backlash, and other negative reactions from the unhappy population. Having a more public group of employees may lead to more resignations due to threats, high turnover, or the institution simply refusing to continue to bargain with its student-athletes, which would create a wall between the university and its student population.

In addition to the tradeoffs with institutional-level collective bargaining, it is important to also consider which student-athlete populations may choose to collectively bargain together. The most natural first choice may be for the entire student-athlete population to work together. However, this is highly dependent on the size of the student-athlete population at an institution. An institution may choose certain sports to participate in, and others to opt out of. This means

that student-athlete needs may vary by sport, and it may be difficult to reach a consensus on student needs if the population is significant on campus.

Considering each student-athletes' needs by sport may be the next logical choice but creates several different groups for the university to collectively bargain with and may overload the institution. An overloaded institution with limited capacity is less likely to be flexible in collective bargaining negotiations and may not be willing to attempt to bargain with every individual sport. Additionally, certain sports are more likely to bring in a higher revenue for their conference and university.[134] Out of the sports the NCAA offers, football and men's basketball generate the largest revenues from media rights, ticket sales, licensing, and other means of financial support from the community.[135] This gives an institution a higher incentive to collectively bargain with student-athletes participating in football and men's basketball, creating a disproportionate impact both on other sports and on female student-athletes who are not allowed to compete in these sports.

Turning to the final potential group for collective bargaining: gender-based populations. Not only do university guidelines remain in consideration, but the federal Title IX rules apply as well.[136] Title IX provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[137] In the college sports world, this is more predominantly seen in the amount of collegiate sports that are offered to men

[134] Andrew Zimbalist, *Analysis: Who Is Winning in the High-Revenue World of College Sports?*, PBS NEWS (Mar. 18, 2023, 7:14 PM), https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports.
[135] *Id.*
[136] NCAA, *Title IX Frequently Asked Questions*, NCAA, https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions.aspx (last visited Apr. 21, 2025).
[137] *Id.*

and women, maintaining equitable scholarship opportunities, and requiring equal treatment across campus.[138] Additionally, Title IX applies not only to public universities but also to "almost all" private postsecondary institutions because they are recipients of federal funding through financial aid programs utilized by their student populations.[139]

Title IX protections may operate parallel to CBAs and negotiations, acting as guardrails to promote fair and equitable treatment to both student-athlete populations. These protections may also force institutions to look at other sports besides those that generate the most revenue for their school, which tend to leave female student-athletes behind in the process.

Applied to the overarching theme of student-athlete parents, collectively bargaining via two gendered student-athlete groups may provide the most opportunity for parents to advocate for themselves and their specific needs. Student-athlete women may, with the support of their fellow students who are not parents, find common ground and promote safe motherhood and a minimum time for pregnancy leave. Fathers may be able to advocate for paternity leave under the common ground of active fatherhood and find support from fellow athletes who are also facing familial responsibilities even outside of parenthood.

Drawbacks for this method of collective bargaining, when combined with the Title IX protections, are largely mitigated in practicality. However, universities may still be reluctant to bargain with multiple student groups. Unfortunately, this reluctance may only be exacerbated by other student groups on campus, such as unionizing undergraduate student workers.[140] Large

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[138] *Id.*
[139] *Id.*
[140] Liam Knox, *'We're Not Slowing Down,' Student Workers Say*, INSIDE HIGHER ED (April 26, 2023), https://www.insidehighered.com/news/faculty-issues/labor-unionization/2023/04/26/were-not-slowing-down-student-workers-say (explaining that student workers, including Resident Assistants and dining hall employees, are increasingly unionizing, continuing a trend seen among graduate students and adjunct faculty, influenced by post-pandemic labor activism).

universities experiencing collective action across campus may face tough decisions on collective bargaining, especially as the population demanding action grows.

Overall, whether collective bargaining occurs at the NCAA, division, or institutional level, each entity is certain to face challenges. When factoring in student-athlete population groups, between a full student-athlete population, divided by sport, or grouped by gender, student-athletes will find ways to work together, regardless of their grouping, to promote collective action and demand change in some form.

IV. LOOKING INTO THE FUTURE: THE LASTING IMPACT OF NCAA INACTION

In reviewing alternatives to circumvent the NCAA's lack of assistance of their student-athletes, the issue of pregnancy and student-athlete parental concerns are only the beginning of the NCAA's inadequate response to student needs. The world of collegiate sports has long been considered the "wild west" of the legal world, with a constantly evolving means of assessing the NCAA and its power.[141] Starting with a change as simple as a pregnancy eligibility exemption begins the conversation that the *Alston* case opened: that the NCAA is no longer keeping up with the times and adequately addressing the needs of the student-athletes it purports to represent and protect.

The NCAA's lack of proactivity is growing more and more urgent, and this landslide of opportunity, the pregnancy exemption, opens the door that can lead to future changes down the road regarding NIL and Transfer Portal rule. Just as the pregnancy exemption can have simple changes that the NCAA refuses to make, which can be circumvented, so too do these new issues.

[141] Rush Nigut, *NIL: The Wild West of College Athletics*, RUSH ON BUSINESS (Dec. 1, 2024) https://www.rushonbusiness.com/2024/12/articles/sports-and-entertainment-law/nil-the-wild-west-of-college-athletics/.

Moving into the future, this pregnancy exemption may pave the way for future change and finally open the door wide open into the glaring issues the NCAA presents but refuses to address.

The NCAA has built a track record of action taken as a reactive approach, rather than proactively developing policies to protect its student-athletes.[142] The NIL issue is only the beginning of disjointed responses from the NCAA, and student-athlete parents stand for similar treatment if the conversation is opened again. The NCAA faces federal legislation, state policies, or student-athlete unionization in response to its absence of action and guidance. Policies developed too late create confusion between state legislatures and NCAA regulations, forcing the NCAA to adapt its policies when the association had the opportunity to be at the front of the conversation. Student-athlete parent concerns create an opportunity for the NCAA to address the issue head-on and craft policies in an equitable way. However, continued failure to respond to NIL and transfer portal needs are indicative of the NCAA's refusal to create up-to-date policies, and alternative measures must be taken to help the student-athlete parents in need of advocacy.

V. CONCLUSION

Although it is clear that some degree of action is necessary to respond to the NCAA's lack of action, the avenue by which to achieve a successful result is subjective. In responding to the needs of collegiate student-athlete parents, who demand equal treatment and empathy from institutions, these concerns demand action.

The NCAA's choice to not expand the eligibility extension for student-athlete fathers in the *Baker v. NCAA* case created a disastrous precedent and a growing need to circumnavigate the

[142] Dan Murphy, *New NCAA Rules Conflict with Some State Laws over NIL Deals*, ESPN (June 27, 2023, 1:20 PM), https://www.espn.com/college-sports/story/_/id/37923337/new-ncaa-rules-conflict-some-state-laws-nil-deals.

NCAA decision making moving forward. With this in mind, there are three primary means of addressing student-athletes' concerns about parenthood.

First, legislation could be implemented at a federal level. The Family and Medical Leave Act (FMLA) creates a simple starting point for including student-athlete parents within the current legislation. Language, like other exceptions made within the FMLA, including certain hourly practice requirements, could be added. Similarly, state legislation could be enacted to provide protections like how Florida's NIL laws created a baseline for student-athletes.

Lastly, student-athletes could work together to collectively bargain for their own needs. Although the most uncertain in the fact of ever-evolving stories in the current news, this alternative has the potential to impact a wider audience of student-athletes beyond the protection for student-parents.

Ultimately, each alternative would be met with their own trials and hardships on the road to achieving a positive result for these student-athletes and are subject to outside variables that may prove to be large roadblocks. However, any alternative to promote a level of action to meet the needs of student-athlete parents is more than the NCAA has allowed in the last 19 years and may pave a pathway to other student needs that have been left by the NCAA's inactivity.[143] Hopefully, these movements will empower student-athletes to advocate for what they need to succeed on the field and at home and collectively prove that the NCAA is in desperate need of an overhaul.

[143] *See Butler*, U.S. Dist. LEXIS 61632 (2006).