



State of West Virginia
Office of the Attorney General

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Charlie Baker
President, National Collegiate Athletic Association
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Dear Mr. Baker:

The NCAA recently rejected RaeQuan Battle's request to play basketball for West Virginia University during the coming season. Instead, the NCAA has insisted that RaeQuan must sit out one whole season at WVU merely because he had already transferred from one Division I school to another back in 2021.

The NCAA's decision to reject RaeQuan's request for a waiver of the NCAA's "year-in-residence" requirement was wrong. For one thing, it conflicts with the NCAA's own guidelines and principles. For another, the NCAA's choice to arbitrarily limit student choice through these transfer guidelines—both in RaeQuan's case and in many similar cases—raises significant antitrust-related concerns.

I urge you to reverse your decision and grant RaeQuan's request for a waiver. The NCAA should also take immediate steps to implement a more appropriate system for regulating student-athlete transfers.

Real issues are at stake here for the citizens of West Virginia, and they implicate my duties as the State's chief antitrust officer. It is my hope to work with you in a collaborative manner to address the concerns raised in this letter, but we reserve the right to use all appropriate options to protect our citizens and students.

RaeQuan's Transfer to West Virginia University

At the Division I level, [your organization claims](#) to "promote the opportunity for ... eligible student-athletes to engage in fair competition." It professes to conduct collegiate athletic programs

“in a manner designed to enhance the well-being of student athletes who choose to participate.” And it says that its membership “believes in and is committed to ... diversity.”

As part of the Division I model, Division I member-schools have recognized that “a careful balancing of these [and other] values may be necessary to help achieve the purposes of the Association” “[i]n some instances.” In fact, [Article 2 of the NCAA Constitution](#) contemplates that the Association will allow for “flexibility” in adopting and applying rules for competition at all levels.

Likewise, [the Committee for Legislative Relief](#)—the NCAA committee responsible for providing exceptions and waivers to NCAA rules—is empowered to “waive the application of a rule” when it does not serve values like these. Relief from a rule is especially appropriate when “minimal to no competitive or recruiting advantage will result from the waiver being granted” or when “[s]tudent-athletes collectively benefit.”

In the specific context of immediate eligibility after multiple transfers, [the same committee has recognized](#) that waivers of the year-in-residence requirement should be granted “for reasons related to the student-athlete’s physical or mental health and well-being.” The committee has also said that multiple transfers without a year in residence should be permitted because of “exigent circumstances.” And just a few years ago, [the NCAA stressed](#) that its transfer regulations should ultimately “prioritize student-athlete opportunity and choice.” In the end, the NCAA has suggested that the waiver process should take a case-by-case approach, and even the written guidelines are not meant to be binding rules.

Yet in denying RaeQuan’s request for a waiver to the year-in-residence requirement, the NCAA seems to have lost sight of all the above principles. In short, the NCAA has struck the wrong balance.

From all appearances, RaeQuan needs basketball for his well-being. His coach has [admitted](#) that he is “really worr[ied]” about RaeQuan being unable to play because RaeQuan “really does need basketball in his life.” For RaeQuan, basketball provides “accountability and ... structure each and every day to keep his head on straight.” But to obtain those important benefits without a needless delay, RaeQuan would need to now pack his bags and seek to return to Montana State University—all after becoming part of the WVU community. Unsurprisingly, RaeQuan has shown no interest in doing that.

The NCAA’s decision to deny RaeQuan the opportunity to engage in fair competition this year also comes as another bump in an already tumultuous collegiate career for RaeQuan.

His first school, the University of Washington, [went fully remote](#) because of COVID early in March 2020. COVID then [took multiple members of RaeQuan’s close family](#). When RaeQuan eventually returned to school for the pandemic-affected 2020-2021 season, his team experienced a “woeful” campaign that led [RaeQuan and five of his teammates to transfer elsewhere](#). RaeQuan seemed to be finding his footing at Montana State. But [his head coach left](#)—a circumstance that [would have alone justified a transfer waiver](#) under previous NCAA policies.

RaeQuan then [announced his intent to transfer](#). Considering the NCAA's past practices, [he had no reason to know](#) that the NCAA would apply its transfer restrictions as aggressively as it has here, as the full import of the policy became clear only months later. And since arriving at WVU, public reports confirm that he has become central to the community (while continuing the academic success that he enjoyed at his other institutions). Yet RaeQuan now must sit.

Given just how many obstacles RaeQuan has already faced during his time in college, one would expect the NCAA to show some of the "flexibility" that it has touted before. Yet at least to this point, it hasn't.

A more flexible approach would be especially appropriate here given RaeQuan's pre-collegiate background, too. Even before college sports, RaeQuan had faced substantial challenges in life. In 2013, RaeQuan [lost a close cousin to suicide](#). Less than a year later, a school shooting took the lives of four classmates. The shooter—who ultimately took his own life—[was also related to RaeQuan](#). During these hard times, RaeQuan found solace in basketball.

"[D]espite all the challenges he's had in his life," [RaeQuan's WVU coaches report](#) that "he is such a great individual, a great teammate, and a very positive person." The NCAA should be looking for ways to support student-athletes like these—not stifle them. (And for its part, WVU has a long history of helping its basketball student-athletes leverage the sport to overcome challenging circumstances—just ask Jerry West.)

What's more, if the NCAA's commitment to diversity is to mean anything, then the Association should have approved RaeQuan's waiver request. RaeQuan [is a member of the Tulalip Tribes of Washington](#). Before college, he spent "his entire life on the reservation 40 miles north of Seattle." And when his basketball talents allowed him to attend college, RaeQuan became the first person from the Tulalip people to earn a Division I scholarship in any sport. WVU recognizes how [RaeQuan's heritage is central to his story](#); head coach Josh Eilert has [already visited him on the reservation](#).

Quite simply, especially considering how rarely [Native Americans compete in the NCAA](#), the Association should think twice before sidelining one of the few active indigenous student-athletes for an entire season.

For all these reasons, the Association should reverse its decision to deprive RaeQuan of a "vital, co-curricular part of [his] educational experience" for the 2023-24 season. A waiver would not provide any competitive advantage to anyone. And granting waivers when substantial mitigating circumstances are present benefits all student-athletes, each of whom might someday face challenging circumstances. Altogether, the NCAA should let RaeQuan play—now.

The NCAA's Problematic Handling Of Transfers Generally

RaeQuan's story is unfortunately only one of many similar stories. According to the [NCAA's own data](#), about 650 student-athletes entered the transfer portal this year as "multiple time transfers who

would require a waiver to compete immediately.” No doubt even more students would have sought transfers if the Association had not announced its newly restrictive policies earlier this year. The presumption is now that *none* of these student-athletes will be able to play the sports they love for a year. Criticism of the transfer process has become so commonplace that [your organization has been forced to issue several statements](#) defending the rules over the past few months.

The Association’s decision to restrain hundreds of student-athletes each year—thus depriving them of the chance to pursue the athletic and educational opportunities of their choice—raises serious questions under the antitrust laws. That’s especially so given that these opportunities are often tied to name, image, and likeness agreements that in turn provide substantial commercial benefits to athletes at Division I institutions like WVU. Yet to date, the NCAA has never convincingly explained how these restrictions align with either state or federal antitrust law. *See* 15 U.S.C. § 1 (barring agreements to restrain trade or commerce); W. Va. Code § 47-18-3(a) (same). No wonder, then, that my colleagues in [Ohio](#), [North Carolina](#), and even at the [U.S. Department of Justice](#) have already warned that the Association’s transfer-related actions may be unlawful.

The year-in-residence requirement produces obvious anticompetitive effects. Because of the rule, student-athletes—who face no other real option for playing these kinds of sports—are dissuaded from pursuing a transfer. If they decide to go ahead anyway, they face another year out of the job market and must bear other potential expenses and costs that come with extending college for the length of the “redshirt” year. And the multiple-transfer rule does not even allow for immediate eligibility when a player is forced to transfer after having his scholarship pulled—so players in those circumstances might just end up dropping out entirely or heading to a Division II school. Thus, student-athletes [lose the ability to market their services](#) to the schools that would value them most. As [a former justice of the North Carolina Supreme Court explained](#), these harms confirm that “[t]his policy of having to sit out a year of competition has nothing to do with the welfare of the young men and women impacted by the rule.”

At least on their face, the NCAA’s “procompetitive” reasons for its transfer restrictions do not pass muster. Indeed, [one expert](#) even dubbed those reasons “chimerical and disingenuous.”

For instance, the Association repeatedly intones that the need for student focus requires a time out after transfer. Last month, [NCAA leadership said](#) that “extenuating factors, such as mental health,” might “suggest a student-athlete should be primarily focused on addressing those critical issues during the initial transition to a third school.” Similarly, the Association has questioned whether allowing transfers without a one-year wait period might somehow stunt academic progress. Of course, one could question whether the distractions of a transfer are that much greater than the other distractions that come with being a student-athlete at a Division I school—and whether a “suggestion” is enough evidence to sustain this kind of restraint. The NCAA should be able to summon more concrete evidence of student underperformance if the problem were real; that evidence has never been made public. And consider the contrary evidence that *is* public. Instead, [the NCAA has said before](#) that “student-athletes who transfer with at least a 2.6 grade-point average have the same likelihood of academic success as a student-athlete who remains at his or her original institution.” How, then, can it now say that *all* two-time transfers will suffer from damaging distractions? Nothing in RaeQuan’s case suggests such a concern.

Even the NCAA's own policies undermine its "focus"-based reasoning. The NCAA permits "one-time" transfers to play without imposing a year-in-residence requirement even though those same concerns would apply in that situation, too. Many so-called "4-2-4" transfers (who transfer twice to and from two-year colleges) [can also play immediately](#). First-time transfers from junior colleges can play immediately as well, even though the leap to a more rigorous Division I institution is more challenging than a lateral DI-to-DI move. Likewise, the NCAA permits freshmen students to play, even though those (typically less mature) students are also making a similar transition to a new learning environment. Yet the NCAA abandoned the restriction of freshmen eligibility years ago. Each of these exceptions undermines the notion that a year on the bench is a prerequisite for student success. And if the NCAA were truly concerned with student-athletes enjoying sufficient time to focus on a smooth transition, [then it would restrict the practices and training sessions that account for the bulk of an athlete's time](#). But it does not.

The NCAA often cites amateurism as another reason behind its rules, but that justification also doesn't seem to work here. If the NCAA were merely worried about transfers motivated by quasi-professional and athletic-focused concerns, then [it could at least provide for more exceptions to the presumptively blanket bar on transfers](#). The NCAA's choice to offer only the narrowest of exceptions implies that it has some aim other than preserving amateur play. [Other, narrower alternatives](#)—like limiting eligibility to those enrolled at certain times or cabining transfers to certain windows of time—also could serve the same interests in a less oppressive way. And other NCAA rules, such as the anti-poaching provisions, help preserve the amateur nature of competition, too.

If the unique way that the Association treats these student-athletes "suggests" anything, it is that something is amiss. If these student-athletes are students first, then why are only athletes singled out for such restrictions? After all, a non-athlete can transfer from school to school and participate in extra-curricular activities as much as he or she pleases—but not a student-athlete. And if they are really athletes first, then why aren't other participants in NCAA athletics restricted, too? Coaches, administrators, and the like can come and go as they please, but not players like RaeQuan. The whole arrangement reads something like an unbargained-for and asymmetrical noncompete agreement.

In answer to legitimate concerns like these, the NCAA has largely emphasized that its governing bodies—which purport to represent all NCAA member institutions—have approved the rules. The Association has maintained that any changes to those rules should come by way of those same governing bodies. But it is unclear why the NCAA believes that a horizontal restraint of trade should be immunized by the participants' ostensible agreement. And it is not reasonable to think that affected parties should stand by and hope that the same processes that produced these facially defective policies will reverse course and implement more appropriate measures.

Indeed, the rather haphazard way in which the Association has implemented and applied these rules over the years suggests just the opposite. In fact, after only just recently changing its transfer guidelines, the NCAA [has announced](#) that it is again undertaking yet another review of the transfer

rules. So it's understandable that some have predicted that "[the NCAA will likely not act on its own](#)" to implement a final, clear, and workable solution.

Lastly, the Association cannot rely on prior precedent rejecting prior challenges to NCAA transfer rules, as [the Association recently tried to do](#) in response to an inquiry from the Ohio Attorney General. Next to none of these precedents probed whether the transfer rules survive a traditional rule-of-reason analysis. Instead, they employed presumptions of procompetitiveness and other deferential modes of review to avoid a complete analysis. *See, e.g., Deppe v. NCAA*, 893 F.3d 498, 502 (7th Cir. 2018). [That short-cut is no longer available to the NCAA](#), particularly considering *NCAA v. Alston*, 141 S. Ct. 2141 (2021). There, the Supreme Court made plain that the dicta that the NCAA had relied on to secure those wins—dicta from *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 101-02 (1984)—did not “declare the NCAA’s compensation restrictions [or any other restrictions] procompetitive in 1984 and forevermore.” *Id.* at 2158; accord *O’Bannon v. NCAA*, 802 F.3d 1049, 1064 (9th Cir. 2015). *Alston*—a case brought by a former WVU running back, by the way—is a reminder that “[t]he NCAA is not above the law.” 141 S. Ct. at 2169 (Kavanaugh, J., concurring). And as should be obvious by now, the ordinary “law” and the rule-of-reason analysis it entails seems very likely to defeat the existing transfer rules.

The NCAA needs to take another look at its transfer rules and implement provisions that do not present questionable and facially anticompetitive restraints of trade.

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College athletics are deeply important to the athletes, the schools, and the communities that support them. And WVU is deeply important to RaeQuan. Yet rigid rules applied without reason threaten all that—and present serious problems that demand real solutions. I welcome the chance to work with your organization to develop solutions that could benefit student-athletes. In my view, we owe our young people an earnest effort to achieve fair and market-driven outcomes for all, not just blind adherence to guidelines and rules that aren’t working. And setting things right in RaeQuan’s case would at least be progress.

I would appreciate a meaningful response from the NCAA no later than November 6, 2023, explaining how it plans to address these concerns.

Sincerely,



Patrick Morrissey
West Virginia Attorney General

cc: Scott Bearby, General Counsel, NCAA