JOSHUA H. STEIN
ATTORNEY GENERAL

September 26, 2023

Via Electronic Mail

Charlie Baker
President, National Collegiate Athletics Association
700 W. Washington Street
P.O. Box 7110
Indianapolis, Indiana 46206-6222

Re: Devontez Walker and the NCAA's Transfer Rules

Dear Mr. Baker:

I write to express my concern about the NCAA's decision to bar Devontez Walker from playing football for the University of North Carolina at Chapel Hill this season. That decision is wrong—and likely illegal.

As you know, Mr. Walker has applied for a waiver of the NCAA's "year in residence" requirement for student-athletes. That rule generally requires student-athletes who transfer schools to refrain from competition for one academic year after their transfer. *See* NCAA Rule 14.5.1. But it carves out numerous exceptions—most notably, a broad exception for a student's first transfer from one four-year institution to another. *See* NCAA Rule 14.5.5.2.10.

It is my understanding that the NCAA denied Mr. Walker's application for a waiver despite numerous considerations counseling against such a denial:

- *First*, Mr. Walker began his career as a student-athlete at North Carolina Central University. But Mr. Walker never actually played at N.C. Central because the 2020 season was cancelled due to the COVID-19 pandemic. Kent State University—the school where Mr. Walker moved after N.C. Central—is thus the only university where he has ever played a college football season.

- *Second*, Mr. Walker's decision to leave Kent State and transfer to UNC-Chapel Hill was finalized *before* the NCAA's Division I Council voted to approve legislation restricting the ability of student-athletes to secure waivers after transferring more than once. Mr. Walker made the decision to change schools with the reasonable expectation—based on your organization's well-documented policy of flexibility and accommodation in response to the COVID-19 pandemic—that he would be able to transfer and immediately play.

- *Third*, Mr. Walker's decision to leave Kent State was motivated in large part by mental-health struggles. The NCAA professes to care deeply about the student-athletes the organization regulates and indeed has carved out an express exception to the default transfer rules for scenarios where a student-athlete transfers "[f]or reasons related to the student-athlete's physical or mental health and well-being." NCAA Division I Committee for Legislative Relief, *Information Standards, Guidelines and Directives*, *available at* https://ncaaorg.s3.amazonaws.com/committees/d1/clr/D1CLR_Guidelines.pdf.

- *Fourth*, Mr. Walker decided to transfer in part to be closer to his family in North Carolina, particularly his ailing grandmother. I understand from public reporting that the NCAA just granted University of Minnesota football player Craig McDonald an exception to the two-transfer rule under similar circumstances.

- *Fifth*, Mr. Walker was a model student at Kent State—securing a 3.7 GPA—and has continued to be a model student since he arrived on campus at UNC-Chapel Hill.

Despite all of these mitigating factors, the NCAA has denied Mr. Walker the opportunity to play football at Carolina this fall. Not only is that decision wrong as a matter of common sense and decency, it is also likely unlawful.

Restricting Mr. Walker from playing at UNC-Chapel Hill this fall raises serious antitrust concerns as an illegal restraint of trade. In essence, the NCAA has imposed a sweeping, unilateral, one-year non-compete restriction, in violation of both state and federal law. *See, e.g.*, 15 U.S.C. § 1 (barring agreements in restraint of trade); N.C. Gen. Stat. § 75-1 (same, under North Carolina state law).

Just two years ago, in *Alston v. NCAA*, 141 S. Ct. 2141, 2156 (2021), a unanimous U.S. Supreme Court held that the NCAA is not "categorically exempt . . . from ordinary rule of reason review." *See also id.* at 2166-69 (Kavanaugh, J., concurring) (declaring that "[t]he NCAA is not above the law" and urging more searching scrutiny of the organization's rules). *Alston* confirms that the NCAA's rules are typically subject to a conventional "rule of reason" analysis and therefore must be supported by reasons that antitrust law determines to be "procompetitive." *Id.* at 2160.

It is exceedingly difficult, if not impossible, to justify the NCAA's decision to bar Mr. Walker from playing football at Carolina this fall as being procompetitive.

To start, the "year in residence" rule is now riddled with so many exceptions that the NCAA cannot plausibly substantiate the rule's prior justifications. Since April 2021, the rule requiring transfers to sit out a year has not applied to a student-athlete's first transfer between schools. This glaring exception is a clear admission that transferring schools does not automatically jeopardize student-athlete welfare nor imperil college sports as a whole.

This is far from the only exception to the general rule that athletes must sit out a year following a transfer. Student-athletes can secure waivers from the "year in residence" rule for all

manner of reasons—when their major is discontinued or when they have suffered discrimination, to name just two.

To be clear, I take no issue whatsoever with the notion that the NCAA's categorical rules need exceptions and believe those exceptions should be applied liberally in appropriate circumstances. At the same time, the NCAA's exceptions—and the erratic manner in which they have been applied—make it difficult to accept that preventing Mr. Walker from playing football this fall produces any procompetitive benefits.

The only potential procompetitive justification for the transfer rule that would seem to have any persuasive force post-*Alston* is that the rule helps student-athletes remain on track to graduate because it gives them a chance to integrate on campus academically and socially before fully resuming the rigors of their sport. But that justification falls flat for Mr. Walker—he remains on track to graduate already and has maintained strong grades at every institution he has attended.

Furthermore, the NCAA transfer rule bars student-athletes only from competing, not from practicing or participating in other team activities. This approach recognizes the common sense proposition that elite athletes should not be expected to abandon their sport for a year to focus solely on academics and social life. But practice, not competition, typically constitutes the bulk of the time that a student-athlete spends on athletics. The NCAA will thus be hard-pressed to argue that denying Mr. Walker a transfer waiver was necessary to promote a focus on academics and campus integration, especially given that Mr. Walker is in good academic standing.

In any event, legitimate concerns about multi-transfer athletes' ability to graduate on time could plainly be addressed through a less categorical approach than the sweeping rule that has been applied to Mr. Walker. For instance, the NCAA could institute a rule that permits student-athletes who are on track to graduate to compete immediately following a transfer, but requires those who are not on track to wait.

This is precisely the kind of analysis that a court tasked with evaluating the NCAA's decision regarding Mr. Walker is likely to engage in. Such a court will undoubtedly struggle to conceive of any procompetitive benefit that could justify the anticompetitive restraint that the NCAA has imposed.

My concerns, moreover, extend beyond your decision to bar Mr. Walker from playing football at Carolina this fall. The NCAA's transfer rules, as applied to Mr. Walker's unique case, are unlikely to survive rule-of-reason review. But the transfer rules also seem likely to violate the antitrust laws more broadly.

I certainly agree the NCAA has a valid interest in differentiating college sports from pro sports. Nevertheless, numerous court decisions—including *Alston*—have made clear that it is loyalty among alumni and regional fans that ensures the popularity of college sports, not the NCAA's idiosyncratic and ever-changing rules about the metes and bounds of "amateurism." *See, e.g.*, *In re NCAA Grant in Aid Cap Antitrust Lit.*, 958 F.3d 1239 (9th Cir. 2020) *aff'd sub*

nom. Alston v. NCAA, 141 S. Ct. 2141 (2021); *O'Bannon v. NCAA,* 7 F.Supp.3d 955, 1001 (N.D. Cal. 2014), *aff'd in pertinent part*, 802 F.3d 1049 (9th Cir. 2015).

Given this new legal landscape and given my particular concerns about the NCAA's treatment of Mr. Walker, my office is considering the full range of options at its disposal to investigate the NCAA's potential antitrust violations. These options include issuing civil investigative demands to the NCAA, initiating an investigation alongside Attorney General Offices in my sister States, and pursuing litigation alleging violations of state and federal law.

While I will not hesitate to pursue these options should I decide that they are warranted, I stand ready to engage with the NCAA on a voluntary basis should the organization decide to do so. I would welcome a response by Friday, September 29, 2023.

Best Regards,

Josh Stein