

Date of Hearing: July 9, 2019

ASSEMBLY COMMITTEE ON HIGHER EDUCATION

Jose Medina, Chair

SB 206 (Skinner) – As Amended June 20, 2019

SENATE VOTE: 31-5

SUBJECT: Collegiate athletics: Fair Pay to Play Act

SUMMARY: Allows, commencing on January 1, 2023, college student athletes to earn compensation for the use of their own name, image, or likeness and also obtain professional representation such as a sports agent, in relation to their college athletics. Specifically, **this bill:**

- 1) Specifies that a postsecondary educational institution will not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness.
- 2) Specifies that earning compensation from the use of a student's name, image, or likeness will not affect the student's scholarship eligibility.
- 3) Specifies that an athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association (NCAA), will not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness.
- 4) Specifies that an athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the NCAA, will not prevent a postsecondary educational institution from participating in intercollegiate athletics as a result of the compensation of a student athlete for the use of the student's name, image, or likeness. Also explicitly specified is that:
 - a) A postsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics will not provide a prospective student athlete with compensation in relation to the athlete's name, image, or likeness;
 - b) Professional representation obtained by student athletes will be from persons licensed by the state. Professional representation provided by athlete agents will be by persons licensed, as specified; and,
 - c) Athlete agents representing student athletes shall comply with the federal Sports Agent Responsibility and Trust Act, as specified, in their relationships with student athletes.
- 5) A scholarship from the postsecondary educational institution in which a student is enrolled that provides the student with the cost of attendance at that institution is not compensation for purposes of this section, and a scholarship will not be revoked as a result of earning compensation or obtaining legal representation.

- 6) Defines, for purposes of this section, “postsecondary educational institution” to mean any campus of the University of California (UC), the California State University (CSU), or the California Community Colleges (CCC), an independent institution of higher education, as defined in Section 66010, or a private postsecondary educational institution, as defined in Section 94858.
- 7) Declares the intent of the Legislature to monitor the NCAA working group created in May 2019 to examine issues relating to the use of a student’s name, image, and likeness and revisit this issue to implement significant findings and recommendations of the NCAA working group in furtherance of the statutory changes proposed by this act.
- 8) Declares the intent of the Legislature to continue to develop policies to ensure appropriate protections are in place to avoid exploitation of student athletes, colleges, and universities.

EXISTING LAW:

- 1) Enacts the Student Athlete Bill of Rights, which requires intercollegiate athletics at four-year institutions of higher education that receive, on average, \$10 million or more in annual revenue derived from media rights, to comply with the prescribed requirements related to student athletes’ rights. These requirements include provisions concerning when intercollegiate athletic programs are required to renew scholarships, cover health insurance costs, and cover medical treatment expenses for student athletes who have experienced a sports-related injury. (Education Code (EDC) Section 67450)
- 2) Prohibits any person from giving, offering, promising or attempting to give money or other item of value to a student athlete or member of the athlete's immediate family to induce, encourage or reward a student athlete's application, enrollment or attendance at a public or private institution of higher education to participate in intercollegiate sporting activities. (EDC Section 67360)
- 3) Prohibits any person from giving, offering, promising, or attempting to give any money or other things of value to any particular student athlete or member of the immediate family of the student athlete for either of the following purposes:
 - a) To induce, encourage, or reward the student athlete’s application, enrollment, or attendance, at a public or private institution of postsecondary education in order to have the athlete participate in intercollegiate sporting events, contests, exhibitions, or programs at that institution; and,
 - b) To induce, encourage, or reward the student athlete’s participation in an intercollegiate sporting event, contest, exhibition, or program. These provisions do not apply to student athletes who receive any money or other thing of value from a higher education institution offered in accordance with the official written policy of that institution, which is in compliance with the bylaws of the NCAA. (EDC Section 67360)
- 4) Defines “student athlete” as an individual who attends an elementary, junior high, high school, or postsecondary educational institution, and who participates in any interscholastic athletic program in California, including an individual who receives scholarship funds for the

individual's athletic participation and an individual who does not receive scholarship funds for athletic participation. (EDC Section 67360 et seq.)

FISCAL EFFECT: According to the Senate Committee on Appropriations:

- 1) Compliance staff: the CSU indicates that additional compliance staff would be needed for each of its 21 NCAA Division I and Division II athletic programs at a cost ranging from \$3.2 million to \$4.2 million. The UC has six NCAA Division I athletic programs and one NCAA Division II athletic program and indicates it would need additional staff for each program at a cost ranging from \$1.0 million to \$1.4 million General Fund.
- 2) NCAA penalties: the UC indicates that the total cost of the fines could range from \$175,000 to up to \$1.8 million, while the CSU estimates total fines from \$525,000 to up to \$5.3 million.
- 3) Revenue losses: the CSU estimates systemwide revenue losses to be anywhere from \$9 million to \$15 million as a result of this measure. The UC indicates revenue losses for being out of compliance with the NCAA as well but the actual figures are unknown and would vary based on campus and conference affiliation.

COMMENTS: *Need for the bill.* According to the author, "...*Inside Higher Education* and Drexel University revealed that over 80 percent of full-scholarship athletes live at or below the federal poverty level. Meanwhile, the NCAA and universities use these athletes to generate billions in profits, through ads, TV deals and ticket sales. Athletes face severe repercussions if they receive compensation from sponsorship deals or use their own image for financial gain. For many athletes, college is the only time that their name, image and likeness is profitable. Athletes have lost eligibility to participate in their sport for things such as accepting groceries and assistance with rent. Meanwhile they generate millions [of dollars] for universities and billions [of dollars] for the NCAA. The NCAA president Mark Emmert made over 3 million dollars in salary just last year, while any athletes who put their bodies on the line struggle to make ends meet. SB 206 will prevent any student in California from losing their scholarship due to compensation on their own name, image and likeness."

What is the NCAA? The NCAA is a voluntary, membership association of nearly 1,300 colleges and universities, athletics conferences and sports organizations that administer intercollegiate athletics. Although the NCAA promotes intercollegiate athletics and student-athletes, its core function is to create rules and ensure a level playing field in intercollegiate athletic competition. Representatives from member schools and conferences propose, debate, and vote on bylaws that govern the association. The NCAA enforces these rules, which govern, among other things, student-athlete financial aid, employment, and transfer eligibility.

In its 2016-2017 fiscal year, the NCAA took in approximately \$1.06 billion in revenue. The NCAA competitions take place among colleges and universities that share the same Division, of which there are three. Division I and Division II schools offer athletic scholarships, while Division III schools may or may not. Generally, larger schools compete in Division I and smaller schools in II and III.

Other Associations. Student athletics are governed by many different sanctioning bodies with different rules. The welfare of California student-athletes are overseen by a variety of athletic

sanctioning bodies, whose rules and oversight ability differ depending on the size, location, and course offering of the various institutions of higher education.

The major sanctioning organizations include the NCAA (described above), the National Association of Intercollegiate Athletics (NAIA), the National Junior College Athletic Association (NJCAA), the California Community College Athletic Association, and the National Christian College Athletic Association (NCCAA). Even within these major sanctioning bodies, rules differ. For instance, the NCAA rules governing Division I, II and III institutions of higher education are not necessarily the same across divisions.

How is this bill incompatible with NCAA bylaws? As noted in the Senate Education Committee analysis, the NCAA maintains bylaws that regulate recruiting, scholarship levels, timing and methods of communication between institutions of higher education and student athletes. *Committee staff notes that* athletes receiving a partial athletic scholarship or no athletic scholarship are subject to the same pay prohibitions as those that receive full athletic scholarships.

- 1) *Financial Aid.* Currently, NCAA bylaws impose a number of restrictions on student-athlete financial aid. Any student-athlete who receives financial aid other than that permitted by the Association shall not be eligible for intercollegiate athletics. Such payment is not allowed because it would be compensation based upon athletic skill, a preferential benefit not available to the general student population. As it stands, NCAA rules forbid a student-athlete from receiving preferential benefits or treatment because of the athlete's reputation, skill or potential to be a professional athlete.

Specifically prohibited financial aid, benefits and arrangements include, but are not limited to, the following:

- a) An employment arrangement for a prospective student-athlete's relatives;
- b) Gift of clothing or equipment;
- c) Co-signing of loans;
- d) Providing loans to a prospective student-athlete's relatives or friends;
- e) Cash or like items;
- f) Any tangible items, including merchandise;
- g) Free or reduced-cost services, rentals or purchases of any type;
- h) Free or reduced-cost housing;
- i) Use of an institution's athletics equipment (e.g., for a high school all-star game);
- j) Sponsorship of or arrangement for an awards banquet for high school, preparatory school or two-year-college athletes by an institution, representatives of its athletics interests or its alumni groups or booster clubs; and,

- k) Expenses for academic services (e.g., tutoring, test preparation) to assist in the completion of initial-eligibility or transfer-eligibility requirements or improvement of the prospective student-athlete's academic profile in conjunction with a waiver request.
- 2) *Cost of Attendance*. NCAA bylaws stipulate that an institution will not award financial aid to a student-athlete that exceeds the cost of attendance that normally is incurred by students enrolled in a comparable program at that institution. The “cost of attendance” is an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution. A student-athlete is not eligible to participate in intercollegiate athletics if they receive financial aid that exceeds the value of the cost of attendance as defined in this NCAA bylaw.
- 3) *Agents*. NCAA rules forbid student-athletes to agree, orally or in writing, to be represented by an agent or organization in the marketing of their athletic ability or reputation until after the completion of the last intercollegiate contest, including postseason games. The NCAA prohibition includes an agreement that is not effective until after the last game.

NCAA rules forbid a student-athlete or their representative from negotiating or signing a playing contract in any sport in which the athlete intends to compete, or to market the name or image of the athlete.

- 4) *Consequences of non-compliance with NCAA bylaws*. Violations of NCAA bylaws impact the eligibility of student-athletes, and the teams for which they play, for participation in NCAA competition. Violations may result in harsh penalties on the student, the team and the university. Penalties may include financial sanctions, repayment of monies received from NCAA championship competition, forfeiture of contests, and expulsion from the association.

Relevant court and administrative decisions. This measure is the latest in a line of actions attempting to monetize student athletes' talents as collegiate athletes.

- 1) The first major effort came in 2009 when Ed O'Bannon sued the NCAA for authorizing and profiting from use of his likeness and statistics from his years as a college basketball star in a video game without compensation. The case, *O'Bannon v. National Collegiate Athletic Association*, was filed as an antitrust class action lawsuit against the NCAA, in which the plaintiffs' challenged the NCAA's use of the images of its former student athletes for commercial purposes. The suit argued that former student athletes are entitled to financial compensation for the NCAA's use of their image. The NCAA maintained that providing such compensation would be a violation of its rules and bylaws. In 2014, an original ruling was made in favor of O'Bannon, holding that the NCAA's bylaws are a violation of antitrust law. However, in 2015, the Ninth Circuit Court of Appeals reversed the District Court's ruling, holding that under a rule of reason standard, the NCAA had a permissible purpose in upholding amateurism. (*O'Bannon v. National Collegiate Athletic Association*, 802 F. 3d 1049, (9th Cir. 2015))
- 2) The next major effort came in 2014 when a group of Northwestern University football players attempted to declare themselves employees and unionize. It was a split decision, with the players being found at the district level to be employees, but the National Labor Relations

Board (NLRB) denying recognition of their effort to unionize, siding with the University and NCAA, who in part had asserted, “recognition of the players as employees violates long standing precedent” of amateurism.

- 3) The most recent case is that of *Alston v. NCAA*, wherein the plaintiffs challenged the legality of the NCAA and its’ member institutions practice of capping grants-in-aid at the cost-of-attendance based on federal antitrust laws. The NCAA contended that the rules were necessary because they served several procompetitive purposes permissible under federal antitrust laws. The court ruling in favor of the plaintiffs, holding that the NCAA can no longer “limit non cash education-related benefits and academic awards,” while allowing the NCAA to retain a substantial amount of discretion over student-athlete compensation that is unrelated to education. The ruling also provided that the NCAA allow conferences to create their own rules and policies for scholarship, and allow student athletes to receive a scholarship valued at greater than the total cost of attendance. The case settled with the NCAA agreeing to pay the estimated 40,000 member class of former students \$208 million arrears. Because the NCAA had already changed their rules to allow institutions to offer full costs of attendance there were no future damages.

Arguments in support. The Alliance for Boys and Men of Color, a co-sponsor of this legislation, writes that, “Restrictive rules paired with time commitment and poverty have a negative impact on academic performance. Studies show more than half of California’s NCAA Division 1 and Division 2 colleges have one or more teams with graduation rates below 60 percent. Approximately 40 percent of NCAA Division 1 and Division 2 athletes say they do not have enough time to keep up with academics during the season, and many say athletics prevent them from taking classes. California’s African-American athletes are overrepresented in revenue producing sports and suffer the lowest graduation rates. SB 206 provides a path to allow collegiate athletes to make money on their name, image and likeness while still in college. But it does not require schools to pay athletes directly nor allow any of these payments to affect scholarship offers or eligibility.”

The American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO, write in support that, “...athletes cannot be prohibited from consulting with an agent. This is important for allowing college athletes to prepare for their future in professional athletics. While universities are intended to be centers of academia, some athletes are enrolled solely to participate in sports before they transition to the professional level. It is critical that they are provided with guidance along this route and are not misled by those who may be in compliance with NCAA standards, but do not have the athlete's best interests in mind. Sports agents act on behalf of the athletes they represent, and therefore, should not be shunned while college athletes are at the crucial preliminary stages of their careers.”

The California-Hawaii State Conference of the NAACP supports the bill based on their belief that, “For many athletes, college is the only time they may profit from their participation in sports. The NCAA reveals less than 1% of women's college basketball players will make it to the WNBA, and less than 2% of men's college basketball, football, and soccer will ever play professionally.”

Arguments in opposition. Opposition to this bill spans public and private institutions, and includes both four-year and community colleges. Opposition wrote to express concern in several key areas:

- 1) *Inconsistency with prior court rulings.* Stanford University wrote that, "...SB 206 is inconsistent with recent court rulings, first in O'Bannon v. NCAA, and more recently in Alston v. NCAA that determined that all student-athlete benefits must be tied directly to education purposes only. In fact, although the court in Alston ruled against the NCAA, the judge held that payments not tethered to education, like name, image, and likeness payments, are not permitted because they are 'professional-level cash payments, unrelated to education, that could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand for Division I basketball and FBS football.'"
- 2) *NCAA Bylaws Violation.* NCAA-member institutions wrote concerning violations of NCAA bylaw 12.1.2, which dictates ways in which a student can lose their amateur status, and NCAA bylaw 12.5.2.1, which makes a student ineligible for participation if they accept compensation for name, image and likeness or for the endorsement of commercial products.

The University of California wrote that "...SB 206 creates a circumstance in which student athletes at UC could be in violation of NCAA bylaw 12.1.2 and NCAA bylaw 12.5.2.1. These bylaws strictly prohibit student-athletes from receiving compensation through use of their name, image, or likeness, and provides penalties for student-athletes and institutions who fail to comply. This bill would put the student-athlete, their teammates, and the athletics programs at risk of losing NCAA and conference eligibility, which would result in the loss of educational benefits and other competitive opportunities for UC student-athletes. This is an issue that would affect more student-athletes beyond recipients of scholarships. Allowing student-athletes to receive compensation from outside sponsors would jeopardize the University's existing sponsorship agreements, leading to budget cuts and the likely elimination of non-revenue sports."

The University of Southern California (USC) noted that "SB 206 would encourage students to violate the NCAA bylaws, becoming athletically ineligible and putting athletic teams and athletic departments at risk. The NCAA has two bylaws that specifically prohibit participation in intercollegiate competition if they receive any outside compensation. In the past, when a single student has engaged in any activity that violates the NCAA rules, the entire team and program are negatively impacted. In 2010, USC's athletic program was investigated and punished for NCAA rules violations by our football, men's basketball and women's tennis teams. As part of the investigation, two former USC athletes were found to have violated NCAA rules by accepting compensation from sports agents. The Trojan athletic program received some of the harshest penalties ever handed down to a Division 1 program. [These included:]

- a) The USC football team was forced to vacate the final two wins in its 2004 national championship season, as well as all of its wins in 2005;
- b) The USC football team was banned from bowl games in both 2010 and 2011;
- c) The USC football team was docked 30 scholarships over the next three years (2012-13, 2013-14 and 2014-15); and,
- d) The USC basketball team gave up all of its wins from the 2007-08 season and sat out of postseason play in 2010."

- 3) *Current NCAA working group.* The Association of Independent California Colleges and Universities (AICCU) wrote that “Last month the NCAA announced the creation of a working group that will review the NCAA’s policies around name, image, and likeness. The group includes conference commissioners, student athletes from Division 1, 2, and 3, and other administrators for student athletics. The group will examine modifications to current policies, and prepare a final report which will be released in October. We believe SB 206 should be held in committee, in order for this work to conclude and for policymakers to then assess what changes to state law are appropriate without putting athletic programs and student athletes at risk.”
- 4) *Community College-specific concerns.* The California Community College Athletic Association (CCCAA) wrote in opposition, noting that “...our programs are organized differently from athletic programs at four-year institutions...[our] policies and procedures have created an environment in which a student-athlete puts academics first. Our collegiate athletics is not subsidized by high profile TV rights and are instead designed to increase student success, equity, and access.

“SB 206 (Skinner) would reverse the steps that our colleges, the CCCAA, and state policymakers have made to emphasize academics by permitting student-athletes to generate revenue based on their athletic ability. It will naturally shift the focus of a student-athlete from excelling academically to performing well on the athletic field.

“Finally, SB 206 (Skinner) would result in a reduction of competitive equity among our programs. It would open the door to local boosters or businesses to pay student-athletes and begin to attract the most talented athletes in our system. A reduction in competitive equity for our programs would create an imbalanced playing environment and could reduce interest in playing at our institutions.”

Request by NCAA and PAC-12 Conference. The President of the NCAA has reached out to this Committee to request delay in hearing SB 206, asking “On behalf of the nearly 1,300 NCAA member colleges, universities and conferences, I write to request respectfully that the Committee on Arts, Entertainment, Sports, Tourism and Internet Media and the Committee on Higher Education postpone further consideration of Senate Bill 206, the Fair Pay to Play Act, while we review our rules. We recognize all of the efforts that have been undertaken to develop this bill in the context of complex issues related to the current collegiate model that have been the subject of litigation and much national debate. Nonetheless, when contrasted with current NCAA rules, as drafted the bill threatens to alter materially the principles of intercollegiate athletics and create local differences that would make it impossible to host fair national championships. As a result, it likely would have a negative impact on the exact student-athletes it intends to assist. We believe this initiative necessitates conversations and agreements among member universities and colleges about how we can constructively engage. We humbly ask that the California legislature provide NCAA member schools the time and opportunity to thoroughly assess issues surrounding student-athlete name, image and likeness (NIL), including potential unintended consequences that might arise if SB 206 is passed as written.”

Committee comments. Committee staff notes that amendments taken in the Senate Appropriations Committee delays implementation of this bill until January 1, 2023, and amendments taken in the Assembly Committee on Entertainment, Sports, Tourism, and Internet Media state the intent of the Legislature monitor the NCAA working group noted in opposition

comments, and to revisit this policy to implement significant findings and recommendations in the NCAA working group's October report. Taken together, these provisions are designed to give the legislature time to assess the impact of this legislation on the collegiate athletics landscape, while also allowing for a continued conversation with stakeholders as this issue is addressed nationally.

Amendments. *The Committee has recommended, and the author has accepted,* amendments that will remove "California Community Colleges" for the definition of "postsecondary educational institution" listed in EDC Section 67456(e) as proposed in SB 206.

Additionally, the Committee has recommended, and the author has accepted amendments that will create a name, image, and likeness working group that will be charged with reviewing CCCAA's bylaws and making recommendations to CCCAA and the Legislature. This working group, led by the California Community College Chancellor's Office, will include, but not be limited to, CCC coaches, CCC student athletes, CCC administrators, and a CCCAA representative. The recommendations shall be presented to the Legislature and CCCAA no later than July 1, 2021.

The author has requested amendments that will strike language in Section 1(b) that names the act, and allows it to be cited, as the "Fair Pay to Play Act."

Pending and prior legislation. AB 1518 (Chu) of the current session, would authorize an athlete agent to offer or provide money or any other thing of benefit or value to a student athlete if it is authorized by, and is in compliance with, an official written policy of the student athlete's school and the terms of the contract comply with the bylaws of the National Collegiate Athletic Association. AB 1518 is pending in the Senate Judiciary Committee.

AB 1573 (Holden), of the current session, would add to the Student Athlete Bill of Rights (SABR) provisions authorizing institutions of higher education to establish a degree completion fund, prepare notices containing pertinent data relating to the rights of students, as specified, and provisions prohibiting institutions of higher education from intentionally retaliating, as defined, against a student athlete as provided. AB 1573 is pending in the Senate Appropriations Committee.

AB 2747 (Holden, 2018) would have authorized college athletes to self-organize, as specified. Requires campuses to establish a process by which the complaints of student athletes may be reported and investigated, as specified. Prohibits a student athlete from being penalized for receiving gifts or income, as specified. Establishes and defines collegiate mandated reporters, as specified. AB 2747 was held in the Senate Appropriations Committee.

AB 2220 (Bonta, 2017) would have expanded the Student Athlete Bill of Rights (SABR) from four universities to all intercollegiate athletic programs that provide athletic scholarships, as defined, and would have removed the limitation in existing law for funding of SABR provisions to media rights revenues derived from the university athletic department. It would further have provided a private right of action, as specified, to college athletes who claim to have had any rights established under the SABR violated by an institution of higher education, including any of its personnel, as defined, and changed references from "student athlete" to "college athlete." AB 2220 was held in the Senate Appropriations Committee.)

AB 1435 (Gonzalez-Fletcher, 2017) would have established the College Athlete Protection Act under the administration of the College Athlete Protection Commission, which would be established by the bill, for the protection of college or university athletes participating in intercollegiate athletic programs offered by institutions of higher education located in California. AB 1435 was held in the Senate Education Committee.

SB 1525 (Padilla), Chapter 625, Statutes of 2012 established the Student Athlete Bill of Rights, requiring public and private four-year universities that do not renew a student's athletic scholarship to provide an equivalent scholarship to that student, requiring an athletic program to be responsible for medical expenses of its student athletes resulting from their participation in the athletic program, and establishing a trust fund into which institutions of higher education that receive at least \$10 million in annual revenue from media rights for intercollegiate athletics contribute funds.

SB 193 (Murray, 2003) would have enacted the Student Athletes' Bill of Rights, which in essence, would have removed NCAA authority over California student athletes. The bill also sought to entitle student athletes to workers' compensation benefits, and require higher education institutions to report on student athletes annually, as specified. SB 193 was held in the Assembly Education Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

American Federation of State, County and Municipal Employees, AFL-CIO
California Faculty Association
California Hawaii State Conference of the NAACP
UAW Local 5810
University Professional & Technical Employees-CWA Local 9119
1 Individual

Opposition

Association of Independent California Colleges & Universities
California Community College Athletic Association
California State University, Office of the Chancellor
Chief Executive Officers Of California's Community Colleges
Stanford University
University of California
University of Southern California

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