

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 26 (Skinner)
Version: December 7, 2020
Hearing Date: March 23, 2021
Fiscal: Yes
Urgency: No
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SUBJECT

Collegiate athletics: student athlete compensation and representation

DIGEST

This bill extends the existing authority for a collegiate student athlete to receive compensation to also include compensation earned from the use of the student's athletic reputation, and moves the operative date of the statute up one year. The bill prohibits discrimination against student athletes, except as to recruitment. The bill provides a student athlete additional remedies in an action pursuant to the statute, including attorney's fees and court costs.

EXECUTIVE SUMMARY

SB 206 (Skinner, Ch. 383, Stats. 2019) enacted Education Code section 67456 and paved the way, for the first time, for college student athletes to earn compensation for the use of their own name, image, or likeness. It protected student athletes against adverse action as a result of seeking such compensation and allowed student athletes to seek representation.

This bill updates various components of Section 67456. It extends the bases for receiving compensation to include the use of the student athlete's athletic reputation. It also prevents postsecondary educational institutions from denying student athletes any rights provided to other college students, except in relation to recruitment. The bill also moves its operative date forward one year, to January 1, 2022, or when rule changes adopted by the Board of Governors of the National Collegiate Athletic Association to allow student athletes to receive compensation for third-party endorsements take effect, whichever occurs first. Most relevant to the jurisdiction of this Committee, the bill provides that a student athlete who prevails in an action for a violation of Section 67456 may recover reasonable attorney's fees and court costs.

The bill is author sponsored. There is no known opposition. The bill passed out of the Senate Education Committee on a 6 to 0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Prohibits a postsecondary educational institution from upholding 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. Earning compensation from the use of a student's name, image, or likeness shall not affect the student's scholarship eligibility. (Ed. Code § 67456(a)(1).)
- 2) Prohibits an athletic association, conference, or other group or organization with authority over intercollegiate athletics, including the National Collegiate Athletic Association, from preventing 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 and from preventing a postsecondary educational institution from participating in intercollegiate athletics as a result of that compensation. (Ed. Code § 67456(a)(2), (3).)
- 3) Restricts a postsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics from providing a prospective student athlete with compensation in relation to the athlete's name, image, or likeness. (Ed. Code § 67456(b).)
- 4) Prohibits a postsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics from preventing a California student participating in intercollegiate athletics from obtaining professional representation in relation to contracts or legal matters, including, but not limited to, representation provided by athlete agents or legal representation provided by attorneys. Representation obtained by student athletes shall be from persons licensed by the state, as specified. (Ed. Code § 67456(c).)
- 5) Provides that 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, and a scholarship shall not be revoked as a result of earning compensation or obtaining legal representation pursuant to this section. (Ed. Code § 67456(d).)
- 6) Prohibits a student athlete from entering into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness if a provision of the

contract is in conflict with a provision of the athlete's team contract. An institution asserting such a conflict is required to disclose to the athlete or the athlete's legal representation the relevant contractual provisions that are in conflict. A student athlete who enters into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness shall disclose the contract to an official of the institution. (Ed. Code § 67456(e).)

- 7) Prohibits a team contract of a postsecondary educational institution's athletic program from preventing a student athlete from using the athlete's name, image, or likeness for a commercial purpose when the athlete is not engaged in official team activities. (Ed. Code § 67456(f).)
- 8) Defines "postsecondary educational institution" for these provisions as any campus of the University of California or the California State University, an independent institution of higher education, as defined, or a private postsecondary educational institution, as defined. (Ed. Code § 67456(g).)
- 9) Makes the above provisions operative on January 1, 2023. (Ed. Code § 67456(h).)
- 10) Provides that a trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay. (Code Civ. Proc. § 128.5.)

This bill:

- 1) Makes the operative date of Section 67456 contingent on when rule changes adopted by the Board of Governors of the National Collegiate Athletic Association to allow student athletes to receive compensation for third-party endorsements take effect, but no later than January 1, 2022.
- 2) Allows student athletes to earn compensation for their athletic reputation.
- 3) Prohibits postsecondary educational institutions from denying student athletes any rights provided to other students, except in terms of recruitment.
- 4) Permits a student athlete that is a prevailing plaintiff against an institution in violation of Section 67456 access to reasonable attorney's fees and court costs, in addition to any damages or equitable relief.
- 5) Inserts a severability clause in Section 67456.

COMMENTS

1. Background: SB 206 and compensating student athletes

SB 206 and the resulting statute, Section 67456 of the Education Code, addressed a long contentious issue of the National Collegiate Athletic Association's rules surrounding student athlete compensation. Section 67456 paves the way for college student athletes to earn compensation for the use of their own name, image, or likeness, and to seek representation. Following California's lead, a host of other states have already passed similar legislation, prohibiting rules that prevent such compensation, including New Jersey,¹ Michigan,² Nebraska,³ Colorado,⁴ and Florida.⁵ Other states are considering statutes of their own⁶ and multiple bills have been introduced at the federal level.⁷

Student athletes have also taken to the courts to address the issue, with the most recent example being *Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.)* (9th Cir. 2020) 958 F.3d 1239, where the Ninth Circuit Court of Appeals found certain NCAA restrictions on education-related benefits were unlawful restraints of trade in violation of federal antitrust laws.⁸ The United States Supreme Court is set to hear arguments in the case later this month.⁹ Perhaps sensing the tides changing, the NCAA announced last year that steps were being taken to allow for "student-athlete compensation for endorsements and promotions."¹⁰

In partial response to this news, this bill amends the operative date of the statute. Section 67456 currently states its operative date as January 1, 2023. However, with the potential of the NCAA rolling out a new set of rules on compensation, rules that will likely not completely track with California's scheme, this bill pushes the operative date forward to January 1, 2022, or "when rule changes adopted by the Board of Governors of the National Collegiate Athletic Association to allow student athletes to receive compensation for third-party endorsements take effect, whichever occurs first." This prevents a situation where athletes and postsecondary educational institutions in

¹ N.J. Stat. § 18A:3B-86.

² MCLS § 390.1731 et seq.

³ R.R.S. Neb. § 48-3601 et seq.

⁴ C.R.S. 23-16-301.

⁵ 2020 Bill Text FL H.B. 287, enacting the Student Athlete Achievement Act.

⁶ See e.g., Alabama House Bill 150, <https://legiscan.com/AL/bill/HB150/2021>.

⁷ See e.g., S.5062 (Booker, 2020) <https://www.congress.gov/bill/116th-congress/senate-bill/5062/text?q=%7B%22search%22%3A%5B%22college+athletes%22%5D%7D&r=5&s=2>; H.R.850 (Trahan, 2021) <https://www.congress.gov/bill/117th-congress/house-bill/850?s=1&r=5>.

⁸ See also, *O'Bannon v. NCAA* (9th Cir. 2015) 802 F.3d 1049.

⁹ Athletic Staff, *NCAA case on athlete compensation set for Supreme Court on March 31* (February 1, 2021) The Athletic, <https://theathletic.com/news/ncaa-athlete-compensation-supreme-court/9Zgc5xkjinWHx>.

¹⁰ *Board of Governors moves toward allowing student-athlete compensation for endorsements and promotions* (April 29, 2020) NCAA, <https://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions>.

California would be forced to implement and adapt to a new set of rules from the NCAA for some interim period, and then implement and adapt to Section 67456 when operative. Although a variable operative date in a statute is uncommon, courts have found that “the effective date of a statute may be made contingent upon a future event.”¹¹

The bill also adds “athletic reputation” as a basis for student athletes to earn compensation. This is intended, at least in part, to pave the way for athletes to make reference to the schools they attend and play for when seeking compensation. To make such intentions clear, the author may wish to consider adding a definition of “athletic reputation” to avoid unnecessary confusion or potential litigation. There is federal legislation, introduced by Senator Cory Booker and currently pending, that includes such a definition:

The term “athletic reputation” means —

(A) with respect to a college athlete, the recognition or fame of the college athlete relating to the intercollegiate athletic ability, standing, participation, or performance of the college athlete; and

(B) with respect to an institution of higher education, the recognition or fame the institution of higher education garners from the athletic programs of the institution of higher education.¹²

However, the term seems to have a general understanding in the industry and is used in NCAA rules.

The bill also makes clear that schools are prohibited from denying student athletes any rights provided to other college students, except as to recruitment. Most relevant to this Committee’s jurisdiction, the bill provides additional remedies to athletes in the event of a violation of the statute, including attorneys’ fees.

2. Fee-shifting provisions and reducing barriers to seeking redress

Ordinarily, under the so-called “American Rule,” each party to a lawsuit must bear its own attorneys’ fees, regardless of the outcome.¹³ However, the American Rule can be

¹¹ *Busch v. Turner* (1945) 26 Cal.2d 817, 821; see also *People v. Palomar* (1985) 171 Cal. App. 3d 131, 135, fn. 5 (“The Legislature may specify the legal effects to be attached to the operative clause. For example, it may specify that a statute will become operative upon the occurrence of a contingency.”).

¹² S.5062 (Booker, 2020), <https://www.congress.gov/bill/116th-congress/senate-bill/5062/text?q=%7B%22search%22%3A%5B%22college+athletes%22%5D%7D&r=5&s=2>.

¹³ Code of Civil Procedure § 1021; *Musaelian v. Adams* (2009) 45 Cal.4th 512.

altered by contract or statute. Such changes to the American Rule are known as “fee-shifting provisions.”

Fee-shifting provisions may be one-way or two-way. A two-way fee shifting provision entitles the winning party to have its attorney’s fees covered by the losing party. A one-way fee-shifting provision only allows one side in a case, usually the plaintiff, to recover attorney’s fees, if that side prevails. One-way fee shifting provisions are generally used to help litigants obtain counsel where they might not otherwise be able to afford one.¹⁴ One-way fee-shifting provisions can also be employed to encourage private enforcement of a public policy aim.¹⁵ “The approach that should uniformly encourage the pursuit of claims of all sorts in all situations is a one-way pro-prevailing-plaintiff rule. Such a policy permits plaintiffs to expect greater net recoveries, without adding a counterbalancing threat of loss.”¹⁶

This bill provides: “A student athlete who prevails in an action brought against an institution for a violation of this section may recover reasonable attorney’s fees and court costs, in addition to any damages or equitable relief, against the institution.” Such a clause allows a student who has been harmed by an institution’s violation and who brings a successful claim to be awarded attorneys’ fees.

The intent of this provision is to ensure harmed students are able to practically enforce the rights afforded them under the statute. Lower income student athletes may not otherwise have the means to bring suit, if attorneys’ fees and costs were not provided for, especially where their personal damages are relatively small. As one appellate court describes the calculus:

In categories of cases where the Legislature wants to encourage litigation it can intervene to alter the decision-making equation by instituting unilateral fee-shifting. Then the injured person knows he will not have to absorb his own lawyer's legal fees, at least if he wins. This makes it economical to seek redress not just in the aggravated cases where the potential economic recovery is huge but in modest cases as well. It also means the probability of success does not have to be so high before it makes economic sense to file suit. Thus, as a result of the Legislature's intervention, more injured parties will be able to file more lawsuits and the public policy behind the substantive statute -- whatever it may be -- will be enforced more broadly and more effectively. Moreover, as one

¹⁴ *Flannery v. Prentice* (2001) 26 Cal.4th 572.

¹⁵ See Krent, *Explaining One Way Fee Shifting* (November 1993) 79 Va. L. Rev. 2039, 2044; *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 326 (“Economic analysis . . . supports the proposition that two-way fee-shifting will cause fewer claims to be filed than either the American rule of no fee-shifting or one way plaintiff fee-shifting”).

¹⁶ *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 327, quoting Rowe, *Predicting the Effects of Attorney Fee Shifting*.

commentator observes: "Awarding fees as part of a prevailing plaintiff's relief should also provide *increased and efficient deterrence of wrongful primary conduct* because of the prospect of having to pay the full cost that an injured party incurs in securing compensation for its loss. . . ." ¹⁷

This reduces the barriers to seeking redress for a harmed plaintiff because it may otherwise be difficult to secure and pay for legal representation. However, a common response in opposition to such fee-shifting provisions is that it will encourage frivolous lawsuits. One court has directly responded to a party raising this "spectre of frivolous lawsuits," dismissing such concerns:

But unilateral fee-shifting only encourages the filing of cases where there is a reasonable opportunity of winning. Victory is the only way to have one's legal fees paid by the other party. So defeat is still expensive. Moreover, the Legislature already provides a way for the victim of a frivolous lawsuit to shift his legal fees to the offending plaintiff. Code of Civil Procedure section 128.5 authorizes trial courts to "order a party, . . . pay any reasonable expenses, *including attorney's fees*, incurred by another party as a result of bad-faith *actions . . . that are frivolous . . .*" This should be enough to discourage frivolous filings even where the Legislature has provided for unilateral fee-shifting. ¹⁸

3. Stakeholder positions

According to the author:

With Gov. Newsom's signature of SB 206 (Skinner) in 2019, California became the first state to enact legislation to address the massive inequity in college sports, a huge industry in which everyone involved – colleges and universities, the NCAA, large corporations – pocket billions of dollars each year, while student athletes are excluded from any of that wealth.

SB 206 gave college athletes the right to earn compensation from their name, image, and likeness (NIL), such as from endorsement and sponsorship deals, and allowed college athletes to operate a business or take jobs as a coach or instructor.

To give colleges and the NCAA time to adjust, SB 206 contained an effective date of Jan. 1, 2023. However, since the passage of SB 206, at least five other states

¹⁷ *Covenant Mutual*, 179 Cal.App.3d at 325.

¹⁸ *Id.* at 328, citations omitted. The current language of the provision in Section 128.5 of the Code of Civil Procedure cited by the court, reads: "A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay."

have enacted comparable laws, with Florida's NIL law slated to take effect first – on July 1, 2021.

Additionally, the NCAA has proposed rule changes that could take effect prior to SB 206's effective date, if the effective date of SB 206 is not moved up. As a result, California college athletes and colleges and universities could be at a disadvantage to college athletes and schools whose NIL rules take effect earlier.

Further, if California does not move up the effective date of SB 206, then our state colleges and universities will have to implement the NCAA's rules until California's NIL law takes effect, then redo their rules to accommodate for the state law.

SB 26:

- Moves up the implementation date of SB 206 to coincide with the NCAA's proposed rule changes or no later than Jan. 1, 2022.
- Clarifies that college athletes can earn compensation for their "athletic reputation" to ensure that an athlete could identify the name of their college or university in endorsements and advertisements.
- Ensures that college athletes are not denied the same rights as all other college students, except when it comes to recruitment.
- Allows college athletes to collect attorneys' fees and court fees should a court rule that a California school violated SB 206.
- Clarifies to protect California college athletes' NIL rights in the event that the law is challenged in court.

The National College Players Association writes in support that the bill "will bolster California's landmark college athletes bill, SB 206, and align it with other states' efforts by moving up the effective date and by clarifying and strengthening provisions that ensure college athletes have the same rights as other students."

SUPPORT

Generation Up
National College Players Association
The Professional Collegiate League
United Steelworkers District 12

OPPOSITION

None known

RELATED LEGISLATION

Prior Legislation: SB 206 (Skinner, Ch. 383, Stats. 2019) *See* Executive Summary.

PRIOR VOTES:

Senate Education Committee (Ayes 6, Noes 0)
