

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1788

SPONSOR: Education Committee and Senator Hill

SUBJECT: Corruption of Student Athletes

DATE: March 20, 2003 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dormady	O'Farrell	ED	Favorable/CS
2.	_____	_____	CJ	_____
3.	_____	_____	JU	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

SB 1788 makes it a second degree misdemeanor to give or offer anything of monetary value to any person with the intent of encouraging a high school or middle school student athlete residing in Florida to attend a particular academic institution, become a professional athlete, or endorse a product or commercial establishment. The bill provides exceptions for schools offering scholarships or for the provision of items and expenses specifically permitted under the school's rules governing recruitment of athletes. The section also does not apply to offers of employment by professional sports organizations, provided that the organization makes certain required disclosures, or to gifts given to an athlete by his or her spouse, parent, sibling, grandparent or guardian.

This bill creates a new section of the Florida Statutes.

The bill takes effect July 1, 2003.

II. Present Situation:

Currently, when student athletes accept offers of merchandise, money or other inducements from persons and that transaction becomes known, the student athlete sacrifices his or her amateur status, sometimes to the great detriment of the student's athletic development, education and career. The persons offering such inducements, however, who are generally themselves adults, often suffer no consequences of such actions in law, although they may suffer consequences pursuant to the rules of amateur athletics and educational institutions, as noted below, or civil penalties. If they are athletic agents, they may also be subject to criminal penalties for some types of behavior, as further detailed below.

Rules governing amateur status. Under the bylaws of the Florida High School Activities Association (FHSAA), in order to participate in high school athletics in the state, a student must be an amateur athlete. According to FHSAA bylaw 11.9, this means that a student must not accept any payment, gift or donation for participating in a sport, or use a name other than their own name when participating.¹ Violation of these provisions results in ineligibility to participate in a high school sport for one year.

The National Collegiate Athletic Association (NCAA) also maintains detailed guidelines for maintaining amateur status, which impact high school student athletes who plan to play sports in college.² These requirements preclude student athletes who wish to maintain amateur status from taking a number of actions, including (among other restrictions) accepting inducements of the sort contemplated by SB 1788. Once found ineligible to participate in collegiate athletics, under NCAA rules student athletes are generally barred permanently, unless they participate in an eligibility reinstatement process, which generally must be initiated by the college or university that they attend.

Existing penalties for offering inducements to athletes. Under ss. 468.456 and 468.45615, F.S., athletic agents³ are prohibited from “offering anything of value to any person to induce a student

¹ Section 11.9, the applicable section of the Bylaws of the Florida High School Activities Association, Inc., provides in part:

11.9 AMATEURISM

11.9.1 A student may not participate in an athletic activity of this Association unless he/she is an amateur. A student who has accepted remuneration, gift, or donation for participation in a sport or participates under an assumed name becomes a professional and is thereafter disqualified for further participation in that sport in high school for a period of one year. Reference to “gift or donation” is not intended to preclude the acceptance of medals, trophies, plaques, keys, pins, or ribbons of small intrinsic value, if presented by the sponsoring organization. Championship rings, sweaters, jackets or award blankets may be accepted by students provided they are presented by the school which they represent.

² The NCAA’s “Guide for the College Bound Student Athlete” details some restrictions for high school athletes to follow in order to maintain amateur status and eligibility to play college sports. Following is a relevant excerpt of the NCAA’s guide:

Don't lose your college eligibility by becoming a professional. You are a "professional" if you:

- Are paid (in any form) or accept the promise of pay for playing in an athletics contest;
- Sign a contract or verbally commit with an agent or a professional sports organization;
- Ask that your name be placed on a draft list [Note: In basketball, once you become a student-athlete at an NCAA school, you may enter a professional league's draft one time without jeopardizing your eligibility provided you are not drafted by any team in that league and you declare your intention in writing to return to college within 30 days after the draft];
- Use your athletics skill for pay in any form (for example, TV commercials, demonstrations);
- Play on a professional athletics team; or
- Participate on an amateur sports team and receive any salary, incentive payment, award, gratuity, educational expenses or expense allowances (other than playing apparel, equipment and actual and necessary travel, and room and board expenses).

³ An athletic agent is defined to mean any person who “directly or indirectly...recruits or solicits a student athlete to enter into an agent contract or who, for any type of financial gain, procures, offers, promises, or attempts to obtain employment or promotional fees or benefits for a student athlete with a professional sports team or as a professional athlete, or with any

athlete to enter into an agreement by which the agent will represent the student athlete[,]" and a violation of this prohibition is a second degree felony. The prohibition applies only to interactions with student athletes who have informed a college or university of their intent to participate in that school's intercollegiate athletics, which will generally include only seniors in high school. It is likely that the actions prohibited by this section – inducing a student athlete to enter into an agency agreement – are equivalent to an offer or gift made “with the intent of encouraging [an athlete] to...become a professional athlete,” as would be prohibited by SB 1788. The prohibition under ss. 468.456 and 468.45615, F.S., applies only to athletic agents, however, while the restrictions of SB 1788 would apply to any person.

Other than the penalties provided by ss. 468.456 and 468.45615, F.S., there are currently no criminal penalties in Florida associated with giving gifts or other enticements to student athletes under circumstances that would jeopardize the athlete's amateur status. Athletic agents, who are required to be licensed by the state, may be assessed certain administrative penalties for misconduct. Additionally, s. 468.4562, F.S., provides a statutory right of action for colleges and universities to sue any person – not just agents -- who violates any of the restrictions of the part, including the prohibition in s. 468.456, F.S., against “Violating or aiding and abetting...[the violation of] rules of the athletic conference [or] association governing a student athlete or student athlete's college or university.” As the behavior described in SB 1788 may violate the rules of applicable athletic conferences or associations, colleges or universities could have a civil right of action to sue any person who takes such actions, for damages and equitable relief. Persons offering inducements such as those described in SB 1788 may also be subject to other non-criminal penalties for their actions, pursuant to the rules of amateur athletics or organizations or institutions with which they may be affiliated (e.g., pursuant to a rule of a university at which that person works).

III. Effect of Proposed Changes:

As noted above, when student athletes accept offers of merchandise, money or other inducements from persons, the student athlete often sacrifices his or her amateur status, while the persons offering these inducements to the student athlete may suffer no consequences from their actions.

SB 1788 provides a criminal penalty to all persons – not just athletic agents – for giving or offering anything of monetary value to any person in order to encourage a high school or middle school athlete residing in Florida to attend a particular academic institution, become a professional athlete, or endorse a product or commercial establishment. Taking any of these actions would be a second degree misdemeanor, punishable as provided in s. 775.082, F.S. (which provides for imprisonment for up to 60 days for second degree misdemeanors), or by a fine not to exceed the larger of \$1,000 or three times the value of the inducement given or offered. The bill does not limit prosecution of the offender under any other law.

The bill provides that its restrictions do not apply to any of the following actions or items:

promoter who markets or attempts to market the student athlete's athletic ability or athletic reputation...[including] all employees or other persons acting on behalf of" an athletic agent who undertakes any of these activities. S. 468.452, F.S.

- An academic institution offering a scholarship to the student athlete;
- The provision of items and expenses specifically permitted under the rules and regulations governing the recruitment of athletes by the academic institution;
- An offer of employment made to a student athlete by a professional sports team or organization that has provided the athlete with a written statement outlining any limitations that the acceptance of such offer will place on the athlete's amateur status; or,
- Gifts given to an athlete by his or her spouse, parent, sibling, grandparent or guardian.

The criminal penalties imposed by SB 1788 would likely provide a deterrent to persons considering taking the actions described in the bill. The activities that are prohibited under the bill may not, however, correspond precisely with all of the restrictions on behavior established by the FHSAA and the NCAA. For example, under the FHSAA rule, participating in a sporting event under an assumed name would disqualify a student from amateur play. A person who induced a student to participate in an event under an assumed name would not be subject to the criminal penalties offered by the bill, but the student's amateur status would still be jeopardized. Accordingly, the bill may offer a criminal deterrent to certain categories of behavior that would jeopardize a student's amateur status, but not others. Additionally, it may be helpful to clarify whether the term "high school or middle school student athlete" includes all students of high school or middle school age who participate in sports, or whether this group is meant to include student athletes participating in sports on their school teams only (and excludes those who participate in sports only through a private club.)

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Federal Constitutional Issue: First Amendment Analysis. Under SB 1788, any person who "gives or offers anything of monetary value to any person" with the intent of encouraging a student athlete to attend an institution, become a professional athlete or make an endorsement, commits a criminal misdemeanor. Because the conduct being regulated here – giving or offering inducement for a particular purpose – is effected by communication, the bill must be analyzed under the U.S. Constitution's First Amendment protection of freedom of speech or expression. First Amendment restrictions will be applied to the state of Florida by incorporation from the Fourteenth Amendment to the U.S. Constitution.

Because the harm that would result from a defendant's inducement results solely from the content of his or her communication, the bill contains a content-based restriction on freedom of speech, and a court applying a First Amendment analysis to the bill would likely apply strict scrutiny. If the speech regulated in this bill could be established as commercial speech, however, then a court's standard for reviewing it in the event of a constitutional challenge would be more relaxed. It appears that a case could be made that the bill regulates commercial speech because of both the transactional nature of the conduct being governed (an item of monetary value in exchange for desired behavior) and also because the inducement is likely to be offered – and accepted – pursuant to an economic interest or commercial motive.

Commercial speech generally may be regulated, and it is not entitled to any protection at all if it is found to be misleading or deceptive. If speech has even the potential to mislead, then it may be regulated.⁴ If an argument could be formed under this doctrine that offers or gifts of inducements are misleading to the student athlete, then the law would likely survive a constitutional challenge. It is likely, however, that the communication regulated by SB 1788 could be presented in either a misleading or a non-misleading way (e.g., the inducement could be offered either with an assurance that no harm will result from taking it or with a disclosure that, if made public, it could jeopardize the student's amateur status), in which case the legislature should attempt to prohibit only the misleading method of communication.

Even if the speech is entitled to the standard protections afforded non-deceptive commercial speech, however, it has a chance of passing the U.S. Supreme Court's test for regulation of commercial speech. In order to survive a First Amendment challenge to a law regulating commercial speech, the state would have to show that the regulation directly advances a substantial government interest in a way that is reasonably tailored to achieve its objective.⁵ The statute may pass this relatively lenient test.

State Constitutional Issues. The Florida constitution also protects freedom of speech under Article I, §4. Under Florida case law, the scope of the Florida constitution's protection of freedom of speech is the same as that of the First Amendment of the U.S. constitution.⁶ Accordingly, Florida courts apply the principles of freedom of speech as set forth in federal case law⁷, as described above.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

⁴ *In re R.M.J.*, 455, U.S. 191 (1982).

⁵ *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557 (1980).

⁶ See *University Books and Videos, Inc. v. Metropolitan Dade County*, S.D.Fla. 1999, 78 F. Supp. 2d 1327 and *Florida Canners Ass'n v. State, Dept. of Citrus*, App.2 Dist., 371 So.2d 503 (1979).

⁷ *Café Erotica v. Florida Dept. of Transp.*, App. 1 Dist., 830 So.2d 181 (2002).

B. Private Sector Impact:

Persons will be prohibited from giving or offering items of monetary value to student athletes as described in the bill.

C. Government Sector Impact:

State law enforcement authorities will be required to assume any costs associated with enforcement of the new criminal law and related prosecution costs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
