

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

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|--------------------------------------|---|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

The bill makes it a second degree misdemeanor to engage in certain activities which are currently not statutorily prohibited.

B. EFFECT OF PROPOSED CHANGES:

Currently, when student athletes accept offers of merchandise, money or other inducements from persons and that transaction becomes known, the student athlete may sacrifice 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

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];

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 this bill. Once found ineligible to participate in collegiate athletics, 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: Athletic agents³ are prohibited from “offering anything of value to any person to induce a student athlete to enter into an agreement by which the agent will represent the student athlete”. 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

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.”

Changes made by HB 389: HB 389 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. These offense would be a second degree misdemeanor, punishable by up to sixty days incarceration (as provided in s. 775.082, F.S) 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 provides that its restrictions do not apply to the offering or giving of a scholarship by the academic institution or the provision of items and expenses specifically permitted under the rules and regulations governing the recruitment of athletes by the academic institution. The prohibition also does not apply to an offer of employment by a professional sports team that has provided the athlete with a written statement outlining any limitations which the acceptance of the offer would have on the amateur status of the athlete.

C. SECTION DIRECTORY:

Section 1: Creating s. 877.135, F.S. prohibiting the giving or offering of certain inducements to high school or middle school athletes.

Section 2: Providing effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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- 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).

³ss. 468.456 and 468.45615, F.S.. 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 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.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

Under HB 389, 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 HB 389 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.

B. RULE-MAKING AUTHORITY:

C. DRAFTING ISSUES OR OTHER COMMENTS:

It appears that the provisions of this bill are intended to deter individuals from taking action which would cause a student to lose his or her eligibility to participate in middle school, high school and collegiate athletics. 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.

However, the provision prohibiting offering an inducement to an athlete appears to include behavior that may not jeopardize a student's eligibility under the NCAA. The NCAA appears to prohibit an athlete from using his or her athletic skill in a commercial for which he or she is compensated but does appear to restrict commercial endorsements which are not related to his or her status as an athlete.⁶ Further, the bill does not require the person who provides an inducement to an athlete with the intent to encourage the athlete to endorse a product or commercial establishment to have knowledge that the student is an athlete. For example, if an owner paid a group of students to appear in an advertisement for a local business and one of the students was an athlete, the owner would be violating this section – even if they were unaware that the student was an athlete.

The bill does not provide a definition of the term “high school or middle school athlete”. It is not clear whether the term would only include middle or high school athletes who compete for the school they attend or would also include middle and high school age students who play for an organized league that is not affiliated with their school.

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 Article 12.1 of NCAA By-laws. Found at http://www.ncaa.org/library/membership/division_i_manual/2002-03/

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

The Subcommittee on Criminal Justice recommended the adoption of a strike-all amendment which defines the term "student athlete" to clarify that the term applies to a student in grades 6 through 12 who participates in interscholastic athletic contests as a representative of the school the athlete attends and who resides in this state. The amendment clarifies that the offense only applies in cases where the offender knew that the student was an athlete. The amendment also clarifies some of the exceptions contained within the bill.