

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

SB 1401 (Bradford)
Version: April 25, 2022
Hearing Date: April 26, 2022
Fiscal: Yes
Urgency: No
TSG

SUBJECT

College Athlete Race and Gender Equity Act

DIGEST

This bill directs California's institutions of higher education, except for California Community Colleges, to establish and manage degree completion funds for their student athletes in an amount determined by a formula taking into account the revenue generated by the sport in question and the amount of athletic scholarship aid given to student athletes participating in that sport.

EXECUTIVE SUMMARY

Some college sports – football and men's basketball in particular – generate significant revenues for the institutions of higher education where they are played. Other sports tend to generate far less income. Either way, the student athletes do not directly share in any revenue generated. Moreover, while some student athletes receive scholarships for their participation in sports, the scholarship amounts do not necessarily correlate with the revenue that the sport generates for the school. That dynamic has a disparate racial impact because a greater proportion of Black student athletes play college football and basketball than other college sports. There is also evidence, in the form of comparatively low graduation rates, that Black student athletes are not being given sufficient opportunity and support to finish their degrees.

This bill requires California institutions of higher education to establish and manage degree completion funds for their student athletes. The amount deposited into each student athlete's fund would depend on a formula factoring in how much revenue the student athlete's sport generates for the school and how much the school awards in scholarships to student athletes who participate in that sport. The student athletes would have access to some of the funds while in school and they would receive the remaining balance upon graduating within six years. In this way, the bill aims to ensure that student athletes get to share in the revenue that their sport generates for their respective schools, that they have access to resources to support their educational experience, that they are given an extra incentive to graduate, and that racial disparities

in the treatment of student athletes are addressed. Further refinement of the formula behind the accounts may be needed to ensure that the bill does not inadvertently render California institutions of higher learning out of compliance with their obligations not to discriminate on the basis of gender.

The bill is sponsored by the National College Players Association. Support comes from advocates for college athletes who assert that the bill is needed to help ensure college athletes receive a fair share of the revenues they generate and to boost graduation rates. There is no opposition on file. The bill passed out of the Senate Education Committee by a vote of 4-0. If the bill passes out of this Committee, it will next be heard in the Senate Committee on Appropriations.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Defines “postsecondary educational institution” for the purpose of the following 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).)
- 2) 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).)
- 3) 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, likeness, or athletic reputation, and from preventing a postsecondary educational institution from participating in intercollegiate athletics as a result of that compensation. (Ed. Code § 67456(a)(2) & (3).)
- 4) 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, likeness, or athletic reputation. (Ed. Code § 67456(b).)
- 5) 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).)

- 6) Authorizes a postsecondary educational institution to establish a degree completion fund, in accordance with applicable rules and bylaws of the governing body of the institution and applicable rules and bylaws of any athletic association of which the institution is a member. (Ed. Code § 67452.3)
- 7) States that no public funds should be used in connection with any athletic program conducted under the auspices of a public postsecondary educational institution, or any student organization within the postsecondary educational institution, that does not provide an equivalent opportunity to both sexes for participation and use of facilities. The factors considered when determining whether an educational institution has provided equivalent opportunity include, but are not limited to, travel arrangements, scholarships, medical facilities, and compensation of coaches. (EC § 66271.8)

This bill:

- 1) Makes a series of findings and declarations to the effect that:
 - a) college football and men's basketball players of color have lower graduation rates in comparison to other students, other athletes, and their teammates;
 - b) there is evidence of educational neglect of Black college athletes;
 - c) there are indications that graduation rates among Black male athletes are declining;
 - d) California's Football Bowl Subdivision players and Division I men's and women's basketball players are predominantly Black and are the only college athletes in the state who do not receive at least 50 percent of the revenue they produce;
 - e) excessive athletic program expenditures on salaries, administration, and facilities are not necessary to field intercollegiate athletics and should be partially redirected to address racial and gender-based inequities endured by college athletes; and
 - f) federal courts have ruled that National Collegiate Athletic Association (NCAA) policies limiting college athlete compensation violate federal antitrust law at the expense of college athletes.
- 2) Expresses the intent of the Legislature to develop policies to ensure appropriate protections are in place to avoid the exploitation of student athletes.

- 3) Obligates an institution of higher education to establish a degree completion fund for each of its student athletes, in accordance with specified rules, and to manage that fund as a fiduciary to the student athlete without charging the student athlete for any costs incurred.
- 4) Provides that the amount deposited into a student athlete's degree completion fund by the institution of higher education shall be determined by subtracting the amount of grant-in-aid scholarships offered in that sport from 50 percent of the athletic program's revenue for that individual sport. The difference shall be divided among each student athlete in that sport. The resulting quotient shall be allocated to the student athlete's degree completion fund.
- 5) Prohibits an institution of higher learning from reducing a student athletic scholarship as a result of a transfer of funds to the student for purposes of the degree completion fund.
- 6) Provides that a student athlete shall have immediate access to funds of up to twenty-five thousand dollars (\$25,000) per academic year.
- 7) Provides that a student athlete who completes an undergraduate baccalaureate degree within six years from when the student athlete is enrolled at an institution of higher education shall receive the balance of their fund within 60 days of showing proof of completion.
- 8) Provides that a student athlete forfeits their degree completion fund and the balance in that fund shall be redistributed back to the institution of higher learning's athletic program if:
 - a) the student athlete does not complete an undergraduate baccalaureate degree within six years of first enrolling in an institution of higher education;
 - b) the student athlete transfers to an athletic program at a community college;
 - c) the student athlete transfers to an out-of-state institution of higher education and participates in an athletic program at that institution of higher education;
 - or
 - d) the student athlete chooses to no longer participate in an athletic program.
- 9) Provides that if a student athlete suffers a debilitating injury or condition resulting from their participation in an athletic program at their institution of higher education that would significantly interfere with the completion of an undergraduate baccalaureate degree, then, notwithstanding (8), above, the student athlete shall receive the remaining balance of their degree completion fund within 60 days of showing proof of the injury or condition.
- 10) Provides that if a student athlete transfers to a different institution of higher education and participates in their athletic program, then the remaining balance of

the student athlete's degree completion fund shall be transferred to the new institution of higher education within 60 days, but if the student athlete later stops participating in the new institution of higher education's athletic program, then the balance in the degree completion fund shall be returned to the original institution of higher education.

COMMENTS

1. Impetus for the bill

For decades, college athletes have been amateur athletes. College and universities can award athletic scholarships to their students and cover some incidental expenses, but under the collective rules governing college sports through the National Collegiate Athletic Association (NCAA), paying college athletes is forbidden. (*NCAA v. Alston* (2021) ___ U.S. ___ [141 S.Ct. 2141, 2148-2149. Hereinafter, *Alston*.]) Due in part to recently enacted California legislation, college athletes are beginning to see new opportunities to earn compensation for the use of their name, image, likeness, and athletic reputation. (See Prior Legislation, below, for more detail on these laws.) There are still limitations on paying student athletes, however.

Meanwhile, college athletics are big business.

The NCAA's current broadcast contract for the March Madness basketball tournament is worth \$1.1 billion annually. Its television deal for the FBS conference's College Football Playoff is worth approximately \$470 million per year. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. For example, the Southeastern Conference (SEC) "made more than \$409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding \$650 million that year." All these amounts have "increased consistently over the years." (*Alston, supra*, at 2150-2151]. Internal citations omitted.)

The student athletes who generate this income may receive scholarships in some instances, but these sums do not correlate with the amount of money that the student athletes generate for the schools. The dynamic is especially pronounced for those sports that generate the most revenue: football and basketball. Because a greater percentage of Black student athletes participate in those two particular sports, the dynamic also has a disparate racial impact: Black student athletes are disproportionately involved in generating revenue for the schools, but that disproportionality is not reflected in the scholarship money they receive in return.

The author and sponsor of this bill highlight a recent concurring opinion by U.S. Supreme Court Justice Brett Kavanaugh which summarizes the issue concisely:

The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. (*Alston, supra*, at 2168.)

Relatedly, the sponsors of the bill decry what they describe as “unacceptably low” graduation rates among Black athletes in the top revenue-generating sports: 42.6 percent among Black men’s basketball players, 62.7 percent among women’s basketball players, and 63.9 percent among FBS football players. The disturbing implication, the sponsors have written, is that Black athletes “are recruited not to be degree seekers but to score touchdowns and hit three pointers.”¹

2. Solution proposed by the bill

This bill proposes a mechanism designed to allow college athletes a share in the revenues they generate while supporting and incentivizing them to complete their degrees. In the process, the mechanism also serves to address some of the racial disparity in how the money made on college sports gets distributed.

Here is how it would work. The bill requires California colleges and universities (except for the California Community Colleges) to establish and manage degree completion funds for each of their student athletes. The amount of money to be deposited in each student’s account would depend on the following formula. Take half of the amount of revenue generated for the school by the student athlete’s sport. Subtract the sum of all of the athletic scholarships given to students participating in that sport. Finally, divide the difference among all of the students participating in that sport.

Under this formula, the more revenue that a sport generates for the school, the more money the student athletes participating in that sport will receive. If a particular team is not getting that much, collectively, in scholarships, then the deposit into their degree completion fund account will be higher and vice versa. Either way, the student athletes should, collectively, receive back about half of what their sport generates for the school

¹ *Civil Rights Violations Complaint Against NCAA Colleges* (Mar. 22, 2022) National College Players Association. On file with the Committee.

in revenue. Not only does this reduce the exploitation of student athletes by ensuring that they get a larger piece of the overall pie, it should reduce or eliminate the disparate racial impact that the current system has.

The money in the degree completion account serves, most obviously, as an incentive for the student athlete to graduate. Under the bill's terms, so long as the student athlete earns their degree within six year of starting, the student athlete gets the balance of whatever is in their degree completion account upon graduation.

The degree completion account serves a second purpose under the bill as well. It also offers student athletes financial support along their educational journey because the bill specifies that the student athlete may have immediate access to up to \$25,000 from the account each year. For low-income student athletes, the availability of this money may enable them to afford stable housing, purchase food, acquire educational equipment, help take care of family members, or simply relieve financial stress. All of these things are likely to increase student athletes' prospects of achieving their education goals. In short, the degree completion fund envisioned by the bill does not just offer a reward upon graduation, it also helps to provide students with what they will need to get there.

3. Equal protection and Title IX considerations

As the author and sponsors make clear, this bill is intended to address multiple problems at once. First, the bill seeks to reduce the degree to which colleges and universities exploit student athletes financially. It does this by requiring the schools to share the revenue generated by student athletic programs. Second, the bill is intended to provide student athletes with additional financial support as they pursue their education. It accomplishes that by making some amount from the fund immediately available to student athletes each year. Finally, the bill incentivizes student athletes to graduate by offering a financial reward in the form of the balance from the degree completion fund.

In pursuing these objectives, the bill also addresses some of the racial disparities detailed in Comment 1, above. Specifically, by aligning what student athletes receive back in scholarships and degree completion funds with the amount of revenue that their sport generates for the school, the bill ensures that Black student athletes are not receiving a proportionately smaller share of the revenue they generate.

In recent years, California has passed other remedial legislation intended to address longstanding patterns of discrimination, particularly in the context of corporate boards. (See, SB 826, Jackson, Ch. 954, Stats. 2018; AB 979, Holden, Ch. 316, Stats. 2020.) Both pieces of legislation were challenged on the grounds that they violate constitutional guarantees to equal protection under the law. In one case, the law has been struck down because it drew legal distinctions based on race and ethnicity without being, in the

court's view, narrowly tailored to serve a compelling state interest. (*Crest v. Padilla II* (Los Angeles County Superior Court April 1, 2022) Docket No. 20 STCV 37513.)

In contrast to those pieces of legislation, this bill does not draw legal distinctions on the basis of race, gender, or any other suspect category under equal protection analysis. Although it may have the effect of remedying racial discrimination, the bill itself is "colorblind." It calls for degree completion funds to be established for all student athletes and its formula for determining how much gets deposited into each player's account is a function of revenues, scholarship amounts, and the number of students on each team.

Although the bill does not draw legal distinctions based on suspect categories like race, ethnicity, and gender on its face, the Committee may wish to mull the practical and legal implications of the bill's formula for funding the proposed degree completion accounts. As the proponents of this bill point out with regard to the existing system: just because the way resources get distributed is facially neutral does not mean it will not have disparate impacts when applied in reality.

The formula in this bill for distributing money into student athlete's degree completion accounts will be most favorable to student athletes participating in the sports that generate the most money. As discussed, football is one of those sports, and it is a sport played almost exclusively by people who identify as male. More generally, women's college sports may generate less revenue than the sports played by their male counterparts. If that is the case, then the formula proposed by this bill will almost certainly benefit male student athletes more than it will female athletes.

These disparate impacts mean that the bill might force California institutions of higher learning to violate their Title IX obligations not to discriminate on the basis of sex in any education program or activity receiving Federal financial assistance. (Title IX of the Education Amendments Act of 1972 (2018); 20 U.S.C. 1681(a).) Pursuant to Title IX, "[t]o the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics." (34 C.F.R. §106.37(c)(1).) Although the degree completion funds contemplated by this bill are not scholarships as such, the same principle appears to apply to any athletic-related financial support. Formal U.S. Department of Education guidance on interpretation of Title IX states that:

[w]hen financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount

of work-related aid or loans [...] made available to the members of one sex, for example, could constitute a violation of Title IX.²

Ultimately, if the bill passes out of this Committee, further refinements may need to be made to the degree completion fund distribution formula to ensure that the effort to address disparate impacts in the current system does not inadvertently create a different set of disparate impacts that operate to the detriment of female college athletes and that could render California colleges and universities non-compliant with Title IX.

4. Fiduciary duty of the schools to manage the degree completion accounts on behalf of their student athletes

The bill states that the colleges and universities will have a fiduciary duty to manage the degree completion accounts on behalf of their student athletes. This means that the schools will have the legal obligation to manage the money in the accounts in the best interests of the student athletes, exercising the same care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. (*See, e.g.*, Corp. Code §§ 309(a) & 7231(a).) As a practical matter, this means that the schools would need to consider investing the money in the accounts so that they grow with the market while bearing in mind the potential for risk. Ultimately, if the schools failed to manage the accounts in the best interests of the student athletes, the schools could be held liable for any resulting decreases in the value of the accounts. (Civ. Code § 3333.)

5. Arguments in support of the bill

According to the author:

SB 1401 will address the exploitation and under-compensation of student athletes, in particular the athletes in sports that generate massive amounts of revenue and where the athletes receive only their scholarships in return, which constitutes a small fraction of that total revenue. California's Football Bowl Subdivision football players and Division I men and women basketball players are predominantly Black, and are the only college athletes in the state who do not receive at least 50 percent of the revenue that they produce. The bill sets up a degree completion fund to ensure that 50 percent of revenue generated in sports goes back to the athletes to incentivize graduation, assist with costs of living during college, and give back a fair share of the revenue they generate.

As sponsor of the bill, the National College Players Association writes:

² A Policy Interpretation: Title IX and Intercollegiate Athletics. Federal Register / Vol. 44, No. 239 / Tuesday, December 11, 1979 at (VII)(A)(3)(b).

This multibillion college sports enterprise imposes discriminatory practices that disproportionately harms Black athletes, while predominantly White coaches and administrators make millions of dollars. College athletes throughout predominantly White sports receive fair market compensation, but athletes in the only predominantly Black sports (FBS football and men's and women's basketball) do not. All college athletes should have the opportunity to receive fair market pay. This racially unjust exploitation is amplified by the fact that Black men's basketball players, women's basketball players, and FBS football players have unacceptably low graduation rates - 42.6%, 62.7%, and 63.9%, respectively. Chronically low graduation rates among Black athletes persist as do the 40-50 hours/week athletes report spending on their sport. SB 1401 would be a powerful counterweight to structural obstacles that work against athletes' academic success because it would condition much of the pay on degree completion. This is a much better use for athletic revenue that will otherwise be spent on ever increasing raises for coaching salaries.

SUPPORT

National College Players Association (sponsor)

National Alliance of African American Athletes

United Steelworkers District 12

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 26 (Skinner, Ch. 159, Stats. 2021) expanded the bases on which a collegiate student athlete can receive compensation to include earnings from the use of the student's athletic reputation. The bill also moved up the implementation date for existing statutes relative to compensation earned from the use of a student athlete's name, image, or likeness.

AB 609 (Kamlager, 2021) would have required institutions of higher learning to (1) pay their athletes in sports generating high revenue in comparison to the amount of scholarships awarded; (2) comply with federal law requiring equal opportunity to participate in college athletics, regardless of gender and to suspend an athletic director from intercollegiate athletics responsibilities in the state for three years if such

compliance is not achieved; and (3) limit compensation for athletics administrative personnel. AB 609 died in the Assembly Committee on Arts, Entertainment, Sports, Tourism, and Internet Media.

SB 206 (Skinner, Ch. 383, Stats. 2019) enabled college student athletes to earn compensation for the use of their own name, image, or likeness (athletic endorsements) and authorized student athletes to obtain professional legal representation, such as that provided by a sports agent, in relation to their college athletics, commencing on January 1, 2023. The bill also provided protections for student athletes who elect to engage in these activities.

AB 1573 (Holden, Ch. 382, Stats. 2019) added three provisions of law designed to support and protect the rights of student athletes at institutions of higher learning. Specifically, the bill: (1) authorized schools to establish degree completion funds; (2) directed schools to develop, post, and disseminate specified information regarding existing student athlete rights; and (3) prohibited schools from retaliating against student athletes who report violations of student athletes' rights.

SB 1525 (Padilla; Ch. 625, Stats. 2012) enacted the Student Athlete Bill of Rights.

PRIOR VOTES:

Senate Education Committee (Ayes 4, Noes 0)
