

BILL ANALYSIS

C.S.S.B. 17
By: Creighton
Higher Education
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Texas hosts world class public institutions of higher education that are as diverse as the state itself. However, certain diversity, equity, and inclusion (DEI) practices are polarizing and work against the goal of inclusion. C.S.S.B. 17 prohibits public institutions of higher education from establishing or maintaining DEI offices, officers, employees, or contractors that perform the duties of a DEI office. The bill also prohibits requiring related training.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.S.B. 17 amends the Education Code to require a public institution of higher education to be committed to creating an environment of intellectual inquiry and academic freedom, so that all students are equipped for participation in the workforce and the betterment of society, and intellectual diversity, so that all students are respected and educated regardless of race, sex, or ethnicity or social, political, or religious background or belief.

C.S.S.B. 17 defines "diversity, equity, and inclusion office" (DEI), for the purposes of its provisions, as an office, division, or other unit of a public institution of higher education established for the following purposes:

- engaging in hiring or employment practices at the institution that give preferential treatment on the basis of race, sex, color, or ethnicity, other than through the use of nondiscriminatory hiring processes in accordance with any applicable state and federal antidiscrimination laws;
- providing differential treatment to individuals on the basis of race, sex, color, or ethnicity;
- implementing policies or procedures that give preferential treatment on the basis of race, sex, color, or ethnicity, other than policies or procedures approved in writing by the institution's general counsel for the purpose of ensuring compliance with any applicable court order or state or federal law in accordance with institutional policy; or
- conducting trainings, programs, or activities that advocate for or give preferential treatment on the basis of race, sex, color, ethnicity, gender identity, or sexual orientation, other than trainings, programs, or activities developed by an attorney and approved in writing by the institution's general counsel for the purpose of ensuring compliance with any applicable court order or state or federal law in accordance with institutional policy.

C.S.S.B. 17 requires the governing board of a public institution of higher education to ensure that each unit of the institution does not, except as required by federal law or otherwise provided by the bill's provisions, do the following:

- establish or maintain a DEI office;
- hire or assign an employee of the institution or contract with a third party to perform the duties of a DEI office;
- compel, require, induce, or solicit any person to provide a DEI statement or give preferential consideration to any person based on the provision of a DEI statement;
- give preference on the basis of race, sex, color, ethnicity, or national origin to an applicant for employment, an employee, or a participant in any function of the institution; or
- require any person, as a condition of enrolling at the institution or performing any institution function, to participate in DEI training, which, as follows:
 - includes a training, program, or activity that advocates for or gives preferential treatment on the basis of race, sex, color, ethnicity, gender identity, or sexual orientation; and
 - does not include a training, program, or activity developed by an attorney and approved in writing by the institution's general counsel for the purpose of ensuring compliance with any applicable court order or state or federal law in accordance with institutional policy.

Additionally, the bill requires the governing board of a public institution of higher education to ensure that each unit of the institution adopts policies and procedures for appropriately disciplining, including by termination, an employee or contractor of the institution who engages in conduct in violation of such prohibitions.

C.S.S.B. 17 authorizes the governing board of a public institution of higher education to approve the institution's implementation of a program otherwise prohibited under the bill if the governing board determines that the program otherwise complies with applicable state and federal law and is necessary for the institution to comply with the standards or requirements of the institution's accrediting agency or with the terms of a grant awarded by or contract with the federal government, a private entity, or a nonprofit organization.

C.S.S.B. 17 prohibits the bill's provisions regarding the regulation of DEI offices and programs from being construed to apply to the following:

- academic course instruction;
- scholarly research or a creative work by a public institution of higher education's students, faculty, or other research personnel or the dissemination of that research or work;
- an activity of a student organization registered with or recognized by a public institution of higher education;
- guest speakers or performers on short-term engagements;
- a program or activity to enhance student academic achievement or postgraduate outcomes that allows participation without regard to race, sex, color, or ethnicity;
- data collection; or
- student recruitment or admissions.

C.S.S.B. 17 prohibits a public institution of higher education from spending money appropriated to the institution for a state fiscal year until the institution's governing board submits to the legislature and the Texas Higher Education Coordinating Board a report certifying the governing board's compliance with the bill's provisions during the preceding state fiscal year. This prohibition applies beginning with money appropriated to a public institution of higher education for the state fiscal year beginning September 1, 2024.

C.S.S.B. 17 requires the governing board of each public institution of higher education or the board's designee, in the interim between each regular session of the legislature, to testify before the standing legislative committees with primary jurisdiction over higher education at a public hearing of the committee regarding the board's compliance with the bill's provisions.

C.S.S.B. 17, except as otherwise provided, applies beginning with the 2023-2024 academic year.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2023.

COMPARISON OF SENATE ENGROSSED AND SUBSTITUTE

While C.S.S.B. 17 may differ from the engrossed in minor or nonsubstantive ways, the following summarizes the substantial differences between the engrossed and committee substitute versions of the bill.

While both the substitute and the engrossed provide for the definition and purposes of a DEI office, they differ with respect to the elements included among such purposes as follows:

- whereas the engrossed included influencing hiring or employment practices with respect to race, sex, color, or ethnicity, other than through the use of color-blind and sex-neutral hiring processes, the substitute includes engaging in hiring or employment practices that give preferential treatment on the basis of such categories, other than through the use of nondiscriminatory hiring processes;
- whereas the engrossed included promoting differential treatment of or providing special benefits to individuals on the basis of race, color, or ethnicity, the substitute includes providing differential treatment on the basis of race, sex, color, or ethnicity and does not include the provision of special benefits as the engrossed did;
- whereas the engrossed included promoting policies or procedures designed or implemented in reference to race, color, or ethnicity, the substitute includes implementing policies or procedures that give preferential treatment on the basis of race, sex, color, or ethnicity; and
- whereas the engrossed included conducting trainings, programs, or activities designed or implemented in reference to race, color, ethnicity, gender identity, or sexual orientation, the substitute includes conducting trainings, programs, or activities that advocate for or give preferential treatment on the basis of those categories.

Whereas the engrossed provided for an exception to the prohibitions regarding a DEI office or program for policies, procedures, trainings, programs, or activities approved in writing by the institution's general counsel and office of the attorney general for the sole purpose of ensuring compliance with an applicable court order or law, the substitute provides for such an exception for policies, procedures, trainings, programs, or activities approved in writing only by the institution's general counsel for the purpose of ensuring compliance with an applicable court order or law in accordance with institutional policy.

Whereas the engrossed prohibited the bill's provisions regarding the regulation of DEI offices and programs from being construed to apply to a policy, practice, procedure, program, or activity to enhance student academic achievement or postgraduate outcomes that is designed and implemented without regard to race, color, ethnicity, or sex, the substitute instead prohibits the those provisions from being construed to apply to a program or activity to enhance student academic achievement or postgraduate outcomes that allows participation without regard to race, sex, color, or ethnicity.

The substitute includes the following provisions that are not in the engrossed:

- a provision that authorizes an institution's governing board to approve the implementation of a program otherwise prohibited by the bill under certain conditions; and
- a provisions establishing that, as a higher education purpose, a public institution of higher education must be committed to creating an environment of:
 - intellectual inquiry and academic freedom so that all students are equipped for participation in the workforce and the betterment of society; and
 - intellectual diversity so that all students are respected and educated regardless of race, sex, or ethnicity or social, political, or religious background or belief.

The substitute does not include the following provisions that were present in the engrossed:

- a provision that includes among the requirements of the governing board of each institution of higher education the requirement to ensure that a majority of the members of a search committee for the position of president or other chief executive officer of an institution under the board's control and management are members of the board;
- a prohibition against an accrediting agency taking or threatening to take adverse action against an institution of higher education based on the institution's compliance with the bill and a corresponding authorization, if an accrediting agency takes or threatens to take such action, for the attorney general, the institution, or an employee of the institution to bring an action for declaratory or injunctive relief against the agency;
- provisions requiring the state auditor to periodically conduct a compliance audit of each institution of higher education to determine whether the institution has spent state money in violation of the bill and setting out the procedures of the audit;
- a provision establishing that an institution is ineligible to receive state funds, other than those appropriated to pay debt service on bonds or notes previous authorized, for the state fiscal year immediately following the state fiscal year in which a determination is made, pursuant to a compliance audit, that the institution has spent state money in violation of the bill's provisions;
- an authorization for a student or employee of an institution of higher education who is required to participate in DEI training in violation of the bill's provisions to bring an action against the institution for injunctive or declaratory relief; and
- a provision establishing the severability of the bill's provisions.