

**SUBJECT:** Protecting expressive activities at public institutions of higher education

**COMMITTEE:** State Affairs — committee substitute recommended

**VOTE:** 9 ayes — Phelan, Hernandez, Harless, Hunter, P. King, Parker, Raymond, Smithee, Springer

2 nays — Guerra, E. Rodriguez

2 absent — Deshotel, Holland

**WITNESSES:** For — Luke Metzger, Environment Texas; Thomas Lindsay, Texas Public Policy Foundation; (*Registered, but did not testify:* Rick Briscoe, Open Carry Texas; James Dickey, Republican Party of Texas; Ed Sterling, Texas Press Association; Jennifer Allmon, The Texas Catholic Conference of Bishops; Saurabh Sharma, Young Conservatives of Texas; and nine individuals)

Against — (*Registered, but did not testify:* Vanessa MacDougal)

On — (*Registered, but did not testify:* JT Morris)

**DIGEST:** CSHB 2100 would create requirements related to speech and expressive conduct protected by the First Amendment on the campuses of institutions of higher education. The bill would allow the attorney general or a person whose expressive rights had been violated to bring a legal action for injunctive relief or to recover compensatory damages, court costs, and reasonable attorney's fees.

**Protected conduct.** CSHB 2100 would establish state policy to protect the expressive rights of persons guaranteed by the U.S. and Texas constitutions by ensuring that all persons lawfully present on higher education campuses could engage in expressive activities, including assemblies, protests, speeches, distribution of written or visual material, carrying of signs, and circulating of petitions. Commercial speech would not be an expressive activity. A person's expressive rights could not be

unnecessarily restricted or impeded by rules or policies adopted by a higher education institution.

The bill's protections would apply equally to students and to student groups and organizations, regardless of whether the group or organization was recognized by or registered with the institution.

**Common outdoor areas.** A higher education institution would have to ensure that the common outdoor areas of its campus were deemed traditional public forums where a lawfully present person could engage in expressive activities that were lawful and not materially and substantially disruptive. An institution could by rule maintain and enforce reasonable restrictions on the time, place, and manner of expressive activities in the common outdoor areas that:

- were necessary to further a compelling institutional interest and were the least-restrictive means of furthering that interest;
- employed clear, published, content-neutral, and viewpoint-neutral criteria;
- left open ample alternative means of expression; and
- allowed students and employees to spontaneously and contemporaneously assemble or distribute written material without a permit or other permission from the institution.

**Guest speakers.** In determining whether to approve a speaker or in determining a fee to be charged for use of its facilities, an institution could consider only content-neutral and viewpoint-neutral criteria related to the needs of the event. Criteria could include the proposed venue and expected size of the audience, need for campus security, necessary accommodations, and any relevant history of compliance or noncompliance by the requesting student, student group, or employee. An institution could not consider the anticipated attendance of persons not intending to participate in the event or any anticipated controversy related to the event.

An institution would have to make reasonable efforts to ensure the safety

of an invited speaker.

**Policy requirements.** Each institution would be required to adopt a policy detailing students' and employees' rights and responsibilities regarding expressive activities. The policy would have to:

- allow any person lawfully present to engage in expressive activities, including by responding to the expressive activities of others;
- allow students, student groups and organizations, and employees to invite speakers to speak on campus;
- establish disciplinary sanctions for students or student groups or organizations who unduly interfered with the expressive activities of others;
- include a grievance procedure for addressing complaints of a violation;
- encourage the free and open exchange of ideas, including unpopular, controversial, or offensive ideas, in classrooms and all other campus locations;
- prohibit the institution or an employee of the institution from punishing a student or employee in any manner for engaging in expressive activities;
- prohibit the institution from taking official action on a matter of public concern in a manner that required a student or employee to publicly express a particular viewpoint on that matter;
- require the institution to strive to maintain an official position of neutrality on matters of public concern except as necessary for the institution's operations;
- require the institution to permit a student group or organization formed to exercise expressive rights to establish and maintain membership and leadership qualifications that adhered to the group's sincerely held beliefs or sincere standards of conduct;
- contain statements that it is not the institution's proper role to shield persons from expressive activities, including unpopular, controversial, or offensive ideas; and

- entitle students and employees to discuss any problem and spontaneously and contemporaneously assemble or distribute written or visual material without a permit or other permission from the institution.

The policy would have to be approved by a majority vote of the institution's governing board. An institution would have to make the adopted policy available to students and employees of the institution by including the policy in student and personnel handbooks, providing copies of the policy to new students, and posting the policy on the institution's website.

An institution would have to develop materials, programs, and procedures to ensure that the institution's employees responsible for educating or disciplining students understood the requirements laid out in the bill and all the accordant policies of the institution.

**Enforcement.** CSHB 2100 would entitle the attorney general or a person whose expressive rights had been violated to bring an action for injunctive relief to compel the institution to comply with the bill's requirements or to recover compensatory damages, court costs, and reasonable attorney's fees. An action would have to be brought by the first anniversary of the date that a violation was alleged to have occurred.

If a court found a violation, it would have to award the aggrieved person the greater of the amount of the person's compensatory damages or \$1,000. Each day of a continuing violation, including each day that a rule or policy that violated the requirements remained in effect, would constitute a separate violation.

A person whose expressive rights were affected by a rule or policy also could file suit against the institution for declaratory judgment.

**Effective date.** Each institution, by December 1, 2020, would have to post the policy on its website and submit a report regarding its implementation of the bill to the governor and members of the Legislature.

The bill would take effect September 1, 2019.

SUPPORTERS  
SAY:

CSHB 2100 would bolster free speech protections on college campuses by ensuring that protected expression could exist in common outdoor areas and that higher education institutions could not make decisions about guest speakers based on the speaker's viewpoint. Texas would join more than a dozen states that have passed campus free speech laws in the past five years, with many of these bills occurring on a bipartisan basis.

Texas colleges and universities should be places where vibrant debate is not just allowed but encouraged. Unfortunately, there have been instances of speakers being shut down by university officials for presenting an unpopular viewpoint or for drawing protestors who drowned out invited speakers with what is sometimes called the "heckler's veto." CSHB 2100 would prevent campuses from making decisions about scheduling speakers or charging higher fees to student groups based on campus security concerns.

Other issues that have surfaced in Texas or elsewhere include institutions that restrict protests to certain areas on campus, known as "free speech zones," or that charge higher fees to student groups for invited speakers based on campus security concerns. CSHB 2100 would address these issues by requiring higher education institutions to ensure that common outdoor areas were public forums where persons could engage in expressive activities in a lawful and non-disruptive manner.

The bill would protect nonprofits engaging in activities such as collecting petitions, ensuring their right to interact with students on important public policy issues. It also would protect student groups and organizations from being coerced into taking positions that violated their conscience.

While some have said the bill would impair a university's ability to make decisions that protect students' safety and welfare, campus officials would still be able to place reasonable time, place, and manner restrictions on expression if the restrictions were content-neutral and narrowly tailored to

serve a compelling institutional interest. Similarly, higher education institutions could avoid paying costs associated with litigation by adopting and following the policies required by the bill.

**OPPONENTS  
SAY:**

CSHB 2100 could take away the ability of colleges and universities to use their institutional judgment to make decisions about public speech activities that might be necessary to protect the safety and welfare of their students, faculty, and staff. Such decisions often are made in response to serious security concerns rather than out of a flagrant abuse of power as some have suggested.

Although legal remedies for First Amendment violations already exist, the bill would create a new cause of action that could subject colleges and universities to significant monetary damages and legal costs if their policies were determined to violate the requirements of CSHB 2100. The campus expression bill passed by the Senate would not include the potential for costly litigation.