

SUBJECT: Indemnification for admissions decisions in higher education

COMMITTEE: Higher Education — committee substitute recommended

VOTE: 8 ayes — Rangel, Solis, Bailey, Cuellar, Dunnam, Kamel, Rabuck, E. Reyna
0 nays
1 absent — Rodriguez

WITNESSES: For — Miguel Bedolla; Robert Goad, American Association of University Professors; Albert Kauffman, Mexican American Legal Defense Fund; Michael Olivas; Jorge Peacher, Mexican American Physicians Association

Against — None

BACKGROUND : Section 104 of the Civil Practice and Remedies Code provides that the state will secure against actual damages, court costs, and attorney's fees an employee acting in an official capacity. The statute applies to an employee, member of a governing board, or any other officer of a state agency, institution, or department; a physician or psychiatrist under contract with the state; a racing official with the Texas Racing Commission; a person serving on the governing board of an entity on behalf of an institution of higher education; a waste manifest state contractor; or the estate of these individuals.

DIGEST: CSHB 589 would apply indemnification provisions to any employee or volunteer making admissions decisions in an official capacity on behalf of a general academic, medical or dental institution.

The state's liability for indemnification would be limited to damages that were based on an act or omission committed in the course and scope of the person's duties in making a decision on the admission of an individual. The state would be liable in cases involving negligence, except for wilful, wrongful, or grossly negligent acts, or the deprivation of a right, privilege, or immunity secured by the Constitution or laws of Texas or the United States, except when a court or jury found individual acted in bad faith, with

conscious indifference, or with reckless disregard. The state also could be liable when indemnification was in its best interest, as determined by the attorney general or a designee.

In these circumstances, the bill would require indemnification for actual damages, court costs, and attorney's fees, up to the limits specified in the Civil Practice Code.

CSHB would take effect immediately if approved by a two-thirds record vote of the membership of the both houses.

**SUPPORTERS
SAY:**

CSHB 589 would allay the concerns of admissions personnel caught in the current controversy over Texas higher education admissions policy, confirming the long-held state policy of protecting its employees or agents from adjudged damages or penalties. Although there is no precedent for damages awarded against an individual admissions officer, the atmosphere surrounding the management of higher education admissions has changed drastically since the *Hopwood* plaintiffs filed their suit challenging admissions procedures at the University of Texas School of Law over two years ago. Lawsuits and rumors of lawsuits have proliferated, seemingly becoming the preferred means of affecting change in higher education admissions policy.

The Fifth U.S. Circuit Court of Appeals backed up its ruling in *Hopwood* with a warning that individual admissions officers could be personally liable in suits involving the admission or rejection of specific students. UT School of Law has been sued by both minority and Anglo individuals claiming discrimination in admissions policies. State legislators, the Texas attorney general, and officials of the U.S. Department of Education have traded conflicting interpretations of *Hopwood's* impact on admissions policy changes and its possible legal ramifications in a manner suggesting that further legal action may be taken on this issue.

But on the front lines of higher education admissions are those individuals who will carry out the policies decided upon by state and federal officials. It is imperative to emphasize to these individuals, whether they are employees, students, or volunteers, that they will not be penalized for doing their jobs.

Without such emphasis, and with the atmosphere of contention and litigiousness currently surrounding admissions procedures, admissions workers could be intimidated to the point of interfering with the admissions process. This could effectively raise the standard for admitting minority students higher than that for Anglo students; if admissions personnel fear lawsuits, they may protect themselves by recommending for admission only the most outstanding candidates among minorities.

Although the language of CSHB 589 would replicate that of the indemnification provisions of the Civil Practices Code, the assurances bear repeating. The seriousness of this situation and its possible negative effects on Texas higher education require that admissions personnel be guaranteed protection, as long as they act in good faith and within the bounds of their official responsibilities.

CSHB 589 would not open up the state to additional liability, as the actions the bill would cover are identical to those already established in statute. The bill would not protect any additional types of activity, but rather confirm that the protections already provided are extended to all those making admissions decisions on behalf of state institutions.

OPPONENTS
SAY:

CSHB 589 could expose the state to additional liability in lawsuits involving higher education admissions. Any addition to the state's indemnification policies could result in increased damages or penalties paid by the state. Furthermore, singling out admissions personnel for emphasized indemnification could embolden them to make inadvisable or indefensible admissions decisions and increase the potential of the abuse of indemnification protections.

OTHER
OPPONENTS
SAY:

CSHB 589 is unnecessary. The circumstances outlined in the bill are identical to those already in the Civil Practices Code. These provisions cover both higher education admissions workers and students and volunteers because the statute stipulates that individuals are protected regardless of whether they performed their services for compensation.

There has never been any kind of problem warranting the approach that would be taken by CSHB 589. Punitive damages have never been awarded against an individual admissions officer for admitting or not admitting a

student. The Fifth Circuit's allusion to the possibility of such suits just designed to give teeth to its repudiation of affirmative action programs.

NOTES:

The committee substitute specified that volunteers would be indemnified and deleted a provision that would have required schools to collect a \$1 indemnity fee from each student per semester.

The companion bill, SB 179 by Barrientos and Ellis, was favorably reported by the Senate Jurisprudence Committee by 4-3 (Harris, Duncan, Ogden voting nay) on April 9.