

BILL ANALYSIS

C.S.H.B. 166
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Public Education
Committee Report (Substituted)

BACKGROUND AND PURPOSE

According to the Texas Education Agency, more than 700,000 students receive special education services in the state's public schools. Based on the 2021 Annual Disability Statistics Compendium, the number of students receiving special education between the ages of 18 and 21 is more than 20,000. On reaching 18 years of age, students assume all the educational rights their parent or guardian had exercised previously on their behalf. These students' needs and abilities vary widely. Many are unable to fully understand their rights and thus are unable to provide informed consent in the special education process. Some adult students receiving special education services do not have a guardian appointed when they turn 18 and may be vulnerable to having their educational needs and interests overlooked. The federal Individuals with Disabilities Education Act requires a process allowing appointment of a representative in such cases but Texas has not enacted one. C.S.H.B. 166 seeks to remedy this situation by creating a process for school districts to appoint educational representatives for students who are over 18 and without a legal guardian, but unable to fully understand their rights and unable to provide informed consent throughout the special education process.

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 rulemaking authority is expressly granted to the commissioner of education in SECTION 5 of this bill.

ANALYSIS

C.S.H.B. 166 amends the Education Code to provide for the appointment of an educational representative for certain students with disabilities. The bill authorizes a student's parent or, if unavailable, the person who most recently represented the student's interests to serve as an educational representative for a student who meets the following criteria:

- is 18 years of age or older or has had the disabilities of minority removed for general purposes;
- has been certified as not having the ability to provide informed consent regarding the student's educational program; and
- has not been determined to be incompetent.

The bill specifies that this authorization is for purposes of compliance with rules adopted pursuant to the federal Individuals with Disabilities Education Act (IDEA).

C.S.H.B. 166, with respect to the required certification that a student does not have the ability to provide informed consent, authorizes a licensed physician, licensed physician assistant, licensed clinical psychologist, licensed clinical social worker, or licensed specialist in school

psychology who meets certain other qualifications to certify that fact in writing, based on their knowledge and expertise and on clear and convincing evidence obtained through a personal examination of or interview with the student. In making such a determination, the professional must consider whether the student is unable to do the following:

- communicate, even with appropriate verbal support, in writing or in the student's most proficient method of communication, the student's preferences, decisions, and consent with respect to the student's educational program; and
- use an alternative to guardianship, including a supported decision-making agreement or power of attorney, for educational decision-making.

The bill prohibits the professional from determining that the student is unable to provide informed consent solely on the fact that the student has been voluntarily or involuntarily hospitalized for a mental illness or has a diagnosis of an intellectual or developmental disability. The bill requires a professional who issues a certification to provide a copy of that certification to the student and the student's parent or person standing in parental relation to the student. A reevaluation of an adult student with disabilities under federal regulations may be used to request the certification. The bill requires the certification to be renewed annually.

C.S.H.B. 166 requires a district that receives a qualifying notice for the appointment of an educational representative to take the following actions:

- not later than the fifth school day following the request's date of receipt, notify the student of that receipt in the manner appropriate for the student's most proficient method of communication;
- not later than the 15th school day following the date of receipt, accept the certification; and
- promptly acknowledge and recognize as an educational representative the student's parent or, if unavailable, one of the other eligible individuals specified by the bill.

The bill specifies that a qualifying notice is a written, signed notice from a student's parent, legal guardian, or spouse or another person who recently represented the student's interests in another matter as the student's educational representative that is accompanied by the required certification, dated not earlier than the 91st day before the notice's submission date. The individuals eligible to be appointed as a student's educational representative if the student's parent is unavailable are, in order of priority, the person who last cared for the student; the person with whom the student currently lives; or another appropriate individual who is preferred by the student, is not employed by the district, and has significant knowledge of the student and their strengths, opportunities, and post-educational transitional goals.

C.S.H.B. 166 limits the scope of an educational representative's appointment to representing the educational interests of the student in accordance with federal regulations. The bill establishes that the representative has all of the rights of a parent under the Education Code and requires the representative to consider the student's interests, preferences, and goals; to consult with the student before providing informed consent or making educational decisions on the student's behalf; and to notify the student when the representative has provided such consent or made any such decisions. If a student expresses disagreement with an informed consent or educational decision made by the student's educational representative on the student's behalf, the district must include a statement to that effect in the student's individualized education program. The bill sets the expiration of the representative's term on the date of the earliest of the following occurrences:

- the student becomes no longer eligible for special education services;
- the student graduates with a high school diploma;
- a guardian is appointed for the student; or
- the student rescinds the representative's appointment.

C.S.H.B. 166 authorizes a student who has not been determined to be incompetent to rescind the appointment of an educational representative at any time in writing or in the student's most proficient method of communication. If the student is unable to do so in writing, the student's admission, review, and dismissal (ARD) committee is required to document the student's

rescission on the student's behalf. The bill establishes that if a representative's appointment is rescinded, all rights accorded to parents under state law governing special education or under IDEA transfer to the student. The bill requires the district to notify the person who submitted the notice on which the appointment was based regarding the rescission.

C.S.H.B. 166 establishes that the appointment of an educational representative or the certification required by the bill for such an appointment may not be construed as a finding of the student's incompetence or incapacity for any other purpose or as relevant or precedential evidence in any future court or legal action seeking to remove decision-making authority from the student. The bill expressly does not prohibit the appointment of a guardian for a student for whom an educational representative has been appointed.

C.S.H.B. 166 makes confidential and exempts from state public information law any documentation relating to the appointment of an educational representative. The bill requires the commissioner of education to develop and post on the Texas Education Agency (TEA) website certain model forms that may be used for the required certification and to adopt rules to implement the bill's provisions relating to educational representative appointments, including rules to ensure compliance with the federal Family Educational Rights and Privacy Act of 1974.

C.S.H.B. 166 revises provisions relating to the transfer of certain parental rights relating to special education to a student who is 18 years of age or older, whose disabilities of minority have been removed for general purposes, or who is incarcerated to clarify that the applicable rights transfer instead to an agent under a power of attorney or an educational representative appointed for the student if applicable. The bill includes information and resources regarding a power of attorney for educational decision-making and the appointment of an educational representative among the information and resources that must be provided by a district to a student with a disability not later than one year before their 18th birthday or to the student or their parent at any time on request. The bill revises the requirement for the procedures adopted by the commissioner for compliance with federal requirements relating to transition services for students enrolled in special education programs to specify the manner in which an ARD committee must consider and address the involvement of certain persons in the transition and future of a student who is at least 18 years of age by including among those persons an agent under a power of attorney and an educational representative.

C.S.H.B. 166 includes the following among the individuals who may represent a person in an impartial due process hearing brought under IDEA:

- a parent for a person younger than 18 years of age;
- an agent under a power of attorney;
- a supporter under a supported decision-making agreement; or
- an educational representative appointed under the bill's provisions.

The bill prohibits TEA from regulating the appointment or selection of an educational representative under the bill's provisions and establishes that TEA has no jurisdiction over any issue concerning the capacity of an adult student.

C.S.H.B. 166 provides for the meaning of "parent" for purposes of state law relating to special education by reference to its definition under IDEA. The bill revises the definition of "special services" to remove the specification that developmental, corrective, supportive, or evaluative services included in the definition are not instructional in nature.

C.S.H.B. 166 repeals Section 29.017(f), Education Code.

EFFECTIVE DATE

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

COMPARISON OF INTRODUCED AND SUBSTITUTE

While C.S.H.B. 166 may differ from the introduced in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

Certification by a Licensed Professional

With respect to the licensed professionals who may certify that a student does not have the ability to provide informed consent regarding the student's educational program under the bill's provisions relating to educational representatives, the substitute makes the following changes:

- includes a licensed clinical social worker and a licensed specialist in school psychology among the professionals, which were not in the introduced; and
- omits the condition from the introduced that the professional is licensed to practice in Texas specifically.

The substitute revises the provision of the introduced that prohibited a professional from determining that a student is unable to provide informed consent based solely on the student having a diagnosis of an intellectual disability to clarify that this prohibition applies with respect to a diagnosis of an intellectual or developmental disability.

The substitute includes a requirement not present in the introduced for a certification to be renewed annually.

Both the introduced and the substitute require a copy of the certification to be provided to the student, but the substitute also includes the student's parent or person standing in parental relation to the student among the recipients.

Appointment of an Educational Representative

The substitute changes the nature of the educational representative appointment process from a process where a district makes an appointment on receipt of a qualifying request from an eligible individual to a process where the district acknowledges and recognizes an eligible individual as an educational representative on provision of a qualifying notice. The substitute does not include the introduced version's requirement for the district to determine whether a submitted certification conforms with the bill's requirements. The substitute also does not include a requirement for the commissioner to post on the TEA website a model form that may be used for a request for appointment of an educational representative. The bill revises deadlines associated with the appointment process to reference school days instead of business days, as in the introduced.

The substitute and the introduced differ with respect to the prioritized list of individuals eligible to be appointed as an educational representative for a student in the following ways:

- while the introduced placed the student's parent or legal guardian first in the order of priority, the substitute provides that, if available, the student's parent is the individual the district must recognize as the student's representative;
- the substitute does not include the student's spouse as an eligible individual; and
- the substitute instead includes the person who last cared for the student and then the person with whom the student currently lives as individuals who may be appointed if the parent is not available, before any other appropriate individual.

The substitute includes provisions not in the introduced that do the following:

- establish that an educational representative has all the rights of a parent under the Education Code; and

- require a district to include a statement in a student's individualized education program if the student expresses disagreement with an informed consent or education decision made by the student's representative.

The introduced included receipt of a written notice of resignation from an educational representative as an event that triggers expiration of representative's appointment on the date of the event, whereas the substitute does not.

The substitute changes the entity responsible for documenting a student's rescission of the appointment of a education representative if the student is unable to do so in writing from the district, as in the introduced, to the student's ARD committee. The substitute includes a requirement for the district to notify the person who submitted the notice on which the appointment is based regarding the rescission, which did not appear in the introduced.

The substitute includes a prohibition against TEA regulating the appointment or selection of an educational representative and a provision establishing that TEA has no jurisdiction over any issue concerning the capacity of an adult student, which did not appear in the introduced.

Other Provisions

The substitute adds references to both an agent under a power of attorney and an educational representative in the following statutory provisions, whereas the introduced only included references to an educational representative:

- provisions relating to the transfer of certain parental rights related to special education to a student who is 18 years of age or older, whose disabilities of minority have been removed for general purposes, or who is incarcerated; and
- provisions relating to the provision of certain information and resources to a student with a disability or their parent.

The substitute also includes references to a power of attorney and an educational representative in provisions relating to the requirements for procedures specifying the manner in which an ARD committee must consider and address the involvement of certain persons in the transition and future of a student who is at least 18 years of age, whereas the introduced did not.

The substitute includes provisions not in the introduced that provide for the following:

- a definition of "parent" that is tied to IDEA for purposes of state law relating to special education;
- a revised definition of "special services"; and
- an expansion of the list of individuals authorized to represent a person in an impartial due process hearing brought under IDEA.