Utah System of Higher Education
HB 261 Guidance

Purpose: The Utah State Legislature passed HB 261, Equal Opportunity Initiatives, in the 2024 General Session. The bill is effective July 1, 2024. As directed by the Board of Higher Education, the Office of the Commissioner of Higher Education (OCHE) issued this guidance to establish clear expectations to carry out the Legislature's intent operationally through institutional policies, practices, and procedures. This guidance is broad and will not address every situation or compliance obligation. Presidents and administrators should continue to seek legal advice from their institution's general counsel as questions arise. OCHE will update this guidance as needed.

I. Commitment to Opportunity and Success

The Board is committed to increasing access and completion at USHE institutions to support the success of every student.

II. Commitment to Academic Freedom and Free Expression

The hallmark of higher education is its position as the marketplace of ideas, where community members may freely express all ideas and viewpoints and where the merits of those ideas are subject to rigorous scrutiny and must withstand the challenge of open debate and critical examination. Therefore, the Board affirms its commitment to free expression and academic freedom, under rules and policies created in alignment with the Constitution of the United States.

III. Areas Not Covered by HB 261

This bill does not impact:

- Academic freedom;
- Academic research;
- Classroom instruction;
- Accreditation compliance;
- Athletics compliance;
- Policies necessary to comply with state or federal law (including laws related to prohibited discrimination or harassment); and
- Other exceptions listed in the bill.

IV. Summary of HB 261 and Compliance Requirements

For purposes of this guidance, OCHE adopts the provisions and definitions of HB 261, as more fully described herein. This includes the definition of "personal identity characteristics," which is defined as: "an individual's race, color, ethnicity, sex, sexual orientation, national origin, religion, or gender identity."

A. PROHIBITED TRAININGS
Utah Code § 53B-1-117

Statutory Requirement: An institution may not require prohibited training.

"Prohibited Training" means, mandatory instructional programs and related materials for current or prospective employees that promote "prohibited discriminatory practices," including in-person or online seminar, discussion group, workshop, other program or related materials.

Statutory Exceptions: Policies that are necessary to comply with state or federal law, including laws relating to prohibited discrimination or harassment.

USHE Guidance:

- An instructional program is mandatory if the institution's employees or prospective employees are required to attend or complete it as a condition of employment. Mandatory trainings may include, but are not limited to:
  - New employee orientations;
  - Training for undergraduate and graduate student employees, including graduate teaching assistants;
  - Annual, campus-wide compliance training, including:
    - Title VII
    - Title IX
    - FERPA
    - Information Technology Security Awareness Training
    - Code of Conduct
  - Training that the institution requires for employees in particular areas, such as:
    - Employee search committee training
    - Procurement committee training
    - Safety training
    - Institutional Review Board training
    - Clery Act training for campus security authorities

Recommended Next Steps:

- Identify all mandatory trainings;
- For each identified mandatory training, determine whether the training includes any "prohibited discriminatory practices"; and
- For each identified mandatory training with a "prohibited discriminatory practice", determine whether it is allowed under one of the exceptions.
- For any training that is *both mandatory and includes a prohibited discriminatory practice***,** but does not fall within one of the exceptions, either:
  - Designate the training as optional training; or
  - If the institution wants/needs to continue mandating the training, remove all reference(s) to prohibited discriminatory practices in the training programs and materials.

B. PROHIBITED SUBMISSIONS
Utah Code § 53B-1-116

Statutory Requirement: An institution may not require, request, solicit, or compel a prohibited submission as a certification or condition before taking action with respect to:

- Employment, including decisions regarding:
  - Hiring;
  - Terms of employment;
  - Benefits;
  - Compensation;
  - Seniority status;
  - Tenure or continuing status;
  - Promotion;
  - Performance reviews;
  - Transfer;
  - Termination; or
  - Appointment;
- Admission to, advancement in, or graduation from an institution or an academic program;
- Participation in an institution-sponsored program; or
- Qualification for or receipt of state financial aid or other state financial assistance.

"Prohibited Submission" means a submission, statement, or document that requires an individual to articulate the individual's position, view, contribution, effort, or experience regarding a policy, program, or initiative that promotes differential treatment based on an individual's "personal identity characteristics". Also includes a submission, statement, or document that relates to a policy, program, or initiative regarding anti-racism, bias, critical race theory, implicit bias, intersectionality, "prohibited discriminatory practices", or racial privilege. An institution may not require, request, solicit, or compel a prohibited submission as a certification or condition before taking certain employment or academic actions, including qualification for or receipt of state financial aid or other state financial assistance, as outlined in HB 261.

Statutory Exceptions: The following are <u>not</u> "prohibited submissions" under HB 261:

- A submission, statement, or document that relates to a bona fide occupational qualification for the position;
- Policies necessary to comply with state or federal law, including laws relating to prohibited discrimination or harassment;
- Requiring disclosure of an employee's academic research, classroom teaching, or coursework; and
- Requiring an applicant for employment, tenure, or promotion to discuss the applicant's research, teaching agenda, artistic creations, or pedagogical approaches or experiences with students of all learning abilities.

USHE Guidance:

- **Job Postings:** HB 261 does not prohibit institutions from posting jobs in a wide variety of forums, including forums of predominant interest to people with certain identity characteristics. Additionally, the bill does not impact an institution's ability to conduct a

broad initial search that includes a varied group of applicants. Job postings may state that candidates from all backgrounds are encouraged to apply or encourage applications from candidates of all populations.

- **Application and Interview Questions:** If appropriate for the job, HB 261 does not prohibit asking applicants about their experience teaching first-generation college-students, low-income students, or underserved student populations. Ideally, questions should not categorize students or employees by classification. For example, the search committee could ask an applicant:
  - What is your experience in, philosophy about, or plan for supporting students?
  - How do you reach students where they are?
  - How have you been effective reaching students of different backgrounds?
  - Describe your teaching philosophy.
- **No Preferential Consideration:** An institution may not grant any form of preferential consideration to an individual who provides a "prohibited submission". However, institutions may inquire about prospective faculty members' research interests to assess how their expertise may complement existing academic strengths and needs of an academic department.

Recommended Next Steps:

- Inform your campus community that any requirement that includes a prohibited submission must be removed.
- Identify all prohibited submissions required by a policy, program, practice, or initiative that does not involve an exception.
- Review whether prohibited submissions are being included in job postings and advertisements.
- In all departments, review whether prohibited submissions are a part of the hiring process (including in interviews).
- Review whether prohibited submissions are being included in academic and financial aid applications, including program-specific applications, and processes.
- For any prohibited submission requirements that do not fall within one of the exceptions, either:
  - Revise the requirement so that it is no longer a prohibited submission; or
  - Remove the requirement.
- Assess whether employees and committees handling employment, academic, and financial aid processes should be trained on HB 261 requirements.
- If a prohibited submission is required by federal law, prepare a report for the institution's board of trustees detailing the circumstances under which a prohibited submission is required and publish the report on your board of trustees' website in a conspicuous location.

C. PROHIBITED DISCRIMINATORY PRACTICES
Utah Code § 53B-1-118

Statutory Requirement: An institution shall not engage in or maintain a policy, procedure, practice, program, office, initiative, or required training that, based on an individual's "personal identity characteristics":

- Promotes the differential treatment of an individual without an important government interest;
- Influences the employment decisions of an individual other than through neutral hiring processes with regard to "personal identity characteristics" and in accordance with federal law;
- Influences an individual's admission to, advancement in, or graduation from an institution, the public education system, or an academic program; or
- Influences an individual's participation in an institution-sponsored or public education system-sponsored program.

Additionally, an institution cannot engage in or maintain a policy, procedure, practice, program, office, initiative, or required training that:

- Asserts that:
  - One personal identity characteristic is inherently superior or inferior to another personal identity characteristic;
  - An individual, by virtue of the individual's personal identity characteristics, is inherently privileged, oppressed, racist, sexist, oppressive, or a victim, whether consciously or unconsciously;
  - An individual should: be discriminated against in violation of Title VI, Title VII, or Title IX; receive adverse treatment; be advanced; or receive beneficial treatment because of the individual's personal identity characteristics;
  - An individual's moral character is determined by the individual's personal identity characteristics;
  - An individual, by virtue of the individual's personal identity characteristics, bears responsibility for actions committed in the past by other individuals with the same personal identity characteristics;
  - An individual should feel discomfort, guilt, anguish, or other psychological distress solely because of the individual's personal identity characteristics;
  - Meritocracy is inherently racist or sexist; or
  - Socio-political structures are inherently a series of power relationships and struggles among racial groups;
- Promotes resentment between, or resentment of, individuals by virtue of their personal identity characteristics;
- Ascribes values, morals, or ethical codes, privileges, or beliefs to an individual because of the individual's race, color, ethnicity, sex, sexual orientation, national origin, or gender identity; or
- Considers an individual's personal identity characteristics in determining receipt of state financial aid or other state financial assistance, including a scholarship award or tuition waiver.

An institution may not employ or assign an employee or third-party whose duties for an institution include coordinating, creating, developing, designing, implementing, organizing, planning, or promoting policies, programming, training, practices, activities, and procedures relating to prohibited discriminatory practices.

Statutory Exceptions: The following are not prohibited discriminatory practices:

- Policies that are necessary to comply with state or federal law, including laws relating to prohibited discrimination or harassment;
- Requiring disclosure of an employee's academic research, classroom teaching, or coursework; and
- Requiring an applicant for employment, tenure, or promotion to discuss the applicant's research, teaching agenda, artistic creations, or pedagogical approaches or experiences with students of all learning abilities.
- Additionally, the prohibitions in Utah Code section 53B-1-118(2) do <u>not</u> apply to:
  - Athletic and accreditation compliance requirements;
  - Academic research;
  - Academic course teaching in the classroom, including course and program learning outcomes;
  - Private scholarships administered by an institution;
  - Requirements necessary for an institution to establish or maintain eligibility for any federal program; or
  - A grant that requires an institution to engage in a prohibited discriminatory practice if the grant is approved by the institution's board of trustees or the Board of Higher Education.

USHE Guidance:

- **Institution:** The institution includes, but is not limited to, an employee representing the institution and encompasses the institution's units, including colleges, divisions, departments, programs, committees, centers, and/or other institutional sub-units.
- **At-risk Students and Demographics:** Institutions may continue to establish goals related to enrollment, retention, and completion based on objective demographic and institutional data demonstrating that a particular population of students is at risk of not enrolling or completing at rates to be expected given the service region and institutional mission. Gathering data to identify student populations at higher risk is allowable, even when such data may include information about populations with a particular identity characteristic. However, actions, initiatives, programs, or other resources established to advance goals: must be aligned with the principles described of HB 261 and this guidance; must be based on an individualized assessment of a student's needs; must not be based on personal identity characteristics; and must not include undertaking prohibited discriminatory practices.
- **Cultural Center:** A program, office, initiative, administrative unit, sub-unit, committee, and center ("centers") that has been or is being established based on a specific culture, population, or group must conform with the requirements of HB 261. This includes ensuring that a center does not provide student resources, influence student participation in programs, or promote differential treatment of students based on a personal identity characteristic. Centers are subject to following:
  - All centers must be approved by the Board of Higher Education consistent with Board Policy R131. As part of its compliance duties, the Board will review previously existing centers to determine if they conflict with the provisions of HB 261;

    - To the extent centers may continue to operate, all centers' purposes must be focused on cultural education, celebration, engagement, and awareness to provide opportunities for all students to learn with and from one another;
    - Centers should be organizationally separate and distinct from student success and support services. Centers, as separate organizational units, must not provide student success and support resources, such as academic advising, financial aid counseling, and tutoring. Institutions must provide formal student services through their offices of student success and support, or previously established student services offices; and
    - Centers may not engage in any prohibited discriminatory practices identified in HB 261 and outlined in section C of this guidance.
- **Student Clubs:** Institutions may structure student clubs in various ways, such as formal administrative units of the institution or informally associated clubs that operate more independently. For example, student government is generally structured as an administrative unit of the institution, whereas a gardening club may be an informally associated club. Student organizations operating as formal administrative units are subject to the provisions of HB 261. Student clubs not formally designated or treated as administrative units are not considered to be acting on behalf of the institution and are excluded from HB 261 requirements. However, the institution cannot deny a student club's request to be informally associated based on personal identity characteristics and must comply with Utah Code section 53B-27-203.5.
    - Individuals who serve as advisors to informally associated student clubs should be made volunteers acting in their personal capacity. Institutional personnel who serve as advisors to these clubs may not act on behalf of or speak for the institution and must take appropriate steps to make that clear, as needed. Institutions may set parameters for when institutional personnel may be able to serve or not serve as advisors to informally associated clubs and other rules related to such personnel.
- **Employee Affinity Groups:** USHE recognizes the important role employee affinity groups play in supporting faculty and staff and creating opportunities for employees to associate. However, employee affinity groups operating as formal administrative units are subject to the provisions of HB 261. Affinity groups not formally designated as administrative units – those whose membership and activities are conducted in the employees' personal capacities – are not considered to be acting on behalf of the institution and are excluded from HB 261 requirements. Accordingly, an institution should not operate as formal administrative units employee affinity groups that are based on personal identity characteristics and should not provide institutional resources to support these affinity groups.
    - As a resource for employees, an institution may include on an institution's website a list of the name and contact information for all employee affinity groups.
    - Employee affinity groups may also request to use facilities and other institution resources in accordance with the institution's policies.
- **Educational Programming:** Specific educational and academic programming such as cultural events, celebrations, commemorations, lectures, and events focused on highlighting a group based on personal identity characteristics, sponsored by an

institutional program or an employee acting on behalf of the institution, are allowed but should clearly and expressly indicate that they are for educational and academic purposes and that they are open to all. In determining whether an opportunity is open to all, the Board will consider, for example, whether advertisements, communications, and content would lead a reasonable person to understand that all are welcome to participate. Institutions shall consider and develop strategies for how to promote viewpoint neutrality in all institution-sponsored programming.

- **Programs:** Institution-sponsored programs should continue to provide access and participation for all students. When possible, materials and promotional information should indicate that programs serve all students.

Recommended Next Steps:

- Determine if the institution is engaging in any prohibited discriminatory practices.
- If the institution is engaging in a prohibited discriminatory practice that does not fall within one of the exceptions, either:
  - Change the policy, procedure, practice, program, office, initiative, or required training so a prohibited discriminatory practice is eliminated; or
  - Remove the policy, procedure, practice, program, office, initiative, or required training.

D. INSTITUTIONAL SPEECH

An institution may not take, express, or assert a position or opinion on:

- Anti-racism;
- Bias;
- Critical race theory;
- Implicit bias;
- Intersectionality;
- Prohibited discriminatory practices; or
- Racial privilege.

USHE Guidance:

- The institution includes, but is not limited to, an employee representing the institution, and encompasses the institution's colleges, divisions, departments, programs, committees, and/or other institutional sub-units.
- Institution presidents are authorized to speak for their respective institutions, and their messages on institutional matters are presumed to be "institutional" expression absent an express disclaimer.
- Factors that may be considered in determining when other employees are engaging in institutional speech include when:
  - They are speaking as part of their responsibilities for the institution;
  - They have been granted authority by statute, ordinance, regulation, job description, custom, or usage;
  - They are utilizing communication channels commonly or regularly used for institutional communication;
  - The message is closely controlled by institutional leadership; or

    - They are purporting to speak on behalf of the institution, or otherwise acting in such a manner such that they would likely be perceived by the public as speaking on behalf of the institution.
- HB 261 does not abridge academic freedom as identified by the Board or institutions, nor the First Amendment rights of individuals who are authorized to speak for the institution, to take, express, and assert personal opinions and positions in other capacities. However, such individuals should explicitly differentiate personal expression from institutional speech.
- Institutions may regulate employee speech in accordance with First Amendment principles regarding whether a matter is of public concern (not a personal grievance of the individual) and whether the interest of the institution in protecting against disruption, efficiency, harmony, and interference with business operations outweighs the interest of the employee in engaging in the expressive activity.

Recommended Next Steps:

- Review institution policies that state who can speak on behalf of the institution.
- Language used in institutional, college, division, department, program, or other institutional sub-unit mission, vision, values, goals, strategic plans, or acknowledgment statements must be reviewed and remedied from including prohibited language.

E. PROHIBITED DISCRIMINATORY PRACTICE – USE OF OR REFERENCE TO DIVERSITY, EQUITY, AND INCLUSION
Utah Code § 53B-1-118(1)(c)(i)(L)

A policy, procedure, practice, program, office, initiative, or required training cannot be referred to or named diversity, equity, and inclusion.

USHE Guidance:

- Institutions may not have non-teaching, non-research, non-student clubs or organizational units, or positions named with any combination of the words "diversity, equity, or inclusion." This includes divisions, vice presidents, chief diversity officers, or student government positions related to diversity, equity, or inclusion, personal identity characteristics, or any divisions, officers, positions, units, initiatives, committees, programs, practices, policies, or procedures established to coordinate, create, develop, design, implement, organize, plan, or promote prohibited discriminatory practices.
- An institution may not employ or assign an employee or third party whose duties for an institution include coordinating, creating, developing, designing, implementing, organizing, planning, or promoting policies, programming, training, practices, activities, and procedures relating to prohibited discriminatory practices.
- USHE does not interpret this requirement to mean that institutions are required to terminate employees who have job titles that include the words diversity, equity, and inclusion. However, institutions must revise those positions, including job titles and job descriptions, and/or may reassign employees to ensure employees are not engaging in prohibited discriminatory practices.

Recommended Next Steps:

- Identify all policies, procedures, practices, programs, offices, initiatives, or required trainings that are referred to or named diversity, equity, and inclusion.
  Rename or remove such policies, procedures, practices, programs, offices, initiatives, or required trainings.

F. TRAININGS REQUIRED BY HB 261
Utah Code §§ 53B-1-117 and 118

Annually, institutions must train faculty and staff on academic freedom and freedom of speech in accordance with state and federal law, and employees on the separation of personal political advocacy from an institution's business and employment activities.

Recommended Next Steps:

- Develop training for:
  - Faculty and staff on academic freedom and freedom of speech in accordance with state and federal law.
  - Employees on the separation of personal political advocacy from an institution's business and employment activities.

G. OTHER INSTITUTIONAL REQUIREMENTS
Utah Code § 53B-1-118 (1)(c)(iii)(d) and (3)(d)

Student Success and Support: Identify and/or develop an office, division, employment position, or other unit to provide support, guidance, and resources that equip all students, including all students at higher risk of not completing a certificate or degree, with experiences and opportunities for success in each student's academic and career goals, without excluding individuals on the basis of their "personal identity characteristics".

USHE Guidance:

- The institution's student success and support center need not be physically located within the same office space as the other student success and support centers. The institution may have satellite offices in other locations on campus. Additionally, an institution may have student support services split between two divisions at the institution.

Promote Viewpoint Diversity: Develop strategies, including inviting speakers, to promote viewpoint diversity at your institution.

USHE Guidance:

- Section I of the USHE Institutional Neutrality and Speech Guidance provides additional information about viewpoint diversity.
- When conducting the Board's review, USHE will evaluate the strategies developed by the institutions to promote viewpoint diversity. Strategies to promote viewpoint diversity may include but are not limited to policies or descriptions about how institutions welcome and encourage the expression of various viewpoints in a safe manner.

Free Speech and Civic Education: Establish policies and procedures to include opportunities for education and research on free speech and civic education.

Publication of the Titles and Master Syllabi of all Mandatory Courses: Includes courses, seminars, classes, workshops, and training sessions to be published on the institution's website in an online database readily searchable by the public.

USHE Guidance:

- "Mandatory course" means singular courses, seminars, classes, workshops, and training sessions required as a condition of admission, advancement, or graduation.
- "Syllabus" means the course syllabus that, at a minimum, satisfies any standards adopted by the institution and includes:
    - A brief description of each major course requirement, including each major assignment and examination;
    - Required or recommended reading assignments; and
    - A general description of the subject matter of each unit of discussion or study.
- This provision does not include courses required for purposes of complying with academic accreditation or an athletic requirement.
- A mandatory academic course is a course required for graduation, including general education or major requirements, and for which there is no other course that meets the requirement. If two or more courses meet the graduation requirement, those courses are not mandatory. This requirement does not apply to academic courses that are <u>not</u> mandatory.
- Faculty are <u>not</u> expected to modify the content of their academic courses, seminars, colloquiums, panels, debates, or similar expressions or exchanges of academic ideas to comply with the mandatory training prohibitions in HB 261.
- Syllabi should be posted in a searchable database on the institution's website no later than 14 days after the course begins for Spring 2025.
- Beginning summer semester 2025 and for semesters thereafter, syllabi should be posted to the searchable database on the institution's website no later than 14 days prior to the first day of the course.

V. Compliance and Reporting by the Utah Board of Higher Education

A. BOARD REVIEW

Institutions must be compliant with the requirements of HB 261 by July 1, 2024.

Beginning on July 1, 2025, the Board shall conduct a biennial review of institutions' compliance with Utah Code sections 53B-1-116, 53B-1-117, and 53B-1-118:

- **For 2025:** On each institution of higher education; and
- **For 2026 and every year after:** On one-half of the degree-granting institutions of higher education and one-half of the technical colleges.

B. REMEDIATION

If the Board identifies a violation of Utah Code section 53B-1-116, 53B-1-117, or 53B-1-118, the Board shall:

- **Create a Remediation Plan:** On or before 30 days after the day on which the board identifies the violation, work with the institution to create a remediation plan; and
- **Provide an Opportunity to Cure:** Provide the institution 180 days after the day of the creation of the remediation plan to cure the violation.

C. PROCESSING COMPLAINTS

The Board shall make rules in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, to establish a procedure for accepting and processing an individual's complaint against an institution for an alleged violation of these sections.

D. COMPLIANCE REPORT

On or before November 1 of each year, the Board shall prepare and submit a report to the Higher Education Appropriations Subcommittee on:

- The review process and each institution's compliance determination; or
- If a violation is identified, the remediation plan and progress.

E. STUDENT SUCCESS AND SUPPORT REPORT

Beginning on or before July 1, 2025, the Board shall report to the Higher Education Appropriations Subcommittee on the status and allocation of appropriated funds for student success and support.

USHE Guidance:

- In compliance with HB 261, institutions shall identify and track appropriated funds and resources previously associated with diversity, equity, and inclusion programming and initiatives that they have reallocated to student success and support.

F. CAMPUS CLIMATE SURVEYS

- On or before January 1, 2025, the Board shall contract to conduct a campus expression climate survey of each institution to assess student, faculty, and staff members' perceptions of and experiences with campus policy and practice regarding freedom of speech and academic freedom at the institution.
- The Board shall collect and submit the results to the Office of Legislative Research and General Counsel beginning on or before July 1.