

House Bill No. 5603 / Oversight of Higher Education Act

Comments regarding opposition to the bill by Michigan's 15 public universities Daniel Hurley, CEO, Michigan Association of State Universities

House Education Committee / June 10, 2020

On behalf of the 15 state universities of Michigan, I would like to express several major concerns about House Bill 5603, which would create an Office of the Higher Education Ombudsman within the Michigan Department of Education with full investigatory powers over the state universities.

Overly broad authority that conflicts with existing state and federal law

The bill is unprecedented in its breath and scope regarding the creation of a gubernatorially-appointed higher education ombudsman with sweeping investigative authority and access to information that may be barred from release under federal privacy laws.

Powers granted to the ombudsman conflict with the U.S. Constitution, Michigan Constitution, and federal laws and rules, including: FERPA (student privacy), HIPAA (medical privacy), and Title IX (gender discrimination). The ombudsman would be given extensive investigatory authority to interview individuals (including both students and employees), conduct informal hearings, and examine university records with little to no oversight.

Privacy concerns [U.S. Constitution conflicts]

Based on the bill's language, the ombudsman would have the right to enter any "premises" on the state's public university campuses, including privately leased residence hall and apartment rooms, with the ability to search them without a warrant, in violation of the Fourth Amendment of the U.S. Constitution. Bluntly, this ombudsman could enter locker rooms, bathrooms, medical offices, etc., in violation of personal privacy, federal law, and likely state laws.

As it involves instances of campus sexual assaults, the creation of a higher education ombudsman could end up suppressing reporting by survivors for fear of a loss of privacy and control over any investigative/adjudicative process.

Further, the bill purports that the ombudsman may interview any past, present, or prospective student affiliated with a public university. The inclusion of prospective students would apparently allow the Michigan Department of Education, with subpoena power, to have the authority to interview literally any child or adult in the state of Michigan, and based potentially on unsubstantiated claims.

Non-recognition of state universities' governance structure [Michigan Constitution conflicts]

While the bill apparently seeks to emulate the legislative ombudsman offices that have been created by state statute for the Michigan Department of Corrections and the Michigan Veterans' Facility, Michigan's public universities are vastly different than departments created in the Executive Branch, with broad independent powers and authority to supervise and control all aspects of their institutions, including complaints that are within the scope of this legislation. These powers are contained in Article Eight, Sections 5 and 6 of the State Constitution, and have been continuously recognized by Michigan courts, including most recently by the Court of Appeals in *Wade v. University of Michigan* (2017).

Creates a duplicative and circumventing investigative and adjudication system

Most of Michigan's public universities already maintain institutional-level ombudsman offices, and for both students and employees, extensive communications are put forth to ensure that all parties know their rights and responsibilities.

HB 5603 seeks to create an investigation and adjudication process for conduct already governed by federal and state laws. If enacted, the legislation would circumvent all currently existing mechanisms available to university students and employees for resolving matters, including a comprehensive internal reporting, investigative, and adjudication structure, and, for external reinforcement, local law enforcement authorities and the court system.

As just one example, Michigan's public universities are busy integrating new federal regulations governing campus sexual assault under Title IX of the Education Amendments of 1972. The U.S. Department of Education's Office of Civil Rights issued 2,000-plus pages of new regulations on May 6, of which all institutions receiving federal funding must be compliant with by August 14. Whether pertaining to sexual misconduct or any other issues, comprehensive investigative and adjudicative systems at the federal and state level are already in place.

Potentially huge cost implications

The cost implications to the state in creating and maintaining a higher education ombudsman office could be enormous. The office could be mired in costly litigation stemming from the far-reaching activities granted to it.

An independent state oversight mechanism already exists

The Michigan Auditor General conducts performance and investigative audits on various aspects of institutional systems, policies and procedures. Consistent with the Michigan Constitution, the Legislature can utilize the state Auditor General to evaluate and report on the efficacy of the policies and procedures currently in place at Michigan's public universities that are presumably the impetus for this bill.