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## EDUCATIONAL FLEXIBILITY AND EMPOWERMENT CONTRACT

**House Bill 4760 as passed by the House**  
**Sponsor: Rep. Tom Meyer**

**House Bill 4761 as passed by the House**  
**Sponsor: Rep. Wayne Kuipers**

**Second Analysis (10-18-01)**  
**Committee: Education**

### ***THE APPARENT PROBLEM:***

The administrators of school districts sometimes report that the legal requirements governing school operations impede teaching and learning. In particular, they say that the mandates embodied both in federal laws and state statutes, as well as the operational guidelines for programs that are promulgated in rules and regulations, stifle innovations. Further, the many reporting requirements to ensure accountability too often pose a regulatory burden of such magnitude that the adults in schools are deterred from their more important work, which is to ensure human development and academic achievement.

Since 1994, when the federal Elementary and Secondary Education Act (ESEA) was re-authorized and many of its 14 Titles (or chapters) were overhauled, school districts have been able to seek exemptions from federal requirements by making written application to the Michigan Department of Education for waivers. Waivers are granted when school officials demonstrate 1) that a particular rule impedes ongoing and measurable educational improvement, and 2) when the educators making the request can demonstrate they have involved the parents of the children affected by the proposed rule change in their decision-making process. However, when compliance with a rule or regulation is waived under the existing process, the waiver is not granted in exchange for explicit performance and educational achievement goals. Nor is a formal contract executed by the state department and the local district when compliance with a regulation is forgiven.

According to committee testimony, more than 1,200 waivers from federal special education requirements have been granted in Michigan, generally after being requested by intermediate school district officials on behalf of the individual school building administrators in their region. [There are about 3,400

school buildings in Michigan.] Many of the waivers granted have sought relief from three kinds of federal regulations: rules concerning the maximum class size in a special education classroom; those that specify particular teacher-student staffing ratios; and those that set maximum caseloads for special education students in the elementary grades. After scrutiny by a review panel in the Department of Education, the waiver requests generally are granted if those making the request demonstrate that an exemption from the rule would not be detrimental to a child.

In addition to special education flexibility, 175 waivers have been granted to school buildings to waive three additional federal rules. One hundred seventy-three of these 175 waivers were requested by the Michigan Department of Education on behalf of 173 school building administrators, to allow the educators in each school to undertake a two-year comprehensive school-wide improvement program under Title I (of ESEA) if at least 35 percent of their students are poor. The federal rule requires 50 percent poverty to be eligible for the two-year school-wide improvement grant (in which the first year is devoted to planning, and the second to implementation). The remaining two waivers from federal requirements were requested by school districts, rather than the department. They were granted to allow flexibility from a rule that requires a school district to use 75 percent of its Title II (of ESEA) Eisenhower Program Professional Development funds for teacher professional development opportunities in mathematics and science. School officials from the two districts successfully argued that their student performance was lower in subject areas other than math and science, and they asked to redirect a larger percentage of their funds to teacher training in other fields.

House Bills 4760 and 4761 (10-18-01)

To complement the existing federal waiver process, and to incorporate new ideas about freedom, initiative and empowerment that are being discussed by policymakers in Washington, D.C. to allow even greater flexibility when designing educational programs in exchange for better academic performance, some school officials have proposed a state-level waiver program that is coupled with performance contracts that would be capable of measuring improved student achievement. See *BACKGROUND INFORMATION* below. Under the state proposal, virtually all aspects of school law and rules could be waived, except those concerning health and safety, statutory teacher certification requirements, and public school academies (with some exceptions), in exchange for increased academic achievement. To those ends, legislation has been introduced.

### ***THE CONTENT OF THE BILLS:***

The bills would allow for Educational Flexibility and Empowerment Contracts that would be administered by the state superintendent of public instruction in the Department of Education. An “ed-flex” contract would enable a school district to defer compliance with requirements placed on the school district under designated state statutes and rules, as part of a performance contract. Under the legislation, the state superintendent would be required to give priority to applications for ed-flex contracts that were focused on reducing student achievement gaps based on race, gender, and socioeconomic status. A detailed description of the application, the contract, and related matters follows.

House Bill 4761 would amend the State School Aid Act (MCL 388.1609) to specify that the requirements of, and the rules promulgated under, the act would be subject to waiver under an educational flexibility and empowerment contract that was issued under the provisions of House Bill 4760, to which it is tie-barred.

House Bill 4760 would amend the Revised School Code (MCL 380.1294) to specify that a school district could apply to the superintendent of public instruction for an educational flexibility and empowerment contract, either for the school district, or for one or more schools operated by the school district. The contract would allow the superintendent to waive requirements placed on the school district under designated state statutes and rules as part of a performance-based contract with clearly defined and measurable performance goals. A school district could also apply to waive certain federal

requirements. Under the bill, any provision of the Revised School Code, or of the State School Aid Act of 1979, or of any rule promulgated under either statute would be subject to waiver, except health and safety requirements, statutory teacher certification requirements, and public school academy requirements, with some exceptions. However, a waiver could not affect requirements for the equitable participation of children enrolled in nonpublic schools.

If the board of a school district intended to apply for an ed-flex contract, it would be required under the bill to establish an Ed-Flex Planning Committee to work with the board members as they developed their resolution and application. That committee would be required to include a representative of the district’s teacher collective bargaining unit. The following protocol would govern the process.

A school district’s board would indicate its intent to apply for a contract by adopting a resolution, specifying in that resolution which school or schools were to be covered. Before adopting the resolution, the board would be required to hold at least one public hearing at which the types of waivers sought, and the need for the waivers, were explained, and at which public comment was allowed.

Ed-Flex contract application. Under the bill, a school district would submit an application for an ed-flex contract to the superintendent of public instruction, in the form and manner the Department of Education prescribed. However, the application would contain at least all of the following:

- a list of the state and federal requirements proposed to be waived;
- a statement specifying the need for waiver of each requirement, including the purpose and intended results;
- a description of measurable goals for improved student performance, both for each school year and for the overall term of the contract, including but not limited to goals for improving Michigan Educational Assessment Program (MEAP) scores;
- a description of the measurements to be used to determine whether performance goals had been met, both for each school year and for the overall term of the contract;

-an explanation of how the contract and waivers would assist the district or school to achieve its performance goals;

-a fiscal impact statement that estimated how the waiver or waivers might increase or reduce program costs;

-the schools covered, if the contract was not intended for the entire school district; and,

-a copy of the board resolution, and if the contract were intended to cover federal waivers under federal law, an explanation of how the public notice requirements of federal law had been met.

Responsibilities of the state superintendent. Within 60 days after receiving an ed-flex application, the superintendent of public instruction would be required to approve or disapprove it, and notify the school district. However, upon notification to the school district, the superintendent of public instruction could take an additional 30 days to consider the application. Under the bill, the superintendent of public instruction would be required to consult with the state treasurer or his or her designee before approving or disapproving an application. If the application were approved, the superintendent would be required to promptly enter into an ed-flex contract. If the application were not approved, he or she would be required to note the specific reasons for disapproval to the school district, and the district could submit a revised application. If the superintendent of public instruction did not act on an application and notify a school district of his or her decision within 90 days after receiving the application, then the application would be considered approved, and the superintendent would be required to immediately enter into the proposed ed-flex contract with the school district.

Under the bill, the superintendent could not approve an application unless he or she found a) that the performance goals contained in the application were sufficiently specific and would, if met, constitute improved student achievement; b) that the contract would allow the school district to enhance learning and to operate in a more effective, efficient, or economical manner; and, c) that the school district was meeting its financial obligations and fiscal responsibilities.

Ed-flex contract. An ed-flex contract would be required to include at least all of the following:

-all matters addressed in the application;

-assurance that the school district would report its annual progress toward its performance goals;

-an agreement that contract renewal depended upon MEAP scores or other performance measures that demonstrated adequate annual progress toward meeting the performance goals, and that attained a specific measurable benchmark by the end of the contract;

-an agreement on the contents of the empowerment report--a report summarizing the performance goals achieved, and the programs, curriculum, or other innovative approaches used to achieve them--that would be filed by the school district at the end of the contract term; and,

-the term of the contract, which could not exceed five years.

Early contract termination. Under the bill, the superintendent of public instruction could terminate an ed-flex contract before the end of its term if he or she determined that the school district or school had experienced two consecutive years of declining student performance, based on the performance goals set in the contract. However, the superintendent would not be required to terminate the contract if he or she determined that the decline was due to exceptional or uncontrollable circumstances.

Empowerment report; contract renewal. At the conclusion of the term of an ed-flex contract, a school district would be required to submit an empowerment report describing how the district or school had met, or had not met, the performance goals set forth in its contract. If the goals had been met, the superintendent could renew the contract.

Annual report to legislature. The bill would require the state superintendent to submit an annual report to the legislature on the status of the Educational Flexibility and Empowerment Program, including a report on ed-flex contracts issued during the year, and on progress made toward attainment of performance goals.

Educational innovations on web site. As the initial ed-flex contracts expired, the Department of Education would be required to post information on its web site about the educational innovations and best practices used to achieve pupil performance goals under the contracts.

Sunset. The provisions of the bill would be repealed five years after its effective date. At least 90 days before the date of repeal, the superintendent of public

instruction would be required to submit a report to the Senate and House standing committees having jurisdiction over education legislation, and also to the Office of Regulatory Reform. The superintendent's report would be required to identify provisions of statute or rule that had consistently been the subject of waivers or requests for waiver, and it also would be required to make recommendations concerning appropriate changes in statute or rule.

### **BACKGROUND INFORMATION:**

ESEA re-authorization; block grants; super-Ed Flex. The idea of educational flexibility to encourage school district innovation and academic achievement has been discussed by policymakers in Washington, D.C. since the mid-1990s. That policy conversation will continue in earnest during the Bush Administration. Indeed, some education advocates at the federal level of government have observed that 2001 and 2002 are likely to be the busiest time in the history of federal education policy, at least since the advent of Lyndon Johnson's Great Society.

In their report entitled "Education 2001: Getting the Job Done: A Memorandum to the President-elect and the 107<sup>th</sup> Congress," Chester Finn, Bruno Manno, Diane Ravitch and their colleagues, have observed that all the major federal K-12 programs are due for re-authorization during the next two years.

Among the changes these long-time education advocates propose in the federal government's \$14 billion education budget (which provides about seven percent of education funding nationwide) are six performance-based block grants aimed at 1) closing the achievement gap between disadvantaged and advantaged pupils (a grant relating to Title I); 2) helping children become proficient in English; 3) raising teacher quality; 4) expanding school options for parents and students; 5) fostering worthwhile innovations; and 6) demanding accountability.

The authors of the report observe that while the performance-based grants would give states a great deal of freedom (together with substantially increased accountability for results), some states may want to try a different and bolder approach. They recommend that these states should have the option of consolidating any or all of the six performance-based grants into a single grant aimed at improving academic achievement for disadvantaged children. Under this arrangement, which was known in the 106<sup>th</sup> Congress as "Straight A's" or "Super Ed-Flex," a state could amalgamate its federal dollars for programs of its own devising, but it would be held

strictly accountable for the achievement of its children over a five-year period. The authors observe that this arrangement essentially turns states into "charter states", and like charter schools, the states are given maximum flexibility in return for results.

Finn, Manno, and Ravitch note that whether states choose the Super Ed-Flex route or stick with the six separate performance-based grants, they would be entering into a new kind of compact with the federal government. Washington's role would change from regulator to education investor, helping states and school districts to reach a common goal: boosting academic achievement.

In the new contractual arrangements that federal policymakers envision, freedom to innovate without regulatory constraints is offered in exchange for the promise of improvement in academic achievement. The consequences of failure specified in the contracts generally range from early termination or non-renewal of the contract, to the withholding of the administrative portion of a grant award (customarily five to ten percent) or complete termination of the performance-based program grant.

More information about the report is available at [www.edexcellence.net](http://www.edexcellence.net).

Further information about ed-flex contracts between federal and state levels of government are found at [http://143.231.252.66/hearings/106<sup>th</sup>/oi/edreform41999/vallas](http://143.231.252.66/hearings/106th/oi/edreform41999/vallas). Additional information can be found at [www.nea.org](http://www.nea.org). and at [www.educationleaders.org](http://www.educationleaders.org).

Further information from the research report entitled "The Problem of Under-qualified Teachers in American Secondary Schools" by R. Ingersoll that was published in the *Educational Researcher* in March 1999 is available at [www.aera.net](http://www.aera.net).

### **FISCAL IMPLICATIONS:**

The House Fiscal Agency notes that the fiscal impact of the waivers would depend entirely on which requirements were waived. Waiving some requirements could potentially allow local districts more flexibility in spending their dollars, thereby creating a local savings. Other types of waivers could cost local districts additional dollars, if, for example, they involved creating new programming or providing additional services. The direction and amount of the fiscal impact on local districts is, therefore, indeterminate. There is expected to be no fiscal impact on the state. (10-17-01)

**ARGUMENTS:****For:**

The bills would allow school district officials and charter school administrators to remove all regulatory impediments they encounter in their efforts to reduce and eliminate student achievement gaps that are based on race, gender, and socioeconomic status. There is no more important goal for public schools in our state and nation than to equalize achievement opportunities. If state or federal laws and regulations stand in the way, they should be removed. Those who know best what impedes the achievement of young learners are the adults whose educational expertise enables them to work with underachieving students in their classrooms and communities. They must be given every opportunity to innovate in teaching and assessment, in order to enhance the knowledge, know-how, and know-to of the youngsters in these targeted populations.

**For:**

The bills would enable educational innovation while also ensuring school accountability. Although the legislation would allow school officials to waive for up to five years virtually any law or regulation except those concerning the health and safety of students, teacher certification, and the progress of charter schools, it also requires those seeking waivers to specify achievement goals in exchange for the regulatory flexibility. Further, the parties to the waiver agreement would be bound by a contract in which achievement goals are explicitly stated in ways that can be measured by tests or evaluated by performance. If there were no progress on student achievement during the contract's term, it could be canceled by the state superintendent of public instruction. The early termination would ensure adequate protection for the students involved in the educational innovation, and also provide greater accountability for results from the school teachers and administrators.

**For:**

Some educators argued that this legislation was far too broadly written. However, House Bill 4760 was amended during the House floor debate to prohibit waivers of statutory teacher certification requirements. Without such an amendment, virtually any state statute and rule, or federal law and regulation, could have been waived that governs teacher certification and professional development.

The amendment was a good one because researchers are now able to demonstrate deleterious effects on

student learners when their high school teachers are deployed by school administrators to teach outside their subject area. A report of research findings about out-of-field teaching entitled "The Problem of Under-qualified Teachers in American Secondary Schools" was published in the *Educational Researcher* in March 1999 by R. Ingersoll. Ingersoll defines "under-qualified" as a teacher assigned to teach outside his or her major or minor field of study by a school administrator, generally a principal. His assumption is that for most teachers, it is difficult, at best, to teach well what one does not know well. Using the SASS database (data that is collected on the daily course schedules, the education and training, and the certification of teachers and that is not self-reported), his findings demonstrate that assignment outside one's field is a very common practice in American secondary schools. For example, about one third (33 percent) of all secondary school teachers who teach math do not have either a major or a minor in math, math education, or related disciplines like engineering or physics. About one quarter (25 percent) of all secondary school English teachers have neither a major nor minor in English or related subjects such as literature, communications, speech, journalism, English education, or reading education. In science, about one-fifth (20 percent) do not have at least a minor in one of the sciences or in science education. Finally, about one-fifth (20 percent) of social studies teachers are without at least a minor in any of the social sciences (history, geography, economics, sociology, political science, psychology or anthropology), public affairs, or social studies education.

Ingersoll learned that out-of-field teaching did not decline during the period he studied, 1980 to the mid-1990s, and that it takes place in well over half of all secondary schools in the United States. For example, in each of the fields of English, math, and history, every year well over four million secondary-level students are taught by teachers with neither a major nor a minor in the field. Further, the proportion of out-of-field teachers is highest in schools with high poverty levels, and in addition, within those high poverty level schools, the highest proportion of out-of-field teachers is found in classes designed for the least able learners. Small schools also have high proportions of teachers assigned out-of-field. Researchers point out that when poor students in low-income communities are taught by out-of-field

teachers, they perform poorly on educational assessments (Darling-Hammond, 1987; Kozol, 1991; Oakes, 1990).

There is plenty that researchers have yet to learn about teaching and learning within a subject matter learning discipline. However, research already demonstrates that the more subject matter knowledge a teacher has, the better he or she is able to design curricular and assessment materials that isolate key ideas in a learning discipline; and then also to provide performance evaluation opportunities that reveal students' conceptual understanding as they demonstrate their competence by applying their knowledge to solve new problems in unique situations. Genuine learning tasks and authentic assessments that explore the relationships among the main principles within a learning discipline simply cannot be designed by teachers who have little subject matter knowledge. And of course students can never learn at school the subject matter that their teachers do not know.

#### ***For:***

Although the Educational Flexibility Contracts promise educational innovation, the only measure of academic progress that was required under this legislation as originally drafted (that is to say, the only measure specified for both the Ed-Flex application and for the Ed-Flex contract) was annual progress as measured by improvement in MEAP scores. An amendment adopted on the House floor now would recognize other performance measures identified in the ed-flex application as legitimate indicators of learning. The education policymakers of this state already rely far too heavily on single standardized measures of human competence and academic achievement. Now the legislation has been amended to encourage alternative performance measures, such as writing portfolios across the curriculum, and subject matter performance conferences or studio workshops evaluated by panels of experts drawn from the students' respective communities.

#### ***Against:***

During committee deliberations, no school official could cite any particular requirement his or her school district or school would apply to waive using the process that would be established under this legislation. Although these bills promise program innovation via regulatory flexibility, there is no recent historical evidence that school districts or charter schools will restructure their programs, given that opportunity. Indeed, when the Revised School

Code was adopted in 1994, one of its key provisions was Section 11a, the so-called "General Powers" provision. That section of the law grants to school districts all of the rights, powers, and duties that their governing boards expressly state. That is to say, unless the Revised School Code prohibits an action by local school districts, the local district is empowered to implement any action or policy it prefers. However, instead of taking advantage of "General Powers," school district officials have repeatedly been advised by their attorneys to seek explicit statutory permission from the legislature before innovative practices are undertaken. This has been true because school district leaders fear they may be liable for any action that is undertaken unilaterally. Consequently and according to committee testimony, school lobbyists have repeatedly returned to the legislature to request reinstatement of rules and regulations that were very recently removed when the "General Powers" provision was adopted six years ago. For example, rules and regulations eliminated in 1995 have been requested once again to guide local districts' expulsion and school safety policies.

Even charter schools, once thought by some education advocates to serve as engines for innovation within the public school system, have been found in early studies conducted by researchers at Western Michigan University and Michigan State University to mimic existing school structures, and to replicate curriculum and assessment patterns.

Past experience shows that without the direction of a statute and rule, or absent very specific guidelines, school leaders have a very difficult time restructuring in ways that enhance student achievement. These bills would provide far too much latitude to ensure accountability, and they would not spur educational innovation as their proponents contend.

#### ***POSITIONS:***

The Michigan Department of Education supports the bills. (10-18-01)

The State Board of Education supports the bills. (10-18-01)

Oakland Schools supports the bills. (10-18-01)

The Middle Cities Education Association supports the bills. (10-17-01)

The Michigan Association of School Administrators supports the concept of the bills. (10-17-01)

The Michigan School Board Leaders support the bills. (10-17-01)

The Michigan Catholic Conference supports the bills. (10-17-01)

The Michigan Association of Non-Public Schools supports the bills. (10-17-01)

Michigan Association of School Boards supports the bills. (10-18-01)

The Michigan Education Association has a neutral position on the bills. (10-17-01)

The Michigan Federation of Teachers and School-Related Personnel opposes the bills. (10-17-01)

Analyst: J. Hunault

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.