Legislative Analysis

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EDUCATIONAL FLEXIBILITY CONTRACTS

House Bill 5701
Sponsor: Rep. Brian Palmer

House Bill 5702
Sponsor: Rep. Judy Emmons

Committee: Education
First Analysis (5-6-04)

BRIEF SUMMARY: The bills would amend the Revised School Code and the State School Aid Act, respectively, to make their requirements and the rules promulgated under them subject to waiver under an ed-flex contract. The contract would allow the state superintendent of public instruction to waive for a district, for up to five years, certain provisions of state and federal law that were identified in a performance-based contract having clearly defined and measurable performance goals. Except for health and safety requirements, teacher certification requirements, and most additional requirements placed on public school academies, any requirement imposed on a school district, or any rule promulgated under the code or the act, would be subject to waiver. Under House Bill 5701, the governor would have 10 days to override the state superintendent's approval of an ed-flex contract.

The bills are tie-barred to each other so that neither could become law unless both were enacted.

FISCAL IMPACT: These bills would have indeterminate fiscal impacts—both costs and savings—at the state and local levels, and the impacts could vary greatly depending on which provisions or rules were waived.

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.

To complement the existing federal waiver process, and to incorporate new ideas about less intrusive state government oversight, local initiative, and empowerment in exchange for student achievement, some school officials have proposed a state-level waiver program coupled with performance contracts that would be capable of measuring a school's overall improvement. (See Background Information below.) Under the state proposal, virtually all aspects of school law and rules within the Revised School Code or the State Aid School Act could be waived, except those concerning health and safety requirements, and charter school authorization. To those ends, legislation was passed earlier in the legislative session—House Bills 4693 and 4724. However, the governor

vetoed both bills, citing among other things, their unconstitutionality. (See Background Information below)

Both bills have been reintroduced as House Bills 5701 and 5702—the former bill amended to allow the governor the option of over-riding any decision by the state superintendent of public instruction to waive a law or rule.

THE CONTENT OF THE BILLS:

House Bill 5702 would amend the State School Aid Act to make the requirements of the act and the rules promulgated under it subject to waiver under an ed-flex contract issued under the Revised School Code.

House Bill 5701 would create the "Educational Flexibility and Empowerment Law" within the Revised School Code to permit school districts to apply for an educational flexibility and empowerment ("ed-flex") contract, which would allow the state superintendent of public instruction to waive for a district, for up to five years, provisions of the code and the state School Aid Act that were designated part of a performance-based contract with clearly defined and measurable performance goals, or certain federal requirements in accordance with federal law allowing educational waivers. Except for health and safety requirements, teacher certification requirements, and most additional requirements placed on public school academies, any requirement imposed on a school district under the Revised School Code or the State School Aid Act, or any rule promulgated under the code or the act, would be subject to waiver under an ed-flex contract.

The bills are tie-barred to each other so that neither could become law unless both were enacted. A more detailed description of House Bill 5701 follows.

Planning committee; resolution. If the board of a school district intended to apply for an ed-flex contract, the board would have to establish an ed-flex planning committee, which would have to include a representative of each of the school district's collective bargaining units. The committee would be required to work with the board to develop a resolution indicating the board's intent to apply for the contract; the committee also would have to develop the ed-flex application.

The resolution would have to specify the school or schools in the district to be covered by the ed-flex contract, if the contract were not intended to cover the entire school district. Before adopting the resolution, the board would have to hold at least two public hearings at which the types of waivers sought and the need for them were explained and public comment allowed.

Application. A school district would have to submit an application for an ed-flex contract to the state superintendent. The application would have to contain at least all of the following:

-- A specific listing of the requirements proposed to be waived. If the application were intended to serve also as an application for federal waivers under federal law, it would have to include a specific listing of the federal requirements proposed to be waived.
-- A statement specifying the need for a waiver for each requirement proposed to be waived, including the purpose and intended results for each waiver.
-- A description, for each school year and for the overall term of the contract, of the specific measurable goals for improved pupil performance in the school district or school, which would have to include goals for improving MEAP scores.
-- An explanation of how the contract and the waivers would assist the school district or school in achieving its specified performance goals.
-- A fiscal impact statement estimating how the waiver or waivers could increase or reduce program costs.
-- If the contract were not intended to cover the entire school district, the specific schools to be covered.
-- A copy of the required resolution. If the application were intended to serve also as an application for federal waivers, it would have to explain how the public notice requirements of federal law had been met.

("MEAP scores" would mean the scores achieved by the pupils of a school district or school, as applicable, on all Michigan Educational Assessment Program tests administered to pupils of the district or school.)

Approval by superintendent; governor. Upon receipt, the state superintendent would have 60 days to approve or disapprove an ed-flex application and notify the school district of the decision. If approved, the state superintendent promptly would have to enter into an ed-flex contract with the district. If disapproved, the state superintendent's notification to the district would have to explain the specific reasons for the disapproval, and the school district could submit a revised application. If the state superintendent did not notify a school district within 60 days of receiving an application, the application would be considered approved, and the superintendent would have to enter into the proposed ed-flex contract with the district.

House Bill 5701 specifies that within 5 days after approving an application for an ed-flex contract, or after the expiration of the time limit, whichever is earlier, the superintendent would be required to submit the application to the governor. The governor would have 10 days to override the approval of the application (whether it was approved by the superintendent or considered approved due to the expiration of the time limit). If the governor did not override the approval within the 10-day period, the superintendent would be required to promptly enter into the ed-flex contract with the school district. If the governor overrode an approval, the governor would notify the superintendent and the school district, and include notice of the specific reasons for the override. The district could then submit a revised application.

The state superintendent could approve an application only if he or she found all of the following: that the performance goals were sufficiently specific and, if met, would constitute improved pupil achievement; that the contract would allow the school district to enhance learning and to operate in a more effective, efficient, or economical manner; and that the district had exhibited financial responsibility during the preceding three fiscal years. The bill states that the last condition would not preclude the approval of an ed-flex contract for a district in current financial hardship, as long as the hardship were not due to financial irresponsibility, as determined by the state superintendent.

In approving submitted applications, the state superintendent would have to give priority to applications focused on reducing pupil achievement gaps based on race, gender, and socioeconomic status.

Contract. The Michigan Department of Education (MDE) would have to prescribe the form of an ed-flex contract, which would have to contain 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, in order for the contract to be renewed, the MEAP scores or other performance measurements identified in the application for the school district or school would have to demonstrate adequate annual progress toward meeting the performance goals and attaining a specific measurable benchmark by the end of the contract.
-- An agreement on the contents of the "empowerment report" (the final evaluation report) to be filed by the school district at the end of the contract term, summarizing the performance goals achieved during the term of the contract and the programs, curriculum, or other innovative approaches used to achieve these goals.
-- The term of the contract which could not exceed five years.

A provision of the Revised School Code, the State School Aid Act, or a rule promulgated under the code or the act, would be subject to waiver under an ed-flex contract. The state superintendent could *not* waive health and safety requirements, statutory teacher certification requirements, or any requirement under Part 6a of the Revised School Code (which provides for the organization, administration, and staffing of public school academies). Section 503(6) of Part 6a (which requires public school academies to comply with all applicable law, including specific Michigan statutes) could be waived, however, if doing so were necessary to waive a requirement imposed under a part of the code other than Part 6a, and if the same requirement could be waived for a public school. (Section 503(6) lists the following specific acts and provisions with which a public school academy must comply:

-- The Open Meetings Act.
-- The Freedom of Information Act.
-- Provisions prohibiting labor strikes by public school employees.
-- Requirements for student identification at the time of enrollment in a school.

-- A requirement that schools tag the records of missing students.
-- Provisions governing requests for school records.
-- A section prohibiting the separation of students into different schools or departments based on race, color, or sex.
-- Provisions for bilingual instruction.
-- Provisions requiring school buildings to meet construction codes.
-- A law guaranteeing a prevailing wage for employees working under a state contract.
-- Polices governing the procurement of supplies, materials, and equipment by school districts.)

The state superintendent 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 pupil performance, based on the performance goals and measurements set in the contract. Alternatively, the superintendent could terminate a contract if the school had failed for two consecutive years to meet the adequate yearly progress standards of the Federal No Child Left Behind Act in both mathematics and English language arts at all applicable grade levels for all applicable subgroups. The superintendent would not be required to terminate an ed-flex contract if he or she determined that the decline or failure was due to exceptional or uncontrollable circumstances.

When the term of an ed-flex contract concluded, the school district would have to submit an empowerment report, describing how the district or school met or did not meet the performance goals set forth in the contract. The state superintendent could renew the ed-flex contract if the performance goals were met.

Report to legislature. Under the bill, the superintendent would be required to submit an annual report to the legislature on the status of the educational flexibility and empowerment program, including a report on the contracts issued, and on progress made toward attainment of performance goals.

Innovations and best practices web site. As the initial contacts expired, the Department of Education would be required to post information on its web site concerning educational innovations and best practices used to achieve student performance goals under the contracts.

BACKGROUND INFORMATION:

Federal Ed-Flex history in Michigan. The federal Ed-Flex plan began in 1994 as a demonstration program in the Goals 2000 Educate America Act. The program allowed the U. S. Secretary of Education to delegate to six states the authority to waive certain federal education requirements, if those requirements were seen as impeding local efforts at school reform. In 1996, amendments to the legislation authorized the secretary to delegate Ed-Flex waiver authority to six additional states for up to five years. Michigan became an Ed-Flex state at that time, but the state's authority expired in June 2002.

In 1999 the U. S. Congress passed the Ed-Flex Partnership Act, which allows any state educational agency that meets certain eligibility criteria to receive Ed-Flex authority for up to five years. However, in order to be eligible, state education agencies must show they are legally authorized to waive state educational requirements for school districts. Michigan does not currently qualify for federal waiver authority.

Federal Ed-Flex law. The 1999 federal Ed-Flex law contains broader accountability provisions for states than its predecessor statue. Under Ed-Flex, states may waive many of the requirements of seven federal education programs, if doing so advances their school improvement efforts. The wavier authority applies to all of the following programs:

-Title I of the Elementary and Secondary Education Act (ESEA) [*except that the following programs cannot be waived: the Title I Basic Program (sections 1116(a) and (c), including Part A), the Even Start Program (Part B), the Migrant Education Program (Part C), the Neglected and Delinquent Programs (Part D), and the Title I portion of the Comprehensive School Reform Demonstration Program.*]

-The state and local activities portion of the Eisenhower Professional Development Program (ESEA Title II, Part B);

-The Technology Literacy Challenge Fund Program (ESEA Title III, Part A, Subpart 2)

-The Safe and Drug-Free Schools and Communities Program (ESEA Title IV);

-The Class Size Reduction Program (ESEA, Title VI);

-The Emergency Immigrant Education Program (ESEA Title VII, Part C); and,

-The Carl D. Perkins Vocational and Technical Education Program.

Further, civil rights and Individuals with Disabilities Education Act (IDEA) requirements cannot be waived, nor can any waivers be awarded for regulations that would undermine IDEA.

Under the federal law, states may waive state education authority requirements that pertain to whole districts and individual schools within a district.

However, the federal Ed-Flex Partnership Act requires a state to ensure that students in Title I schools be held to the same academic standards as are the students in the state's wealthier schools. [Title I is the name of the $8.5 billion federal program to increase the achievement of disadvantaged students.]

To date, 10 states are part of the federal Ed-Flex programs: Colorado, Delaware, Kansas, Maryland, Massachusetts, North Carolina, Oregon, Pennsylvania, Texas, and Vermont.

Further information about ed-flex contracts between federal and state levels of government can be found at the website of the U. S. Department of Education. Contact www.ed.gov/flexibility and also, www.ed.gov/offices.

More information about Ed-Flex also is available at the web sites of the Mackinac Center and the Heritage Foundation. They can be reached by contacting www.mackinac.org. and www.heritage.org.

Deployment of underqualified teachers. Further information from the research report entitled "The Problem of Under-qualified Teachers in American Secondary Schools" by Richard Ingersoll that was published in the *Educational Researcher* in March 1999 is available at www.aera.net. In addition, many of Ingersoll's publications are available on his web site at the University of Pennsylvania by visiting www.gse.upenn.edu/faculty/ingersoll.html

According to Ingersoll's research, a big part of the problem with the deployment of underqualified teachers, is not the presence of a union, or the fact that many teachers are not well qualified to teach in their subject areas. Rather the improper deployment of subject matter specialists is often the result of the 'revolving door in teaching,' most especially the attrition within high poverty school districts. More than 16 percent of teachers leave their profession each year, on average, compared to attrition in other professions of about 11 percent. The percentage is higher—20 percent—for teachers in public schools with many poor students. Indeed, more than 33 percent of all teachers leave the profession altogether in their first three years, and 46 percent leave in the first five. The result is that almost a third of the teaching force is in some kind of job transition each year. The cost of this extraordinary level of professional dissatisfaction is high, as it disrupts school improvement efforts and slows student achievement.

Governor's veto message. On March 5, 2004, the governor vetoed substantially similar bills—House Bills 4724 and 4693—passed earlier in the legislative session. Governor Granholm's veto message is printed in full on pages 317-318 of the March 9, 2004 Journal of the House.

A portion of the governor's veto message for House Bill 4724 (similar to House Bill 5702, above) is as follows:

"This bill would amend the State School aide Act of 1979 to vest a single state officer unprecedented and nearly unbridled discretion to suspend state law, ignoring the constitutional roles in the enactment of laws provided for the legislature and the governor under Article IV of the Michigan Constitution of 1963. Some examples of current statutory requirements questionably subject to waiver under the bill include:

1. Promises made to Michigan taxpayers under proposal A of 1994…
2. Accountability requirements for school districts, including intermediate school districts…

3. Open enrollment efforts by public school academies…a legal mandate that a public school academy use good faith efforts to advertise that the school is enrolling students and the procedures for applying to enroll…"

A portion of Governor Granholm's veto of House Bill 4693 (similar to House Bill 5701, above) is as follows:

"…I support flexibility. Fortunately, the superintendent of public instruction currently has the authority to waive administrative rules. This bill, however, would amend the Revised School Code to vest in a single state officer unprecedented and nearly unbridled discretion to suspend state law, ignoring the constitutional roles in the enactment of laws provided for the legislature and governor under Article IV of the Michigan Constitution of 1963….

I am not prepared to provide any superintendent of public instruction with such unchecked authority. Under House Bill 4693 an unelected superintendent could waive statutory provisions of the Revised School Code pertaining to many different areas, such as:

1. competitive bidding
2. corporal punishment
3. textbook approval
4. sex education
5. special education programs
6. school attendance
7. curriculum
8. the annexation and transfer of a school district
9. school elections
10. the issuance of bonds and notes…"

FISCAL INFORMATION:

These bills would have indeterminate fiscal impacts at the state and local levels, and the impacts could vary greatly depending on which provisions or rules were waived. At the state level, an indeterminate amount of staff time, materials, and supplies would be necessary to fulfill such functions as reviewing applications for waivers of School Aid and other requirements, monitoring compliance with contracts, and reviewing the "Empowerment Reports" required under House Bill 5701.

At the local level, there could be a potential savings to districts resulting from the flexibility provisions if these provisions allow districts to operate in a more efficient or economical manner. Also at the local level, an indeterminate amount of additional staff time, materials, and supplies could be necessary to prepare applications for a contract, develop and implement the required performance measures, and fulfill reporting requirements.

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, 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:

This version of the legislation to establish educational flexibility contracts promises educational innovation. In contrast to earlier bills first introduced in the last legislative session, in which the only measure of academic achievement that was required was annual progress as measured in a student's MEAP scores, House Bill 5701 would recognize other performance measures, to be identified in the ed-flex application, as legitimate indicators of learning. The education policymakers of this state already rely far too heavily on a single standardized test, the MEAP. This legislation could encourage alternative performance measures, such as writing portfolios used to monitor student development in mathematics, English, or science, as well as subject matter performance conferences or studio workshops evaluated by panels of experts drawn from the students' respective communities. Research demonstrates that both external and internal accountability programs must be present in order to improve student achievement at school—an external program that generally relies on standardized tests, coupled with an internal evaluation program that utilizes teacher-developed assessments so that subject matter learning can be measured during the weeks and months of the school year. Because standardized tests cannot encompass all the important ideas in a learning discipline adequately, they tend to reduce the depth and breadth of a student's intellectual

experience. To ensure deeper knowledge, and higher order analytic skills, alternative forms of evaluation—developed by teachers—are necessary.

Against:

Some educators have argued that this legislation is far too broadly written because it does not prohibit waivers of teacher professional development or address the deployment of teachers who teach outside their areas of expertise and certification. Without such an amendment, virtually any state statute and rule, or federal law and regulation, could be waived that governs teacher deployment and professional development.

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 Richard 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).

A recent up-date of Ingersoll's data, published by The Education Trust in August 2002, indicates that Michigan has a quality teacher gap in high-poverty schools, in addition to

having many under-qualified teachers assigned to teach outside their field of expertise. Here in Michigan, in all of the state's 515 high schools, fully 20 percent of secondary classes in core academic subjects are taught by teachers who do not have at least an academic minor in the field, based on statistically representative samples. In affluent schools the average is 17 percent, verses 25 percent in high poverty schools. In low-minority schools the average is 19 percent, verses 25 percent in high-minority schools. [In a 'high-poverty' school more than 50 percent of the students qualify for federal free- and reduced-price lunches, while 'low-poverty' or 'affluent' schools refers to schools where 15 percent or fewer students qualify. 'High-minority' refers to schools where 50 percent or more of the students are non-white, while 'low-minority' refers to schools where 15 percent or fewer students are non-white. See Background Information above.]

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.

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.

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.

Against:

A question was raised in committee as to whether the legislature could delegate its legislative authority to make (or in this case, to un-make by ignoring through waivers) laws by shifting that authority to an administrator in the executive branch of the government—in this instance, the state superintendent of public instruction. Article IV Section 1 of the Michigan Constitution, "Legislative Power," stipulates that "the legislative power of the State of Michigan is vested in a senate and a house of representatives." The questioner distinguished *laws* from *rules or regulations*, noting that elected and appointed officials in the executive branch have authority over administrative matters, such as those expressed in rules, and can suspend or alter that authority as they see fit. However, the state constitution expressly reserves *law-making* authority for the legislative branch of the government, and it is not clear that the power and force of a law could be abrogated—simply canceled, and in effect repealed—by a department head who works in the executive branch of the government. Perhaps sufficient flexibility to govern local schools could be granted by the legislature, if the legislative branch limited the Ed-Flex program to the waiver of onerous rules and regulations, rather than whole sections of the Revised School Code and the School Aid Act?

During the last legislative session, a state representative raised a similar issue, noting that Ed-Flex diminished the legislature's authority by giving the state superintendent too much power to grant waivers. Reported in the Mackinac Center's *Education Report* (Winter 2002), the state representative noted that "enactment of the measure would potentially relinquish the legislature's role in setting education policy. Ultimately it's like turning over one-third of the state budget to someone...we don't even know who it will be."

Response:

In response to the question of constitutionality raised during committee deliberations, and in the governor's veto message (See Background Information above), House Bill 5701 includes a provision that would allow the governor to over-ride any decisions made by the state superintendent of public instruction to waive a rule or law.

Against:

Competitive bidding should not be subject to waiver. During committee deliberations about House Bill 4693 earlier in the legislative session (a bill substantially similar to House Bill 5701, above), a narrowly defeated amendment to the bill would have

prohibited school districts from waiving the school code's competitive bidding requirements, now used during school construction projects, and for purchases of services that cost more than $12,500. Given the press reports about wrong-doing at one of the state's intermediate school districts—an ISD that is now the subject of a legislative investigation because public information has not been shared with policymakers that could reveal 'sweetheart deals' and 'single-source contracts' that are alleged to have occurred during the construction of a new facility—it seems wise to amend the legislation to explicitly state that the school code's competitive bid provisions could not be waived.

POSITIONS:

The Michigan Manufacturers Association supports the bills. (5-4-04)

The Michigan Association of School Boards supports the bills. (4-20-04)

The Michigan Federation of Teachers and School Related Personnel oppose the bills. (5-4-04)

The Service Employees International Union opposes the bills. (4-20-04)

The Association of Michigan School Counselors opposes the bills. (4-20-04)

The Michigan Association of School Psychologists opposes the bills. (4-20-04)

The International Union-United Auto Workers opposes the bills. (4-20-04)

The Michigan State AFL-CIO opposes the bills. (4-20-04)

Legislative Analyst: J. Hunault
Fiscal Analyst: Laurie Cummings

■ 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.