



AMERICAN CIVIL LIBERTIES UNION

Michigan

House Oversight Committee

House Bills 4435 & 4436

Position: Opposed

April 18, 2019

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The ACLU of Michigan has long supported the expansion and protection of student speech on university and college campuses. We applaud the sponsor and this committee for working to protect the First Amendment rights of all students. Although well intentioned, we oppose House Bills 4435 and 4436 as currently written due to concern that the following provisions in the bills may chill or penalize speech:

- The legislation does not clearly define what areas of college and university campuses will be subject to these rules. HB 4435 Sec.3 makes mention of “public areas” of campus, which could be interpreted to apply to almost every space on a college campus including classrooms, which are not traditional public forums. Without the distinction, the law would be inconsistent with the First Amendment and could lead to mass disruptions of lectures, public events, concerts, etc.
- HB 4435 Sec. 3 (a) requires any restriction on speech to meet a standard of being necessary to achieve a “compelling government interest.” This provision appears to tie all restrictions of on-campus speech to a strict scrutiny standard rather than the current, appropriate standard of intermediate scrutiny.
- In HB 4436 Sec.3 (a)(iv), protests and demonstrations are barred from “infringing” on others’ speech rights. The word “infringement” is undefined and broad, which could potentially penalize or chill protected speech. This may be problematic in a common scenario where a counter protest gets louder than the first protest: although not unlawful, it might interfere in the listener’s ability to hear. The participants in the counter protest, under this legislation, could see their constitutionally protected speech sanctioned.
- HB 4436 Sec.3 (viii) requires universities to remain neutral on public policy controversies of the day. Universities and colleges, however, have a legal duty to remedy and prevent hostile environments pursuant to Title VI and Title IX. For example, if some students hung a noose on the quad – not only should the college speak out against this intolerance and racism, they arguably have a duty to do so.
- Supreme Court precedent that holds a school can refuse funding to a student group engaged in discriminatory conduct, *CLS v. Martinez*, 561 U.S. 661 (2010). Sec.3 (a)(vii) of HB 4436 runs counter to this precedent.
- Finally, the legislation aims to codify “time, place and manner” restrictions on speech. Determining when expressive conduct crosses the line is a legal question that requires examination on a case-by-case basis. We are concerned that this language strips necessary subjectivity from the equation and will cause confusion for universities and colleges, which

could result in them erring on the side of caution and being *less* protective of speech for students.

We have asked to work with the bill sponsor on language to address these concerns while also ensuring that what we have in the end is a final product that achieves your goal to thoroughly protect all students' First Amendment rights on university and college campuses in Michigan.

Respectfully submitted,

Merissa Kovach, Policy Strategist  
American Civil Liberties Union of Michigan  
C: 269.330.2813  
[mkovach@aclumich.org](mailto:mkovach@aclumich.org)