Outline of Comments 1/25/12

Thank you Senator Pavlov and members of the Senate Education Committee.

Good afternoon, my name is Len Wolfe, I am an attorney with the Dykema law firm and head of the firm's government policy practice.

My testimony today will focus on the constitutional and legal issues involved with giving community colleges the authority to grant baccalaureate degrees.

After conducting considerable research on this issue, I believe that there are serious constitutional and legal issues that need to be considered and evaluated with this legislation.

On behalf of the Presidents Council, we researched and analyzed the following legal issue:

Did the framers of the Michigan Constitution of 1963 envision that baccalaureate degrees could be granted by both state public universities and community colleges?

In undertaking this review, we examined:

The history and role of community colleges in Michigan, specifically looking at how the framers of the 1963 Constitution understood the ability of community colleges to grant baccalaureate degrees.

In addition to reviewing the Michigan Constitution of 1963, we examined the Official Record of the Constitutional Convention of 1961, relevant case law, Attorney General opinions and secondary sources related to the Constitutional Convention.

Our review found no evidence in the Constitutional Convention that the framers of the Michigan Constitution envisioned that baccalaureate degrees could be granted by both state public universities and community colleges. In fact, the Constitution evidences a clear intent that these two distinct types of public institutions served and continue to serve different educational missions. The framers of the Constitution recognized the important, yet distinct, missions of the two institutions when crafting the constitutional sections for each institution.

As you are aware, Article VIII of the Michigan Constitution outlines the structure of the State's public education system. Our public education system is comprised of a public elementary and secondary system of schools and a higher education system made up of community colleges and state public universities.

During the Constitutional Convention, delegates divided our state's public higher education system into two distinct types of institutions – community colleges and state public universities. There are numerous references and discussion in the Constitutional Convention where delegates commonly understood that community colleges are 2-year or associate degree programs and state public university are 4-year degree or baccalaureate granting programs.

The Constitutional Convention demonstrates that the framers sought to protect the distinct educational mission community colleges were to fulfill in the Michigan public education system by keeping community colleges under local control and by creating a special advisory board dedicated to community colleges.

Four themes about community colleges emerge from the our Constitutional convention:

(1) The educational mission of the community college was community-centered separate and apart from other institutions of higher education serving a state wide population.

(2) Community colleges were understood to be two-year institutions.

(3) Community colleges were to be governed by locally elected boards.

(4) Community colleges were to be generally supervised by the State Board of Education.

Community colleges are governed by article VIII, Section 7 of the Michigan Constitution. This section authorizes that the Legislature shall provide by law for the establishment and financial support of public community colleges and junior colleges which shall be supervised and controlled by locally elected boards.

In addition, Article 8, Section 7 requires that the Legislature provide by law for a state board for public community and junior colleges which shall advise the state board of education concerning general supervision and planning for such

colleges and requests for annual appropriations for their support. The members of the State board for public community and junior colleges are appointed by the State Board of Education. The Legislature enacted the State Board for Public Community and Junior Colleges in 1964 and that law is still in place today.

In order to implement Article 8, Section 7, the Legislature enacted the Community College Act of 1966. Consistent with Article 8, Section 7, the Community College Act of 1966 creates a different legal, governance, oversight and operating structure for community colleges (e.g., community colleges have locally elected boards, community colleges have certain established geographical boundaries, and unlike state public universities, colleges have certain taxing powers).

For the past 95 years, the Michigan Legislature has authorized some form of community college program "which courses shall not embrace more than two years of collegiate work." The Community College Act of 1966 has always prohibited community colleges from granting baccalaureate degrees. While many may believe that this is a statutory restriction, the underlying basis for this prohibition comes from the Michigan Constitution.

By comparison, constitutional sections applying to state public universities specifically reference the authority to grant four year degrees and, as institutions of higher education with authority to grant 4 year degrees, state public university (unlike community colleges) do not fall under the leadership and supervision of the State Board of Education or a separate advisory board appointed by the State Board.

Specifically, Article 8, section 3 exempts state public universities (as institution of higher education granting 4 year degrees) from the State Board of Education's leadership and general supervision over all public education.

Most importantly, Article 8, section 6 provides that other institutions of higher education established by law having authority to grant 4 year degrees shall each be governed by a board of control appointed by the Governor. This section contains specific legal mandates concerning the legal structure of universities, the governing body (including the creation of an appointed governing board, the method of selecting the board, the length of term in office for board members, the role and selection by that governing board of a president and the grant of authority to the governing board of the general supervision of the institution including control and direction of all expenditures of the university's funds).

Michigan's public education system consists of three different institutional spheres that service distinct missions: (i) elementary and secondary public schools; (2) community colleges; and (3) state public universities. This framework was created by the delegates to the Constitutional Convention and each institution serves a unique purpose. These different spheres, however, do not operate in isolation. On the contrary, what is also unique about our Constitution is that the framers specifically enacted provision for these public institutions to work together either informally or formally by agreement to address the changing educational needs of our State. As noted from other testimony, community colleges and universities have the ability to work together on an informal and formal basis to achieve the same results without any need for this legislation.

So what are the legal problems with HB 4496? There are several.

Let's start with Article 8, Section 3. Community colleges are subject to the leadership and general supervision of the State Board of Education. Institutions of Higher Education granting baccalaureate degrees, are not. If the Legislature gives community colleges the authority to grant 4 year degrees, that would eliminate the State Board's authority under article 8, section 3.

This would also create a conflict between article 8, section 3 and article 8, section 7 of the Constitution. Article 8, Section 7 requires that the legislature shall provide by law for a state board for public community and junior colleges. The constitutional mandate of this state board for community colleges is to advise the state board of education concerning general supervision and planning for such colleges and requests for annual appropriations for community college support.

Thus community colleges would be exempt from the leadership and general supervision of the State Board under article 8, section 3, but subject to such leadership under article 8, section 7.

Another legal problem involves the fact that community colleges, by being granted the authority to grant baccalaureate degrees, would be subject to article 8, section 6 which applies to state public universities. The conflicts between article 8, section 6 and article 8, section 7 are significant:

(i) 4 year degree granting institutions under article 8, section 6 are governed by a board of control which shall be a body corporate.

(ii) the board has general supervision of the institution and control and direction of all expenditures from the institution's funds, but has no power to tax

(iii) 4 year degree granting institutions select a president, who is the principal executive officer and ex-officio member of the board.

(iv) each 4 year degree granting institution's board of control is made up of 8 members, who serve 8 year terms and who are appointed by the governor with the advise and consent of the senate.

Contrast this with a community college organized under article 8, section 7:

(i) under law, community colleges are created at the local level and are supervised by a locally elected board.

(ii) community colleges have the power to tax.

(ii) community colleges are subject to the oversight of the State Board of Education through the State Board for public community colleges and junior colleges.

How do you reconcile these legal, governance and operating structure differences? What happens to the local control of the community college? What happens to the community college district? How does a community college give up its student and community service orientation and become solely academically oriented instead? How do you transition a locally elected board to a gubernatorial appointed board? What happens to the taxing power and the tax revenues of a community college?

None of these issues have been addressed in this bill, and the difficulty with addressing them is that they are constitutional (no statutory) issues.

If the Legislature wishes to move forward with giving community colleges the authority to grant 4 year degrees, there are past statutory examples on the books where a community college was transitioned into a state public university or where a community college was consolidated as part of a state public university.

Finally, if the Legislature wishes to change the constitution to provide for community colleges to grant 4 year degrees, the constitution provides a method for the Legislature to amend the constitution under article XII, section 1.

Thank you and I would be happy to answer any questions you may have.