



Interested Testimony Regarding House Bill 183 Inter-University Council of Ohio

Chair Young, Vice Chair Manning, Ranking Member Miller and members of the House Higher Education Committee. My name is Laura Lanese, and I am the President and CEO of the Inter-University Council of Ohio (IUC). IUC submits this interested party testimony regarding House Bill 183 (HB183) for the committee's consideration. IUC respectfully request that higher education be removed from the provisions of the bill, and if not that the two changes suggested below be incorporated.

The IUC was established in 1939 as a voluntary educational association of Ohio's public universities. Today the association represents Ohio's 14 public universities. Together, these institutions offer a broad range of associate, baccalaureate, graduate, and professional programs. IUC is committed to ensuring affordable opportunities for the more than 290,000 students attending our member institutions without sacrificing the quality of their education or experience.

As you have heard from witnesses and from members of this committee on both sides of the aisle, public universities are not like K-12 schools. First, most of the students on a college campus are adults who have chosen to be at that university. Second, K-12 schools are controlled buildings. Students are monitored and school administrators are aware of visitors in the building. Public universities are more like cities made up of multiple buildings and facilities where visitors have more access and ease of movement. However, HB183 contemplates that public universities would be able to regulate our bathrooms and facilities in the same manner as a K-12 school. This is not possible, and this is one reason IUC is asking this committee to remove higher education from HB183.

In lines 453-461, the bill states, "No institution of higher education shall permit a member of the female biological sex to use a student restroom, locker room, changing room, or shower room that has been designated by the school for the exclusive use of the male biological sex" and vice versa. This language creates an affirmative duty on universities to monitor and regulate all the bathrooms, locker rooms, changing rooms, and shower rooms on campus. The language is strict liability, meaning public universities may be liable anytime an individual enters a facility designated for the opposite sex, and the university does not need to be aware that an individual of the opposite sex has entered a facility for the university to be liable. While IUC believes higher education should be removed from the bill altogether, at minimum the standard should be "knowingly."¹

The prohibition in the bill regarding members of one sex in a facility designated for the opposite sex is expansive and definite, and the bill only includes limited exceptions. In lines 468-470, those exceptions include "a child under the age of ten who is being assisted

¹ Ohio Jury Instruction CR 417.11 Knowingly. A person acts "knowingly" when "the person is aware of the existence of the facts and that his acts will probably cause a certain result or be of a certain nature."



by a parent, guardian, or family member or to a person providing assistance to a person with a disability.” The bill bars individuals entering facilities designated for the opposite sex even when those individuals are cleaning and maintenance professionals, coaches, university employees entering for a legitimate reason, and individuals responding to an emergency.

IUC understands there may be language to create more exceptions to try to address some of these circumstances. The exceptions may include employees of the university entering as part of their job duties and an individual entering to respond to an emergency.² However, the exceptions still do not include individuals who do not work for the university. For example, male coaches that enter the locker room at half time to speak to their girls’ basketball team. Even if the “knowingly” standard is added, a public university would still be liable as the university would know if an opposing team’s opposite sex coach entered the locker room at half time. This is just one example of a situation that is not contemplated in HB183 and there are likely others.

All the unique and public activities that take place on public university campuses are another reason higher education should be removed from the bill. If higher education is not removed, public universities still need the flexibility to address unique circumstances via policy, in a way that is consistent with other relevant laws. Without such an amendment, the bill places public universities in the un navigable position of having to try to achieve compliance with state and federal laws that are likely inconsistent with one another. If higher education is not removed from the bill, IUC respectfully request that section 3345.90(C) at lines 462 – 466³ of the bill be amended to read, “Nothing in this section shall be construed to prohibit an institution of higher education from establishing and enforcing a policy due to special circumstances on the use of a student restroom, locker room, changing room, or shower room.”

When North Carolina passed a similar law, it was argued that North Carolina public universities could lose federal funding and college students could lose access to federal student loans if the public universities were required to violate Title IX. Ultimately, that law was enjoined, and that part of the law was repealed before it ever went into effect. If HB183 should pass as currently written, the loss of federal funding and access to federal student loans for our students is a major concern for IUC. The impact for Ohio could be catastrophic.

In a case called *Bostock*, the U.S. Supreme Court held that discrimination because a person is homosexual or transgender is illegal under Title VII of the Civil Rights Act of 1964 because discrimination on those grounds is inherently discrimination based on the person’s sex.⁴ Justice Gorsuch, for the majority, wrote, “[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the

² HB183 – 2, Lines 517 – 526.

³ Line numbers refer to the As Introduced version.

⁴ *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731 (2020).



first cannot happen without the second.”⁵ “That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁶ Justice Gorsuch’s analysis has been cited and applied to Title IX cases.

The Fourth Circuit Court of Appeals held that Title IX protections against sex discrimination extend to discrimination against transgender individuals required to use the bathroom associated with the sex assigned to them at birth.⁷ The U.S. Supreme Court denied certiorari on this case. The Seventh Circuit held, “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender nonconformance, which in turn violates Title IX.”⁸ The Ninth and Third Circuits have found that the 14th Amendment does not guarantee a privacy right to avoid “risk of intimate exposure to or by a transgender person...”⁹ The U.S. Supreme Court also denied certiorari on this issue.¹⁰

In Ohio, Governor DeWine issued an Executive Order earlier this year that stated, “[n]o person employed by any State cabinet agency or by a State board or commission shall discriminate against any other State employee or candidate for State employment on the basis of...gender identity or expression...”¹¹ From a public university perspective, the Ohio Executive Branch prohibits discrimination based on gender identity for our employees; the Sixth Circuit, Ohio’s circuit, does not have a case on point; and the U.S. Supreme Court has opted not to hear the cases discussed above. These circumstances create a very legitimate concern that if HB183 passes, and public universities are required to implement the law, the courts could hold the public universities are violating Title IX and public universities could lose federal funding and our students may lose their access to federal student loans.

There are many operational expenses and financial impacts resulting from the bill that are not considered in the LSC Fiscal Analysis. Those costs are unknown but are likely significant. For example, some of those expenses include the loss of federal funding discussed above, litigation, civil penalties, compliance and monitoring of bathrooms and facilities, additional security, loss of employee productivity and turnover, diminished global

⁵ *Id.*

⁶ *Id.*

⁷ *G. G. v. Gloucester County School Board*, No. 15-2056 (4th Cir. 2016).

⁸ *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017).

⁹ quoting *Parents for Privacy v. Barr*, No. 18-35708 (9th Cir. 2020); see also *Doe ex rel. Doe v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018).

¹⁰ The only time anything like HB183 has been upheld at the circuit court level was in the Eleventh Circuit Court of Appeals. The case involved a policy that applied to a K-12 school that required separate bathrooms based on sex and mandated that students use the bathroom associated with the sex assigned to them at birth. *Adams ex rel. Kasper v. School Board of St. Johns County*, Florida, No. 18-13592 (11th Cir. Dec. 30, 2022). The facts in this case are distinguishable from circumstances surrounding HB183 as it is applied to higher education.

¹¹ Governor Mike DeWine, Executive Order 2023-01D, Anti-Discrimination Policy in State Government



competitiveness, and increased premiums for liability insurance to name a few. Just litigating the Title IX claims stemming from this bill will deplete the resources of the public universities and waste Ohio taxpayer money. Furthermore, increased litigation causes the cost of liability insurance to increase for universities.¹²

The risk to Ohio's public universities is a risk to Ohio's entire economy. Ohio's public universities added \$68.9 billion in income to the Ohio economy, a value approximately equal to 8.6% of the state's total gross state product (GSP). Expressed in terms of jobs, the universities' impact supported 860,603 jobs. For perspective, that amounts to one out of every eight jobs in Ohio. For every \$1 an individual spends to attend an Ohio public university, they will have a return of \$5.60 in lifetime earnings. This is according to an economic impact study conducted for the IUC by Lightcast, an independent and nationally recognized company that provides labor market data.

Ohio's public universities are essential to Ohio's economy and communities. This committee should be careful of passing any legislation that could result in unintended consequences that negatively impact higher education in Ohio. HB183 is such a bill, and higher education should be removed. Chair Young, and members of the committee thank you for allowing me to submit interested party testimony on behalf of IUC.

¹² see Mary Sell, *Property insurance, staff retainment among Alabama universities' cost increases*, Alabama Daily News, Nov. 21, 2023, <https://aldailynews.com/property-insurance-staff-retainment-among-alabama-universities-cost-increases/>