

Dear President Stivers,

The following is provided in response to your letter dated January 11, 2017 requesting input and comment on your recently filed legislation, Senate Bill 107. First, I want to thank you for providing us with this opportunity.

In crafting a response to your request, my staff reached out to representatives from all the public universities and KCTCS to obtain their feedback and suggestions on the legislation. We understand that you have also asked for their participation in this effort, directly, and we suspect you may receive individual comments and suggestions in response. We felt, however, it was important to provide a response that attempted to capture the thoughts and concerns of state higher education as a whole.

In your letter, you identify four concepts that comprise the intent of SB 107: (1) Senate confirmation of gubernatorial appointees to university and KCTCS boards; (2) a process for dealing with a board member removal for cause; (3) removal of a board member for non-qualification, i.e. when a board fails to meet its member representation requirements; and (4) a process on how a Governor may deal with a board that has become dysfunctional. We will address all these issues separately, although due to the interrelation of the concepts there will be some overlap in the discussion.

In addressing any of these items, it is important to consider the impact amending statutes related to college and university governance may have on institutional accreditation with the Southern Association of Colleges and Schools Commission on Colleges (SACSCOC). As we know from the recent sanctions imposed on the University of Louisville, SACSCOC is very concerned with issues of governance and political influence as described in the following Comprehensive Standards.

Comprehensive Standard 3.2.4 The governing board is free from undue influence from political, religious, or other external bodies and protects the institution from such influence. (External influence)

Comprehensive Standard 3.2.5 The governing board has a policy whereby members can be dismissed only for appropriate reasons and by a fair process. (Board dismissal)

1. Senate Confirmation of Board Appointees.

We support the expansion of Senate confirmation responsibilities regarding all of the public university and KCTCS governing boards. Doing so may obviate the need for a separate process for removing board members for “non-qualification” purposes. Senate oversight of the appointment process would serve to assure compliance with all of the qualification requirements before a candidate is confirmed.

2. Process for Removing a Board Member for Cause.

Currently, KRS 63.080(2) states that a member of any university or KCTCS board may be removed, but only for cause, through an action initiated by the Governor. In such instances, the affected board member is entitled to an appeal (of sorts) before the CPE. While the process has never been used, we recommend that the process be altered for two reasons: 1) the SACSCOC standard calls for a process initiated by the governing board, not by the Governor; and 2) the existing process places the Council on

Postsecondary Education in the unenviable position of having to potentially overrule a determination by the Governor.

We would recommend, instead of the current method of individual board member removal, that KRS require a process that would be outlined in each institution's by laws for doing so. The KRS section could require some minimum standards that could include, but not be limited to:

- a) Any effort to dismiss a trustee be initiated by the board upon which the person serves;
- b) Causes for dismissal, such as malfeasance, neglect of duty, failure to attend meetings, the commission of a felony, or the permanent inability to perform one's duties, are described in the bylaws;
- c) Any dismissal procedure require the affirmative vote of at least 2/3 of the voting members (thereby assuring support of at least some members of each political party); and
- d) Require the reasons for dismissal be stated in writing.

In the event such a process led to the dismissal of an individual board member, the member would then have the right to appeal that decision within a set number of days to the Governor, who in turn would be required to request a report and recommendation from the Council on Postsecondary Education whether to uphold or deny the dismissal. The Governor would then be free to accept or reject the recommendation of the CPE. The Governor's decision would then be final.

Using this approach would comply with the SACSCOC standard requiring the governing board to initiate such an action, consistent with a stated process. It would reduce the likelihood that an elected official was exerting "undue political influence," since the Governor was not initiating the action, and it was supported by a bi-partisan vote on the board. The process would still utilize the CPE in a neutral role through the report and recommendation process suggested. Finally, it would still provide to the Governor ultimate decision making responsibility, but in a way which insulates him/her from the risk of an "undue political influence" finding by SACSCOC.

3. Removal of a Board Member for Non-Qualification

As you know, each statute creating higher education boards in Kentucky contain membership requirements related to gender, race, political party affiliation, alumni status and residency. Senate Bill 12 further clarifies the requirements for the University of Louisville related to minority representation and utilizes important language found in some of the other institution's statutes requiring "no less than" proportional representation of minority citizens. This particular directive, set forth in some of the institutional board statutes, and now the new language related to the University of Louisville, serves as sound public policy. For these reasons and in the interest of consistency, we recommend that language in KRS 164.011 be amended in this manner and that the minority representation language from SB 12 be included in the other board statutes, as well.

There are other differences in the board membership requirements related to residency which vary based on the nature of the institutions and their missions. The requirements related to male and female representation are generally the same, although the statute creating the University of Louisville's board does not contain such a requirement. In any event, when all the requirements are combined, creating and maintaining a compliant board can be a difficult exercise.

We recommend in order to aid in this process, at the time nominations are made to the Governor, the Postsecondary Nominating Committee could be required to provide certification of board representation compliance in support of any single or group of nominees. This would assist in assuring that the representation requirements were met on the front end of the process. This certification of the appointee could also be provided to the Senate in anticipation of his or her confirmation, providing yet another check in the process.

However, this would not cure situations where a board is currently not in compliance. In our view, the process outlined in the bill could be problematic with SACSCOC in that a dismissal because an individual is not of the compliant race, gender, or political affiliation may not be seen as an “appropriate reason.” Also, in seeking to correct a board’s makeup, the process outlined may result in the removal of key board members at a time where crucial decisions are being made. This could disrupt an otherwise well-functioning board. And finally, as difficult as the replacement process would be, determining who should be removed based on this process could be even more difficult to apply in instances where multiple representation requirements are not met and an individual in line for removal meets more than one requirement (e.g. an African-American female could conceivably bring gender, racial and political balance issues into play, simultaneously).

If you feel that a process to rectify compliance outside of the existing member rotation process, you might consider providing a two (2) year grace period so that an analysis of board makeup can take place, allowing the Governor to use his/her best efforts to bring board representation into compliance through new appointments. In addition, voluntary resignations can always be sought to help move the process along more quickly.

4. A Process to Address a “Dysfunctional” Board

While most issues related to a board carrying out its duties boil down to the actions, or inactions, of individual board members, there can be instances where an entire board cannot function properly. The questions then become (1) should the government intervene and appoint new individuals to provide the legally required governance where the current board could not, and (2) under what circumstances? “Dysfunction” is difficult to define in order to encompass all the ways a board may not be carrying out its duties or failing to do so in a proper fashion. Senate Bill 107 lists many of the ways this could legitimately occur, with perhaps the exception of failing to reach a consensus. While a consensus is always preferred, boards may be split on important matters. Odd numbered boards are created for this very reason and a healthy discourse should never be discouraged.

While removal of an entire board should be a remedy rarely used, we would recommend that in such cases a process be defined in KRS. We would recommend that in the first instance, the Governor would need to declare a board “dysfunctional” based upon a set of criteria set forth in statute. The assertion of dysfunction would be set forth in a document (not unlike a bill of impeachment or a civil action complaint). The Governor would then be required to seek the voluntary resignation of the entire board. Depending upon the reaction of each board member, if all complied with the request, the matter would be concluded and the governor could appoint a new board. If, however, some of the board members declined the Governor’s request, the Governor could then choose to simply fill the newly created vacancies, and let the hold over board members continue to serve. This, too, would conclude the matter. Or the Governor could proceed with removal of the remaining board members by submitting

legislation to the General Assembly dissolving the existing board and creating a new board, as was just undertaken in SB 12.

In conclusion, the forced removal of an individual board member or an entire board will always arise out of a set of very undesirable circumstances. Thankfully, we know that these are exceptional situations and therefore mechanisms to address these issues are rarely needed. All the issues we have discussed in this letter are ideally addressed on the front end through certification of representation requirements and proper board training. The latter has already been bolstered tremendously through the passage of House Bill 15 (2016) which requires six (6) hours of instruction for newly appointed board members outlining their duties and responsibilities. Continuing education opportunities are also provided through our bi-annual Trusteeship conferences. We hope that programs like this will help to ensure that board members avoid actions or inactions that could lead to removal for cause or contribute to board dysfunction.

We hope that the comments provided in this letter are helpful as you craft a new, more comprehensive set of guidelines related to university and KCTCS governance. The views of SACSCOC regarding the various alternatives should also be sought, and dialogue with that agency is very much encouraged. If we can be of any help in that regard, please let me know. Thank you again for the opportunity to weigh in on this important piece of legislation and please let me know if you have any questions.

Sincerely,

Robert L. King
President