

March 18, 1992

The Honorable Herm Steger
Idaho House of Representatives
STATEHOUSE MAIL

The Honorable Pamela Bengson Ahrens
Idaho House of Representatives
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Senate Bill 1336; State Board of Education

Dear Representatives Steger and Ahrens:

You have asked whether the provisions of Senate Bill 1336, which envisions the statutory creation of two panels to the State Board of Education (one for higher education and one for public schools), conflicts with art. 9, secs. 2 and 10 of the Idaho Constitution, and whether the creation of two panels of the State Board of Education would require an amendment to that section.

Art. 9, sec. 2 of the Idaho Constitution states:

The general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education, the membership, powers and duties of which shall be prescribed by law. The state superintendent of public instruction shall be ex officio member of said board.

(Emphasis added.)

Because the Idaho Constitution speaks in terms of a single board governing all the educational institutions of the state and because the historical record supports an intent to have educational affairs in this state governed by a single board, the present Board of Education cannot be divided into two panels absent an amendment to art. 9, sec. 2 of the Idaho Constitution.

RULES FOR CONSTITUTIONAL INTERPRETATION

There are no cases interpreting art. 9, sec. 2 of the Idaho Constitution. In addition, a constitutional provision placing the entire supervision of all educational institutions in a state under one board appears to be unique to Idaho. Consequently, it is not possible to simply look at cases from other jurisdictions which have interpreted provisions similar to art. 9, sec. 2.

In interpreting art. 9, sec. 2, or for that matter any provision of the Idaho Constitution, one should follow well-established rules of construction of state constitutions. These rules are, by and large, the same as those used for statutory construction and interpretation. Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990). The first rule of interpretation is to apply the plain language of the constitution:

When called upon to review legislation, this court has stated: "The most fundamental premise underlying judicial review . . . is that, unless the result is palpably absurd, the courts must assume the legislature meant what it said. Where a statute is clear and unambiguous, the expressed intent of the legislature must be given effect." Where the language is unambiguous, there is no occasion for the application of rules of construction.

119 Idaho at 138 (citations omitted).

However, in interpreting the language used in the Idaho Constitution, one should interpret it in its historical context. This will necessarily involve an examination of the history of the development of art. 9, sec. 2. In Girard v. Diefendorf, 54 Idaho 467, 34 P.2d 48 (1934), the Idaho Supreme Court quoted 1 Cooley's Const. Lim. (8th ed.):

A constitution is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inures in the principle of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular and pervading in their prosecution; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action affect such changes, and the courts recognize them; but a court

or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. . . . What a court is to do, therefore, is *to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.

54 Idaho at 474-75.

INTERPRETATION OF ART. 9, SEC. 2, UNDER THE PLAIN LANGUAGE RULE

Art. 9, sec. 2, speaks in the singular of "a state board" having supervisory powers over all of "the state educational institutions and the public school system of the state of Idaho." (Emphasis added.) If this board is split into two councils, then it is effectively no longer functioning as a single board. The plain language of the constitution indicates that the supervision of education in this state shall be governed by a single board. To divide this board or to divide its tasks is to violate the plain language of art. 9, sec. 2.

The term "a" in sec. 2 indicates an intent of a singular board governing educational matters. According to WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, "a" is:

Used as a function word before singular nouns when the referent is unspecified <a man overboard> and before number collectives and some numbers <a dozen>.

The use of the word "a" in the sentence indicates that a single board was intended.

Similarly, the last sentence states that the State Superintendent of Public Instruction shall be an *ex officio* member of the Board of Education. The legislative proposal contained in Senate Bill 1336 makes the State Superintendent of Public Instruction an *ex officio* member of the council governing public schools, but not that portion of the board governing higher education. Thus, Senate Bill 1336 only allows the superintendent a voice in elementary and secondary school matters and excludes the superintendent entirely from any discussion or voice in higher education issues. This, too, appears to violate the plain language of art. 9, sec. 2.

HISTORICAL CONTEXT OF ART. 9, SEC. 2

As originally written, art. 9, sec. 2, provided:

The general supervision of the public schools of the state shall be vested in a board of education, whose powers and duties shall be prescribed by law; the superintendent of public instruction, the secretary of state and attorney general, shall constitute the board of which the superintendent of public instruction shall be president.

Thus, as the Idaho Constitution was originally written, the supervision of education in Idaho was divided between public instruction and higher education. Public schools were supervised by the Board of Education, and higher education, consisting at that time only of the University of Idaho, was governed by a separate board of regents.

During the constitutional debates of 1889, the discussion over art. 9, sec. 2, primarily centered on whether there was any need for a board of public instruction or even the need to require the creation of a board by the constitution. Delegate Morgan asked Delegate McConnell why it was even necessary to take supervision of public schools out of the hands of the State Superintendent and to hamper him by association with the Secretary of State and Attorney General. McConnell and Delegate Pinkham were unable to answer the question and indicated that art. 9, sec. 2, as originally written was borrowed from art. 9, sec. 7 of the Colorado Constitution with little thought. Delegate Morgan made a motion to pass the section, but indicated that he wished additional time in which to prepare a substitute presumably which would vest the Superintendent of Public Instruction with exclusive supervisory powers over public schools in the state. Morgan's substitute was never adopted.

Regarding art. 9, sec. 10, which is the provision dealing with the University of Idaho, a number of delegates stated that the primary goal was to confirm the location, management and powers of the University of Idaho in Moscow. Sec. 10 to the Idaho Constitution was sec. 14 in the original draft. There were several other sections which dealt specifically with the University of Idaho, but the delegates struck most of them and also modified sec. 10 with the apparent goal of confirming the actions of the territorial legislature relating to the university.

Shortly after statehood, problems arose in the system established in the constitution for governing education within the state. For all practical purposes, the Board of Education was the superintendent, and the superintendent's ability to supervise and direct public schools was hampered by the lack of support from the Secretary of State and the Attorney General who had little time or inclination to assume that task. The disjointed system of education had little unity or coordination. The various educational institutions of the state and of local governments viewed one another with distrust and as competitors for limited state money.

As early as 1898, these structural weaknesses were noted by State Superintendent Louis N. B. Anderson:

A general view of the Idaho system shows at once its strength and weakness. The county district schools, the independent district schools, the normal schools and the state university are the component parts of the state system. Some of these parts taken separately are doing strong and efficient work, but the weakness of the system is manifest when we come to study the articulation of its elements. The country schools are not in touch with the graded schools of the independent districts, nor are the graded schools yet in touch with the university. . . . The teachers of the state have worked well, but each in his own separate field with hardly a definite idea as to the general condition of the schools round about him and with hardly a thought as to his relation to the general trend of education in the state or his place in the state system. After two years' time taken to survey the educational field in this state, it is my opinion that the best lines of progress possible for our schools lie in an effort tending to centralize and unify the educational forces of the state.

Anderson, Biennial Report of State Superintendent of Public Instruction, 1898.

Superintendent Anderson was stating his belief that education would best be served in Idaho if it was governed as a unit with the various institutions thought of as component parts of a larger educational system rather than separate institutions. His proposal was to unify education under the leadership of the University of Idaho. The ideas of Superintendent Anderson stated in 1898 may be the seed from which our present art. 9, sec. 2, has grown.

In 1899, Governor Steunenberg, in his biennial address, also noted growing problems in the state school system and proposed integrating the supervision of the various educational institutions of the state with the public schools. Regarding this plan, the Governor stated:

The advantages of thoroughly articulating the University work with the high school work of the State will, I trust, engage your favorable consideration. The two should be brought into close and harmonious relationship to the end that the standard of secondary school work throughout the State be raised and an opportunity to prepare for the University courses afforded in every place where a high school is in operation. Aside from local advantages thus afforded, the University will in time be relieved of much of its preparatory work and can devote its

energies to college work proper. The inability to employ means with which to effectuate this articulation, to which reference is made in the Regents' report, should be removed, and the committee of the faculty made operative.

Steunenberg, Biennial Message of the Governor of Idaho, 1899 at 9-10.

Thus, by the end of its first decade, Idaho was recognizing weaknesses in its fragmented approach to education. By the beginning of its third decade, the solution seemed to be a unified approach in which one board would govern all of the educational affairs of the state and where all institutions, whether public schools or universities, would be treated as component parts in a statewide system. It was felt that such an approach would put the interests of education and students first and make rivalry between institutions a thing of the past. The mood in 1911 favored radical change to the structure of state education. Former State Superintendent of Public Instruction Bernice McCoy, in writing on the history of public education in Idaho, noted:

By 1911 conditions in the educational work of the State had become so acute as to command the attention of the Legislature, the Governor and the public generally. Editorials [on] the educational situation and the necessity of a change appeared in the leading papers. All thinking persons were beginning to feel that something must be done to remedy the situation.

McCoy, *Educational Progress in Idaho as Shown by the Development of the Public School System 1863-1923*, University of Idaho, Master's Thesis at 52 (1923).

Another historian has described the situation existing on the eve of the 1912 constitutional amendment to art. 9, sec. 2:

The various elements of rivalry in the educational system of the state distressed early educators; and these relationships did not improve as time passed. By 1911 the higher institutions were fighting for the tax dollar. Long after the need existed, the normal schools maintained large preparatory programs to compete in numbers with the University. They were also duplicating offerings of the University. The separate boards of the higher institutions and their presidents spent considerable time at legislative sessions to secure appropriations.

The State Academy at Pocatello was functioning as a State high school. The Pocatello High School was finding it quite impossible to maintain a good school. Students preferred to attend a State institution. Their education was at the State's expense.

The city school systems developed independently from the State Department of Education. Functions of the Department of Education became related only to the common schools through the various county superintendents. The attitude of the city schools toward the State also extended toward each other. Students transferring from one school or another, or coming from outside the State, were caught in this "web of distrust," and usually found they had less credits or had classes to take over after they transferred. The situation was compounding itself due to the law providing for the organization of independent school districts. The State Superintendent was unable to secure support for controlling laws from a State Board whose members were already extremely busy with their regular duties as elected State officials.

Farley, An Unpublished History of Idaho Education (1974) at p. 20.

Governor Hawley, in his address to the legislature on January 3, 1911, recognized the problems with the state's educational system. Hawley spoke of the need for fixing an appropriation and creating a tax specifically to support the state's educational institutions. Although the Governor did not call for a constitutional amendment creating a single Board of Education, the legislature followed that course of action. House Joint Resolution No. 12 proposed to amend art. 9, sec. 2, by creating a state commissioner of education and a board of regents. This resolution was rejected by the Senate. House Joint Resolution No. 30, substituted in its place, called for the amendment of art. 9, sec. 2, by creating the State Board of Education. It is House Joint Resolution No. 30 which placed the constitutional amendment on the ballot and resulted in the amendment of art. 9, sec. 2, to its present form.

The problems which occurred in education prior to 1911 are evidence that the legislature and the public intended the constitutional amendment to art. 9, sec. 2, to create a single board governing all the educational affairs of the state. Comments made by superintendents, historians and governors following the adoption of the amendment are further evidence that the intent was for a single board to be created.

Governor Haines, in his address to the legislature, stated:

At the last general election there was also adopted a proposed amendment to the constitution of our state, which provides for the general supervision of state educational institutions and the public school system of the state of Idaho by a state board of education, the membership, powers and duties of which shall be prescribed by law. It is entirely clear to my mind that the legislative enactment which is necessary to give this

constitutional amendment force and effect should be promptly considered by you.

....

The duties of this board should include the general management and control of all our state educational institutions.

Message of Governor Haines to the Twelfth Legislature of the State of Idaho at 26-27 (1913).

Similarly, the first Commissioner of Education, Edward O. Sisson, in reporting to the legislature, stated:

The plan of a single State Board of Education to direct all the educational affairs of the State was ordered by a constitutional amendment, proposed by the Eleventh Session of the State Legislature in 1911, and approved by popular vote in November, 1912. The Twelfth Session of the Legislature in 1913 enacted a law to put the amendment into effect.

....

The characteristic feature of the new system is that the six state institutions and the public schools are all to be considered in relation to each other, and with a view to the welfare of the State. The State Board of Education has only the welfare of the children and young people as its aim and purpose.

....

The essence of the plan is that we should get together in the interests of our schools and our children; that we should think educationally for the whole State, and not for any one institution or any one community or any one section. This means more attention to education, and constant vigilance.

Sisson, Report of the Commissioner of Education at 1 (1914). (Emphasis added.)

The interpretation of the constitutional amendment as requiring a single board to govern all the educational affairs of the state is further strengthened by the report of the State Superintendent of Public Instruction contained in the Biennial Report of 1913-14:

The State Legislature in 1911 passed a resolution calling for a Constitutional Amendment providing for a State Board of Education to have control of all schools, public and State, whose membership, duties and powers should be prescribed by law. . . . The law made many striking changes in the educational system of the State, yet it is one of the wisest and best laws ever placed on our statutes.

Sisson, Biennial Report of the State Superintendent of Public Instruction, 1913-14 at 191.

Bernice McCoy was Assistant State Superintendent for the years immediately preceding 1914. In 1914, she was elected to Superintendent of Public Instruction. For this reason, her master's thesis is particularly enlightening as to this period in history. Regarding the changes to the educational system of the state as a result of the amendment to the constitution in 1912, McCoy writes:

As has already been indicated, this period is separated from the first period in Education under Statehood by the change in the system of administration of the public school system of the State, through the establishment by legislative enactment of "The State Board of Education and Board of Regents of the University of Idaho," thus placing the control of the entire educational system of the State, consisting of the various parallel movements described in a previous section of this thesis, under one board of control.

Viewed from one standpoint this law was the most unique piece of school legislation ever enacted by any State legislature; viewed from another standpoint it was the most natural and logical step for a legislature to take, the establishment of a system of administration which would unify and coordinate the various public educational movements had long been the dream of intelligent educators and laymen, and considered from the standpoint of the Idaho situation the wisdom of the step was doubly true. It grew quite naturally out of the experiences and problems which had arisen in the educational work of the State. Problems and situations not unlike those which had arisen in other States; but which were more acute in Idaho because of the topography, its sparse population, its pioneer conditions, its magnificent distances, together with its lack of transportation facilities and other mediums of communication, all of which made unity and coordination in the State educational work impossible even in a slight degree.

McCoy, Educational Progress in Idaho as Shown by the Development of the Public School System 1863-1923, University of Idaho, Master's Thesis at 44 (1923). (Emphasis added.)

The interpretation of art. 9, sec. 2, as requiring a single board of education to govern all of the educational affairs of the state continued through the ensuing decades. In 1921, the Commissioner of Education, in addressing the State Teachers' Association, stated:

The Constitutional Amendment of 1911 provided very simply that there should be established a State Board of Education in this State which should have charge of both higher institutions and the public schools of the State. Unity seemed to be the thing primarily aimed at. Unity of thought, unity of effort, on the part of all of these, but besides that—and never quite so clear, I think, to the general public—was the further thought of control of education in all its branches and parts, not by the teachers, superintendents, professors and presidents, by the great public itself. . . . If there is one thing that would indicate the highest ideal of the educational system, it is that the board so constituted stands not as the representative of the teachers and educators of the State primarily—for the schools do not exist for the teachers, but the teachers for the schools—not primarily as representatives of the institutions of the State, but primarily as representatives of the great public which thus takes charge of education in all of its branches.

Commissioner of Education Address to the State Teachers' Association, November, 1921, as quoted by McCoy, Educational Progress in Idaho as Shown by the Development of the Public School System 1863-1923, University of Idaho, Master's Thesis at 68-69 (1923).

In 1946, the educational system of the State of Idaho was described:

The basic feature of the Idaho plan which makes it worthy of high commendation is the integration of the control of all public education under a single board of representative citizens.

Public Education in Idaho: A Report of the Idaho Education Survey Commission (1946).

CONCLUSION

It is clear that the plain language of art. 9, sec. 2, of the Idaho Constitution, as well as history, requires that the educational affairs of the state be governed by a single Board

of Education. Dividing the Board of Education into separate bodies for higher education and for public instruction violates art. 9, sec. 2. In order to accomplish the goal of two boards, the constitution must be amended. In addition, the fact that the proposal set forth does not provide the State Superintendent of Public Instruction with a voice in the higher education affairs of the state also appears to violate the plain language of art. 9, sec. 2.

Respectfully,

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