

March 16, 1993

Honorable Jerry L. Evans
State Superintendent of Public Instruction
650 W. State, Room 200
STATEHOUSE MAIL
Boise, ID 83720

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

Re: House Bill No. 345

Dear Superintendent Evans:

This letter is in response to your request of March 12, 1993, for an opinion regarding House Bill 345 which creates a state board of education comprised of two separate councils, one for higher education and one for public schools. The proposal to create two panels to the State Board of Education was also presented in the 1992 legislative session in Senate Bill 1336. With reference to last year's legislation, the Attorney General's Office submitted a legal guideline addressing the issue of whether the separation of the Board of Education into separate bodies violated the provisions of art. 9, § 2, of the Idaho Constitution. A copy of that analysis is provided with this letter for your review.

Although there are minor variations in the legislative proposal submitted in 1992 and H.B. 345, the primary goal of both pieces of legislation is to split the Board of Education into two bodies. After a thorough analysis of the issue last year, this office found that the plain language of art. 9, § 2, of the Idaho Constitution required that the educational affairs of the state be governed by a single board of education.

Article 9, § 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.

In addition, the 1992 guideline noted that Senate Bill 1336 failed to include the Superintendent of Public Instruction as an ex officio member of the body supervising

higher education in violation of the provision of art. 9, § 2, requiring that the Superintendent have a voice in the higher education affairs of the state.

House Bill 345 corrects one of the constitutional deficiencies noted in the 1992 legislation by inclusion of the State Superintendent of Public Instruction as an ex officio voting member of both councils. However, the division of the Board of Education into two councils as provided in H.B. 345 cannot be accomplished by legislation. In order to accomplish this goal, the constitution must be amended.

In addition to the constitutional concerns raised by your correspondence, you have requested procedural clarification for splitting the board into two councils as delineated by House Bill 345.

Your first question concerns whether the rule-making authority provided pursuant to the Administrative Procedure Act (APA) would be retained by the State Board of Education. Idaho Code § 67-5203(c) speaks to rule-making authority vesting with the Board of Education. Since there is no statutory recognition of the proposed councils in the APA, rule-making authority is retained by the board.

You have also asked for guidance regarding supervision of programs which are not defined as "public school" nor "higher education" programs, but that are statutorily required to be governed by the Board of Education; *e.g.*, the Division of Vocational Rehabilitation and the State Historical Society. By statutory designation the Division of Vocational Rehabilitation and the State Historical Society are placed under the general supervision and control of the State Board of Education. *See* Idaho Code §§ 33-101; title 33, ch. 23; and 67-4123. The proposed language in House Bill 345 would not change the requirement that the board, sitting as a whole, be responsible for administering the powers and duties of not only the Division of Vocational Rehabilitation and the State Historical Society, but any agency or institution required by statute to be governed by the board.

Your final question is whether the councils for higher education and public education would be subordinate to the State Board of Education.

House Bill 345 provides that the State Board of Education will convene as a whole for the supervision, governance and control of the general educational programs of common access to both higher education and the public school system. There is no provision establishing the board as a superior to the councils with respect to issues specifically relating to higher education or public schools. As such, there is no provision delineated in the bill for resolution of conflicts between the two councils.

In conclusion, division of the Board of Education into two councils through legislation is unconstitutional. In order to accomplish the intent of the drafters of House Bill 345, art. 9, § 2, of the Idaho Constitution must be amended.

I hope this letter answers your concerns. If I can be of any further assistance, please call.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division