

ATTORNEY GENERAL OPINION NO. 93-6

To: Honorable Jerry Evans
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Per Request for Attorney General's Opinion

QUESTION PRESENTED

May the Board of Education be divided into two councils, one for higher education and one for public schools as required by House Bill 345, without violating the provisions of article 9, section 2, of the Idaho Constitution?

CONCLUSION

No. Creating two autonomous councils, one with final authority over matters relating to higher education and the other with final authority over matters relating to public schools would violate article 9, section 2, of the Idaho Constitution, which requires that a single board of education govern all educational institutions in the state of Idaho. However, if the Board of Education implements House Bill 345 by developing guidelines which require that decisions of the two councils be reviewed and ratified by the Board of Education, the requirements of article 9, section 2, of the Idaho Constitution will be satisfied.

ANALYSIS

The First Regular Session of the 52nd Legislature passed House Bill 345 providing for a State Board of Education comprised of two councils, one representing the interests of higher education and the other representing public schools. House Bill 345 provides in pertinent part as follows:

33-101. CREATION OF BOARD. For the general supervision, governance and control of all state educational institutions, a state board of education is created. The board shall comprise two (2) separate councils, distinguished as follows:

(1) For general supervision of all state institutions of higher education, and such institutions as may be designated by law, to wit: University of Idaho, Idaho State University, Boise State University, Lewis-

Clark State College, the College of Southern Idaho, North Idaho College, and for any other state higher educational institutions which may hereafter be founded, a council for higher education and board of regents of the University of Idaho is hereby created.

(2) For general supervision, government and control of the public school system of the state, including the School for the Deaf and the Blind and any other state educational institution not connected with higher education which may hereafter be founded, a council for public schools is created.

(3) For the general supervision, governance and control of general educational institutions and programs of common access to both higher education and public school systems, including Eastern Idaho Technical College, vocational education, the State Library Board, Idaho work study program, public broadcasting system, Idaho state historical society, and other matters where required by law, the state board of education shall regularly convene as a whole.

....

Where the term "state board" shall hereafter appear, it shall mean the state board of education and, notwithstanding any other provision of law to the contrary, where appropriate, pursuant to the assignment of duties provided in this section, where such reference is relative to post secondary institutions and programs or associated arrangements such reference shall mean the council for higher education and board of regents of the University of Idaho, and, where such reference is relative solely to public schools, elementary through secondary levels, and associated programs, such reference shall mean the council for public schools.

(Emphasis added.)

There are two possible interpretations that can be given to the above quoted language. The first interpretation would provide three autonomous boards to govern education in the state of Idaho. The first board would be the Council for Higher Education and Board of Regents at the University of Idaho, which would provide general supervision for all state institutions of higher education. The second autonomous board would be the Council for Public Schools providing general supervision over public schools, the School for the Deaf and Blind and other educational institutions not connected with higher education. The final board would be the Board of Education which would supervise areas of general education and overlap areas, as well as

institutions specifically listed within the statute. This appears to be the intent of House Bill 345 as it was originally drafted. With reference to the original draft, this office gave an opinion to the legislature that the division of the Board of Education into three autonomous governing entities was a violation of article 9, section 2, of the Idaho Constitution. Subsequent to receiving this opinion, the legislature amended the bill. The amendment to the bill provides a basis for the second interpretation which can be given to the quoted language.

In an apparent effort to cure the constitutional defects of the legislation, section 33-101, subparagraph 3, was amended to require the State Board of Education to act on all "other matters where required by law." Although this amendment could have been drafted with more clarity, it does provide a basis for the interpretation that the board must retain supervisory control over all areas required by the constitution and laws of the state. This would be the interpretation favored by the standard principles of statutory construction. A cardinal rule of statutory construction presumes that the legislature intended to enact valid and constitutional law and, thus, the statute must be given as liberal an interpretation as possible to avoid finding the statute unconstitutional. Scandrett v. Shoshone County, 63 Idaho 46, 116 P.2d 225 (1941); State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972).

We have been asked to aid the Board of Education in determining whether House Bill 345, as amended, can be implemented without violating the provisions of article 9, section 2, of the Idaho Constitution. Our analysis is divided into two parts. In part one we address the constitutional requirements of article 9, section 2. This analysis is consistent with the opinion given to the legislature prior to the enactment of House Bill 345. In part two, we provide guidance to the Board of Education in interpreting House Bill 345 and developing guidelines for implementing a structure which would satisfy the requirements of article 9, section 2, of the Idaho Constitution.

1. **Article 9, Section 2**

Article 9, section 2, states:

Board of education. -- 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 interpreting article 9, section 2, well-established rules of constitutional construction should be followed. The first rule of interpretation is to apply the plain

language of the constitution. Powell v. Spackman, 7 Idaho 692, 65 P. 503 (1901); Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990).

Article 9, section 2, speaks in the singular of "a state board" having supervisory powers over all "the state educational institutions and the public school system of the state of Idaho." (Emphasis added.) The plain language of the constitution indicates that the supervision of education in the state shall be governed by a single board. This interpretation of article 9, section 2, is in accord with an historical review of the intent of the framers of article 9, section 2. Determining the intent of the framers of a constitutional provision is also a fundamental objective in construing that provision. Haile v. Foote, 490 Idaho 261, 409 P.2d 409 (1965).

As originally written, article 9, section 2, of the Idaho Constitution provided that the supervision of education was to be divided between public instruction and higher education. Public schools were supervised by the Board of Education which comprised the Superintendent of Public Instruction, the Secretary of State, and the Attorney General. Higher education, consisting at that time only of the University of Idaho, was governed by a separate Board of Regents.

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. Various educational institutions of the state and of local governments viewed one another with distrust and as competitors for limited state money. *See*, Farley, An Unpublished History of Idaho Education (1974) at page 20; McCoy, Educational Progress in Idaho is Shown by the Development of the Public School System 1863 through 1923, University of Idaho, Master's Thesis at 52 (1923).

By 1911, conditions in the educational system of the state had deteriorated to the point that radical change to the structure of state education was favored.

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 article 9, section 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 article 9, section 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 article 9, section 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 article 9, section 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) (Archives of the State Historical Library).

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 (emphasis added).

Bernice McCoy was Assistant State Superintendent for the years immediately preceding 1914. In 1914, she was elected 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).

In conclusion, the historical overview of the enactment of article 9, section 2, of the Idaho Constitution, as well as the plain language of that constitutional provision, requires that the educational affairs of the state be governed by a single board of education. Therefore, the first interpretation of House Bill 345 providing for three autonomous governing boards to supervise the educational affairs of the state is unconstitutional.

Since the legislature is presumed to enact valid and constitutional law and, further, since the legislature was aware prior to enactment of House Bill 345 that dividing the board into three autonomous governing boards would be unconstitutional, it must be presumed that the intent of the legislature in amending House Bill 345 was to correct the constitutional deficiencies of the legislation.

To correct the constitutional deficiencies of the original legislation, the legislation must be amenable to an interpretation that the councils are merely advisory in nature. As previously noted, section 33-101(3) requires the State Board of Education to act on all "other matters where required by law." Although this language could have been more clearly and artfully drafted, it does appear to require the Board of Education to act as required by the constitution and statutes of the state. Since the constitution requires the Board of Education to govern all of the educational affairs of the state, the appropriate interpretation of House Bill 345 is that the legislature intended to create two advisory

councils to the Board of Education, with the board retaining its constitutionally required control over the educational system of the state.

2. Guidance to the Board of Education in Interpreting House Bill 345 and Developing Guidelines for Implementing a Structure Which Would Satisfy the Requirements of Article 9, Section 2, of the Idaho Constitution.

In implementing the provisions of House Bill 345 to comply with the constitutional requirements of article 9, section 2, of the Idaho Constitution, the Board of Education may create guidelines dividing the board into two advisory councils, one for higher education and the other for public education. The general supervision and control of education in Idaho must be retained by the board. Duties of the councils should be structured by the board with this requirement in mind.

Each council can provide oversight in its particular areas of specialization. The councils can be fact finders for the Board of Education and they can provide their findings along with recommendations to the Board of Education. However, the board must retain the power to make final determinations governing state educational institutions and the public school systems in the state of Idaho.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Article 9, section 2.

2. Idaho Code:

§ 33-101.

3. Idaho Cases:

Haile v. Foote, 490 Idaho 261, 409 P.2d 409 (1965).

Powell v. Spackman, 7 Idaho 692, 65 P. 503 (1901).

Scandrett v. Shoshone County, 63 Idaho 46, 116 P.2d 225 (1941).

State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972).

Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990).

4. Other Authorities:

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

McCoy, Educational Progress in Idaho is Shown by the Development of the Public School System 1863 through 1923, University of Idaho, Master's Thesis (1923).

Message of Governor Haines to the Twelfth Legislature of the State of Idaho (1913) (Archives of the State Historical Library).

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

Sisson, Report of the Commissioner of Education (1914).

DATED this 14th day of April, 1993.

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