

February 10, 1998

The Honorable Ron Black  
Idaho House of Representatives  
**STATEHOUSE MAIL**  
Boise, ID 83720

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

Re: Legal Relationship Between the Office of the  
Superintendent of Public Instruction and the State Board of Education

Dear Representative Black:

On January 27, 1998, you submitted a number of questions concerning the legal relationship between the office of the superintendent of public instruction and the state board of education. Each of your questions is restated in bold below and followed by an answer.

- 1. While Idaho Code § 33-101 refers to art. 4 sec. 20, dealing with the 20 departments, the language in Idaho Code § 33-101 gives the board of education status not granted by the Idaho Constitution, art. 4 sec. 1, describing the executive department. Therefore, is the board of education in fact not an executive department of Idaho state government, rather according to art. 4 sec. 20, one of its administrative departments (67-2402) or an agency (67-5201 . . . “all state boards are agencies”)?**

This question raises the point that the term “department” is used in the Idaho Constitution to refer to what are more frequently described as the “branches” of state government. For example, art. 2, sec. 1, states that “[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial” (emphasis added). These separate departments are also frequently referred to as “branches.” *See, e.g., Malmin v. Oths*, 126 Idaho 1024, 895 P.2d 1217 (1995) (referring to the “executive branch” and “judicial branch” of state government).

Each of the three “departments” set out in art. 2, sec. 1, are further subdivided by other provisions in the Idaho Constitution. As this question demonstrates, art. 4, sec. 1, states that the executive “department,” or “branch,” is headed by a number of statewide elected officials, including the superintendent of public instruction. Each elected official is charged to “perform such duties as are prescribed by this Constitution and as may be prescribed by law.”

Idaho Code § 33-101 states:

For the purposes of section 20, article IV, of the constitution of the state of Idaho, the state board of education and all of its offices, agencies, divisions and departments shall be an executive department of state government.

The reference to art. 4, sec. 20, is important because art. 4, sec. 20, states that, with the exception of those officers specifically enumerated in art. 4, sec. 1, the executive department may consist of only “twenty departments.” The use of the word “departments” in conjunction with the word “twenty” is clearly a reference to the “administrative officers, agencies, and instrumentalities” making up the executive department or “branch.” The phrase “twenty departments” does not mean that there are twenty “branches” of government. This interpretation is bolstered by the fact that the “State board of education” is listed in Idaho Code § 67-2402 under the title, “Structure of the executive branch of Idaho state government” (emphasis added).

**2. Why then is the board of education not under the superintendent of public instruction as one of the 20 administrative departments? (Art. 4, sec. 20 . . . “the departments shall be allocated by law.”) Where is it allocated . . . in what section of code or the constitution?**

The constitutional distribution of powers between the superintendent of public instruction and the board of education can best be understood by reviewing art. 4, sec. 1, and art. 9, sec. 2 of the Idaho Constitution, and the proceedings and debates of the Constitutional Convention. Art. 9, sec. 2 of the Idaho Constitution, as adopted in 1890, provided:

The general supervision of the public schools of this 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.<sup>1</sup>

This provision made it clear that the “general supervision” of the public schools would be vested in the board of education. Art. 4, sec. 1, provides that the superintendent of public instruction was constitutionally designated as the executive officer. Reading the two constitutional provisions together, it appears the board of education is charged with the “general supervision” of the public schools, but the superintendent of public instruction executes state law and board policy relating to public schools.

This conclusion is supported by the proceedings and debates of the Constitutional Convention. What was intended can be seen from the debates set forth at pp. 644-46 of the Proceedings and Debates of the Constitutional Convention of Idaho, 1889. The debate relative to the distribution of these powers was generated by a motion made by Mr. Morgan to amend the proposed sec. 2. The proposed amendment would have provided:

The general supervision of the public schools of this state shall be vested in a superintendent of public instruction, whose duties shall be prescribed by law.

Mr. Morgan argued that it would be better to have one officer setting education policy and argued that the secretary of state and the attorney general would not have adequate time to perform such a function. However, Mr. Morgan's proposed amendment was not adopted, based upon the arguments made by those who favored a board of education. In this regard, Mr. Hasbrouck argued:

I think it is placing too much responsibility and even too much power in a matter that is of such importance as this is, in one man, and I think he needs this advisory board.

Mr. McConnell made a similar argument:

I think there would be no harm in his having some advisors—I can't see any harm in it. It is a common custom to have a state board of education in some states. But I don't believe in leaving it to one man—the entire management and control of schools, any more than I would the management of a university entirely in the hands of one man.

Mr. Mayhew summarized the debate as follows:

I do not care about entering into any discussion of this question, but I have observed this, so far as the discussion has gone, that there is but one question in it at all—in every argument advanced by the gentlemen, and that is this: Are three heads better than one, or three heads better than two? I think they are and therefore should be accepted.

While the debate referred to the board of education as an “advisory board,” the actual language of the amendment clearly contemplates that the board will have the power of “general supervision of the public schools” and not merely the power to advise the superintendent. Nevertheless, the debates do not even hint at an intent to take from the superintendent of public instruction the executive function of executing the laws and

policies as determined by the legislature and the board of education. Moreover, the language of art. 9, sec. 2, giving the board only the power of “general supervision” rather than the power to directly execute law and policy in particular cases, supports the conclusion that the board would generally supervise rather than execute education law and policy.

Art. 9, sec. 2 of the Idaho Constitution was amended in 1912 to provide:

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.

This amendment had the effect of placing the board of education in charge of higher education as well as the public school system. However, the amendment did not change the constitutional role of the board of education. It retained the language that the “general supervision” of the public school system would be vested in the board of education. Accordingly, the constitution vests in the board of education the authority to determine policy and generally supervise the public schools consistent with state law. Furthermore, the constitution vests in the superintendent of public instruction the power and duty to execute the laws of the state and the policies of the board of education with respect to public schools.

**3. Does art. 9, sec. 2, in fact indirectly designate the superintendent of public instruction as the only elected constitutional officer and *ex officio* member of the board, as the presiding officer?**

The plain language of art. 9, sec. 2, states that the “state superintendent of public instruction shall be ex officio member of” the state board of education. There is no indication that the superintendent of public instruction should serve as the presiding officer of the board. In fact, a 1912 amendment to the Idaho Constitution specifically removed the superintendent of public instruction from acting as president of the board. *See* art. 9, sec. 2, Compiler’s Notes. The fact that there was a change in language from the original implies a different construction under rules of statutory and constitutional construction.

**4. “General” is commonly defined as “not confined by specialization.” Does not the extensive writing by the board of education of specific rules, regulations, and code which detail individual requirements contradict the “general” adjective of art. 9, sec. 2?**

The plain language of art. 9, sec. 2, states that “the membership, powers and duties of” the board of education “shall be prescribed by law.” There is no indication that the use of the term “general” is intended to limit the clear delegation of authority to the legislature to specify the “membership, powers and duties” of the board through subsequent legislative enactments. General authority is the broadest authority because it is not limited or special authority.

**5. If the board of education is over the department of education, where in fact is the constitutional office of the state superintendent of public instruction containing (art. 4, sec. 1) the public records, books and papers?**

This question is very similar to your second question in that it seeks clarification of the constitutional relationship between the board of education and the superintendent of public instruction. The analysis and conclusions set out in answer to your earlier question apply equally to this question. The superintendent of public instruction is a distinct constitutional office whose office holder is also a member of the state board of education. The superintendent’s public records, books and papers are legally located in that constitutional office, not in the board of education.

I hope this letter is helpful. If you have any additional questions or comments, please feel free to contact me.

Sincerely,

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<sup>1</sup> This language no longer reflects the current version of art. 9, sec. 2.