

Should this Court clarify the District Court's findings regarding the accreditation standards promulgated by the Montana Board of Public Education?

Under Art. X, sec. 9(3), Mont. Const., the Montana Board of Public Education (Board) has general supervisory power over the public school system. The Board has adopted statewide accreditation standards for elementary and secondary schools. Those standards require teachers to be certified by the State, limit teachers' class loads, outline a minimum instructional program (for example, courses required for high school graduation), and establish minimum size, maintenance, and safety standards for school facilities. The Board argues that these standards establish the instructional component of a basic system of free quality public elementary and secondary schools. It objects to the District Court's findings No. 262 and 270, which read as follows:

"262. The testimony of superintendents, teachers, and trustees clearly establish that from a professional educators' perspective, the minimum Accreditation Standards in no way define a quality education."

"...

"270. In sum, the Montana School Accreditation Standards are minimum standards only, and do not provide the basis for defining quality education." The Board also objects to the last sentence of the court's conclusion No. 18:

"18 ... Thus, the Montana School Accreditation Standards do not define either the constitutional rights of students or the constitutional responsibilities of the State of Montana for funding its public elementary and secondary schools." [236 Mont. 44, 57] The Board moved the District Court to amend the above findings, but the motion was deemed denied after 45 days had passed, under Rule 59)d), M.R.Civ.P. None of the parties disagree with finding No. 261 of the District Court that the accreditation standards establish a minimum upon which quality education can be built.

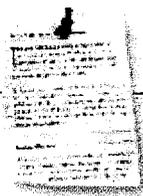
After reviewing the Board's argument and the transcript, we conclude that the findings and conclusion in question should be amended as requested. We therefore hold that findings of fact 262 and 270 and conclusion of law 18 shall be amended to read as follows:

"[Finding of Fact 262.] The testimony of superintendents, teachers, and trustees clearly establishes that from the professional educators' perspective, the minimum accreditation standards do not fully define a quality education.

"[Finding of Fact 270.] In sum, the Montana School Accreditation Standards are minimum standards upon which quality education must be built.

"[Conclusion of Law 18.] Thus, the Montana School Accreditation Standards do not fully define either the constitutional rights of students or the constitutional responsibilities of the State of Montana for funding its public elementary and secondary schools.

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Public Ed. v. Adm. Code Comm.
Decided Mar. 1992

MONTANA FIRST JUDICIAL DISTRICT COURT

COUNTY OF LEWIS AND CLARK

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* * * * * )
* * * * * )
MONTANA BOARD OF PUBLIC EDUCATION, ) Cause No. BDV-91-1072
* * * * * )
Petitioner, )
* * * * * )
vs. )
* * * * * )
MONTANA ADMINISTRATIVE CODE )
COMMITTEE, ) ORDER AND DECISION
* * * * * )
Respondent. )
* * * * * )

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This matter is before the Court on motions by all parties for summary judgment.

FACTUAL BACKGROUND

In 1989, the **Board of Public Education** (hereinafter the **Board**), adopted Rule 10.55.804, A.R.M. That rule, in pertinent part, provided as follows:

Beginning 7-1-92 the school shall make an identifiable effort to provide **educational** services to gifted and talented students, which are commensurate with their needs and foster a positive self-image.

The Administrative Code Committee felt that the aforementioned rule was in contravention of Section 20-7-902(1), MCA, which provides:

A school district may identify gifted and talented children and devise programs to serve them." (emphasis added).

The **Board** would not change its rule. Thereafter, at the request of the Administrative Code Committee, the 1991 **legislature** passed House Bill 116 which states as follows:

Whereas, the **Legislature**, not the Executive Branch, is the lawmaking branch of the state government under the Montana Constitution; and

Whereas, the **Legislature** may delegate its power to

pass laws to the Executive Branch, which may then, within certain limits, adopt administrative rules that have the force and effect of law; and

Whereas, a rule may not conflict with a statute and is invalid if it does; and

Whereas, Section 20-7-902(1), MCA, provides that "a school district may identify gifted and talented children and devise programs to serve them" and Rule 10.55.804 ARM mandates a gifted and talented children program in each school, thereby directly and clearly conflicting with the statute; and Whereas, the **Legislature** has made a gifted and talented children program discretionary, at the choice of each local school **board**, the **Legislature** nonetheless affirms its support of gifted and talented **education** and encourages local school districts to identify gifted and talented students and design and implement programs that meet the needs of those students.

Be it enacted by the **legislature** of the State of Montana:

Section 1. Repealer. Rule 10.55.804, ARM, is repealed.

Section 2 Effective Date. This Act is effective July 1, 1991.

The **Board** felt that it had the authority to promulgate the aforementioned rule pursuant to the Article X, Section 9(3)(a), of the Montana Constitution of 1972, which provides:

There is a **board** of **public education** to exercise general supervision over the **public** school system and such other **public** educational institutions as may be assigned by law. Other duties of the **board** shall be provided by law.

The **Board** brought the instant declaratory judgment action seeking a ruling as follows:

1. The legislative branch is not the sole law-making, or rule-making body under the Montana Constitution. Rather, the **Board of Public Education**, in exercising its Art. X Sec. 9(3) powers of "general supervision" has constitutional rule-making authority. This provision is self-executing and the authority granted is independent of any power that is "delegated" to the **Board** by the **legislature**.

2. The **Board's** accreditation standards, including the rule mandating gifted and talented programs, are within the purview of its Art. X Sec. 9(3), constitutional powers of "general supervision".

3. That House Bill 116 and/or 20-7-902 MCA, to the extent they interfere or conflict with the **Board's** constitutional rule-making are in violation of the separation of powers doctrine of Art. III Sec. 1 of the Montana Constitution and are therefore invalid and of no legal effect.

STANDARD OF REVIEW

Before reviewing the factual matter in particular, it would be helpful to review the standard that this Court will use in granting a motion for summary judgment. As all are aware, this Court cannot grant a motion for summary judgment if a genuine issue of material fact exists. Rule 56, M.R.Civ.P. Summary judgment encourages judicial economy through the elimination of unnecessary trial, delay, and expense. *Wagner v. Glasgow Livestock Sale Co.*, 222 Mont. 385, 389, 722 P.2d 1165, 1168 (1986); *Clarks Fork National Bank v. Papp*, 215 Mont. 494, 496,

898 P.2d 851, 852-853 (1985); *Bonawitz v. Bourke*, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977).

Summary judgment, however, will only be granted when the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), M.R.Civ.P.; *Cate v. Hargrave*, 209 Mont. 265, 269, 689 P.2d 952, 954 (1984). The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. *Kober & Kyriss v. Billings Deac. Hosp.*, 148 Mont. 117, 417 P.2d 476 (1966).

The opposing party must then come forward with substantial evidence that raises a genuine issue of material fact in order to defeat the motion. *Denny Driscoll Boys Home v. State*, 227 Mont. 177, 179, 737 P.2d 1150, 1151 (1987). Such motions, however, are clearly not favored. "[T]he procedure is never to be a substitute for trial if a factual controversy exists." *Reaves v. Reinbold*, 189 Mont. 284, 288, 615 P.2d 896, 898 (1980). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. *Rogers v. Swingley*, 206 Mont. 306, 670 P.2d 1386 (1983); *Cheyenne Western Bank v. Young*, 1 Mont. 492, 58587 P.2d 401 (1978); *Kober* at 122, 417 P.2d at 479.

Clearly, summary judgment is appropriate since there is no disputed question of fact, as has been acknowledged by both parties.

This Court is of the view that the **Board's** motion should be granted.

IMMUNITY

The parties have done an heroic effort of briefing the Court on the question of whether or not the Administrative Code Committee has immunity from the present action. This Court feels, however, that the immunity issue need not be addressed or decided in order to resolve this matter. The Court has before it the State of Montana as a defendant. Clearly, the **Board** is entitled to have House Bill 116 tested before a Court. Perhaps the Administrative Code Committee is not the appropriate defendant. Clearly, however, the State of Montana is an appropriate defendant in such an action. Thus, in order to avoid the question of whether or not the Administrative Code Committee is immune, the Court will dismiss the Administrative Code Committee from this suit. This, however, still leaves the question of whether or not House Bill 116 improperly interfered with the **Board's** constitutional authority.

CONSTITUTIONALITY OF H.B. 116

The Court has been directed to a West Virginia case that is very persuasive. See *West Virginia Board of Education vs. Hechler*, 376 S.E.2d 839 (West Virginia 1988). In that case, the Supreme Court of West Virginia noted that Article XII, Section 2, of the West Virginia State Constitution provided:

The general supervision of the free schools of the state shall be vested in the West Virginia **Board of Education** which shall perform such duties as may be prescribed by law.

Id. at 842.

Pursuant to that Constitutional enactment, the West Virginia **Board of Education** adopted rules concerning design and equipment of school buses. The **board** filed their rule with the West Virginia secretary of state for **publication**. However, the

secretary of state of West Virginia refused to file the rule because the **Board** had failed to first submit the rule to a legislative oversight committee. The West Virginia Supreme Court held that any attempt to impede rules proposed by the West Virginia **Board of Education** was not consistent with the general supervisory powers conferred upon the **board** by the West Virginia constitution.

The West Virginia court noted that state legislators, since they infrequently meet, cannot assume supervisory responsibility for **public** schools. In such cases, the supervision and administrative control over the state school system is placed in a State **Board of Education**. Decisions that pertain to **education** should be faced by those who possess expertise in the educational area. Id. at 842.

The West Virginia court noted that the **Board of Education** enjoyed a special standing due to its placement in the West Virginia Constitution. The Supreme Court of West Virginia held that the particular rule-making by the State **Board of Education** was within the meaning of general supervision of state schools as announced by the West Virginia Constitution, and that any statutory provision that interfered with such rule-making was unconstitutional. Id. at 843.

This is precisely the situation presented before this Court. In the first instance, the West Virginia constitutional provision in question in *Hechler* is very similar to Article X, Section 9(3), of the Montana Constitution. As in *Hechler*, we here have a situation where the Montana **legislature** is interfering with the rule-making authority of a constitutionally created **Board of Education**. This being the case, that statutory interference is unconstitutional.

The Montana Constitution provides:

The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

See Montana Constitution, Art. III, sec. 1.

This Court is cognizant of the fact that there must be balancing between the powers of the **legislature** and those of special **boards** created by Montana's Constitution. This balancing was discussed in detail in the case of *Board of Regents vs. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975). However, in this case, this Court is convinced that the rule here in question, as adopted by the **Board**, is well within its constitutional prerogative to exercise general supervision over the **public** school system.

In its brief, the State of Montana has delved extensively into comments made by delegates to the 1972 constitutional convention. However, if the language of the Constitution is clear, it may not be ignored. Further, if the language is clear, its meaning is to be ascertained from the Constitution itself construing the language as written. This being the case, there is no occasion for construction since the language is plain and unambiguous. See *General Agriculture Corporation v. Moore*, 166 Mont. 510, 516, 534 P.2d 859 (1975).

Further, the State notes that the rule, as originally suggested by the **Board**, was allegedly drafted pursuant to statutory authority and not pursuant to the Constitution. Thus, argues the State, the **Board** cannot now seek to use the Constitution to support the passage of the rule. With this contention this Court cannot agree. The **Board** is a constitu-

tionally recognized and created agency. As such, it is not subject to the usual administrative and legislative constraints to which the State refers. For example, it matters not that the **Board** may or may not have precisely complied with the Montana Administrative Procedure Act in adopting the rule in question. That Act is enacted by the **legislature**. As noted earlier, the **legislature** cannot interfere with other constitutionally created bodies that are properly conducting their business.

Further, the State points to the Attorney General's opinion contained at 44 Op. Att'y Gen. No. 4. However, that opinion expressly indicated that it was not dealing with any constitutional power of the **Board**.

The State exalts form over substance and would require the **Board** to perform a meaningless act. The State seems to be contending that one of the reasons this rule is invalid is that the **Board** did not follow precise administrative procedures. Thus, argues the **Board**, if the **Board** did follow these precise administrative procedures, and indicated that the rule was not being adopted pursuant to a statute but pursuant to the Constitution, then perhaps the rule would be valid. This Court considers such a procedure to be a futile act. This Court will not require the **Board** to go through such a futile procedure. Perhaps that argument would be well taken if we were here dealing with a **board** or agency created by another branch of government. However, we are dealing with a constitutionally-empowered **board**.

Based on the above, the Court hereby enters its declaratory ruling as follows:

The **Board of Public Education**, pursuant to Article X, Section 9(3), of the Montana Constitution, is vested with constitutional rule-making authority. This provision is self-executing and independent of any power that is delegated to the **Board** by the **legislature**. The **Board's** rule mandating gifted and talented programs is within the purview of the **Board's** constitutional power of general supervision pursuant to Article X, Section 9(3), of the Montana Constitution. House Bill 116, to the extent that it interferes or conflicts with the **Board's** constitutional rule-making power, is in violation of the separation of powers doctrine of Article III, Section 1, of the Montana Constitution, and is therefore invalid and of no further force or effect.

DATED this _____ day of March, 1992.

s/JUDGE **SHERLOCK**

pc: W. William Leaphart
Eddy McClure
Judy Browning

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educational institution," and decided against any change in wording. There has been no record of difficulty in the interpretation of the meaning of this provision, which clearly is not intended to restrict objective learning about religious principles, but rather to prohibit the active promotion in a public school of religion or of any particular religious doctrine. The existing language adequately expresses this principle.

Section 8. SCHOOL ELECTIONS. The legislative assembly shall provide for elections of school district trustees.

COMMENTS

This section is similar to section 10 of the existing Constitution, but changes its effect. The original intent of the present section 10 was to segregate school elections from partisan elections. The committee feels that there are other reasons which negate this original intent and which dictate that decisions on this matter should be of a legislative rather than a Constitutional nature. First, it is questionable whether the holding of separate elections has the effect of insulating school issues from partisan ones. Other nonpartisan issues and candidates appear on the same ballot with partisan ones. Moreover, partisanship of various sorts may play a role in a school election whether held separately or not. At least one locality in Montana officially recognizes special parties just for the purposes of such school elections.

Secondly, the holding of separate school elections causes most localities a great deal of extra expense which could be better spent on education itself. One delegate informed the committee that her community spent \$10,000 or more on every school election. The committee feels that such expenses are needless, particularly if the separate election does not accomplish its intended aims.

The proposed new section thus allows for flexibility by leaving the specification of election dates to the legislature, but it still reaffirms the importance of a Constitutional mandate that such elections shall continue to be held. The committee understands the vital importance of the principle of local control of schools and desires to insure the continuation of the system of local election of school trustees. These local school elections are an essential and irreplaceable part of the education system and their existence must be Constitutionally guaranteed.

Section 9. STATE BOARD OF EDUCATION. The board of public education and the board of regents of higher education, as hereafter designated shall together constitute the state board of education which shall meet

periodically on matters of mutual concern. In case of a tie vote at such meeting the superintendent of public instruction may cast a vote.

COMMENTS

Sections 9, 10, and 11 of the proposed new article deal with the state administrative structure for education. Together, these sections provide a substantially revised framework for the operation of the educational system. Under the authority of section 11 of the existing Constitution, a single state board of education presently exercises "supervision and control" over the entire state educational system, sitting as the state board of education on matters concerning the public school system and as ex officio board of regents on university matters. The proposed sections would replace this structure with two boards which would separately supervise higher education and the public school system, but would meet jointly as the state board of education on matters of mutual concern.

The proposed structure would provide a much needed reform in the administration of education in Montana. The state board of education, as it presently exists, operates under a provision written at a time (1889) when the educational system was fundamentally different from what it is today. The educational system of Montana in the nineteenth century consisted only of primary grammar schools and a newly founded state university. Today it consists of a universal system of elementary and secondary schools and a public higher educational system composed of two major universities, four colleges, and three community colleges. In 1889 there were less than 12,000 students in the public educational system; in 1970 there were more than 200,000 students enrolled. At the time statehood was granted Montana, the Office of the Superintendent of Public Instruction consisted of the superintendent and a clerk who performed mainly information-gathering functions in connection with local districts; at present the office has a staff of 162 and administers more than \$52 million funds for a vast array of state educational programs.

The provision for a board which was appropriate to the 1889 situation is clearly not appropriate today. It is not even clear that the state board of education was ever intended to serve as the board for the entire educational system. The phrase, "and the various other state educational institutions" in the existing section 11, appears to refer only to what are commonly thought to be state-run institutions, i.e. state normal schools, school for the deaf and blind, and so forth. It was only by virtue of a Montana Supreme Court interpretation of this phrase in State v. Cooney (102 Mont. 521 [1936]) that this section was specifically ruled to apply to the elementary and secondary school system.

The fear has been expressed that a separate board for public education might usurp the powers of local boards. There is no reason to be concerned about such a possibility, however, since the powers granted the state board would be almost identical to those now granted. Indeed, the committee has actually deleted the word "control" from the powers now granted the board so that the new section reads, "exercise general supervision over the public school system." It would be difficult to argue that this grants any additional powers to the state board at the expense of local school boards.

Under existing law, vocational-technical centers will remain within the public school system and thus under the jurisdiction of the board of public education. Witnesses from the "vo-tech" field assured the committee that this was their preference at the present time. However, the language of this section and of the new section 11 allows sufficient flexibility so that, should conditions change, these institutions could be accommodated in the system of higher education.

The voting members of the board would consist of seven members selected by the governor for six-year overlapping terms. The governor and superintendent retain ex officio membership on the board but in a nonvoting capacity. The committee feels that the elective officials should be separate from board decision-making, but should retain membership on the board for informational and coordinating purposes.

The committee feels that the duties of the superintendent should be legislatively prescribed, to allow for changing conditions and possible alterations of the relationship between the board and the superintendent. It is fully expected by the committee that the office of the superintendent of public instruction will be provided for in the executive article. A majority of the committee feels strongly that the superintendent should be elected, and the committee has structured the educational article with this notion in mind. An elected superintendent provides a necessary direct link to the people which is important to the educational system.

Section 11. BOARD OF REGENTS OF HIGHER EDUCATION. There shall be a board of regents of higher education, a body corporate, which shall govern and control the academic, financial, and administrative affairs of the Montana university system, and shall supervise and coordinate other public educational institutions which may be assigned by law. Said board shall consist of seven members appointed by the governor to six year overlapping terms, subject to confirmation by the senate, under regulations provided by law. The board shall appoint its executive officer and prescribe his term and duties. The governor and superintendent of public instruction shall be ex officio non-voting mem-

CHAIRMAN GRAYBILL: The committee will come to order. Ladies and gentlemen of the committee, when we recessed at noon, we had just finished adopting Section 7 as amended. Therefore, will the clerk please read Section 8.

CLERK SMITH: "Section 8. School elections. The Legislative Assembly shall provide for elections of School District Trustees." Section 8, Mr. Chairman.

CHAIRMAN GRAYBILL: Mr. Champoux.

DELEGATE CHAMPOUX: Mr. Chairman, I move that when this committee arises, that they adopt Section 8.

CHAIRMAN GRAYBILL: Very well, the motion has been made that when this committee arises and reports, after having had under consideration Section 8, we adopt it. Mr. Martin, would you like us—Mr. Martin's not here.

Mr. Heliker, would you like us to read your amendment?

DELEGATE HELIKER: (Inaudible)

CHAIRMAN GRAYBILL: Will the clerk read Mr. Heliker's amendment to Section 8.

CLERK SMITH: "Mr. Chairman, I move to amend Section 8 of the Education and Public Lands Committee Proposal on page 5, line 24, after the word and punctuation 'elections': 'The supervision and control of schools in each school district shall be vested in a school board.' Signed: Heliker."

DELEGATE HELIKER: Mr. Chairman.

CHAIRMAN GRAYBILL: Mr. Heliker, do you mean to put a period after the word "elections"? Oh, you want to substitute that language in place of the language that's there, is that it?

DELEGATE HELIKER: No, I want to add it before the language that's there.

CHAIRMAN GRAYBILL: Add it before. All right. The purpose of Mr. Heliker's amendment is to add to Section 8, on line 24, page 5, right at the beginning of the section, the following sentence: "The supervision and control of schools in each school district shall be vested in a school board." Then it would go on and say, "The Legislative Assembly shall provide—" Mr. Heliker, are copies of your amendments on the desks?

DELEGATE HELIKER: No.

CHAIRMAN GRAYBILL: You might want to write that down then. "The supervision and control of schools in each school district shall be vested in a school board." Then the rest of the sentence—the rest of Section 8 would remain the same.

Mr. Heliker.

DELEGATE HELIKER: Mr. Chairman, not being a member of the Education Committee, although I am vitally interested in the subjects considered by that committee for the same reason that all of us are, of course, plus the fact that I am myself a teacher, but not being a member of the committee, I have become aware of the problems that the committee has considered only as its report has approached the debate stage and as it has come on the floor and been debated. And I became aware—that is, acutely aware, although I was generally aware before, I suppose, if I thought about it much—that there is grounds for concern of—concerning the autonomy of the local control, the local school boards, as financing of the schools gravitates toward the state more and more and as we see in the future the increasing likelihood that it—there will be a continuation of

that trend. And the fear has been expressed here on—in this committee, when we were discussing these matters previously, that the local school boards would lose autonomy as they lost their control over the funds, if they do. Now, this committee has not provided, I notice, for autonomy in the Constitution for local school boards, although that autonomy is provided in the statutes which make the local school boards bodies corporate. At the same time, however, the committee proposal in Section 11 provides for autonomy to a certain extent for the Board of Regents, which they propose to establish as a constitutional board. And I feel, therefore, that we should give constitutional recognition and status to the local boards to—first of all, to allay the fears which have been expressed, which I think are well founded, concerning the preservation of local autonomy; and secondly, to give parallel treatment to the governing boards of the public schools, as well as the public universities and colleges. Thank you, Mr. Chairman.

CHAIRMAN GRAYBILL: Mr. Champoux.

DELEGATE CHAMPOUX: Mr. President, fellow delegates. I also have felt that there is

quite a bit of fear on the part of many delegates here, and no matter what we say, perhaps they'd still have that fear that the local school districts are going to lose some control and some power. And if you'll note in my remarks to the—when we get to 9, 10 and 11, you will note that we have even eliminated the word "control" in the new Public Board of Education, where it is in the old Constitution, and only use the word "supervise". By this amendment the intent is shown, I think, that this delegate—this body does want local control to remain with the local school districts, and I heartily support it.

CHAIRMAN GRAYBILL: Is there other discussion of Mr. Heliker's amendment?

Mr. Burkhardt.

DELEGATE BURKHARDT: I was off the floor. I wonder if you could repeat the amendment. Perhaps others have the same question.

CHAIRMAN GRAYBILL: Very well, the amendment is to add to Section 8, immediately after the title, a sentence as follows: "The supervision and control of schools in each school district shall be vested in a school board." Then the rest of it would be: "The Legislative Assembly shall provide for elections of school district trustees." It establishes a school board.

DELEGATE BURKHARDT: I would speak in favor of it and, as a member of the Education Committee, would heartily support it.

CHAIRMAN GRAYBILL: All right, is there any more discussion?

Mr. Johnson.

DELEGATE JOHNSON: Mr. Chairman, I just rise in hearty support of Mr. Heliker's amendment. I think that our local school boards certainly should have constitutional status.

CHAIRMAN GRAYBILL: Very well. The issue, then, is on Mr. Heliker's amendment, which would have the effect of adding to Section 8 a sentence saying: "The supervision and control of schools in each local school—in each school district shall be vested in a school board." So many as shall be in favor of his amendment, say Aye.

DELEGATES: Aye.

CHAIRMAN GRAYBILL: Opposed, No.

DELEGATES: No.

CHAIRMAN GRAYBILL: It's adopted.

Now, Mr. Martin, may we read your amendment?

DELEGATE MARTIN: (Inaudible)

CHAIRMAN GRAYBILL: Read Mr. Martin's amendment please.

CLERK SMITH: "Mr. Chairman. I move to amend Section 8, page 23, of the Education and Public Lands Committee Proposal Number 10 as follows: at line 23, page 23, by adding, following the word 'trustee' and before the period at the end of the sentence, the following words: 'which shall be separate from elections at which state and county officers are elected.' Signed: Martin."

CHAIRMAN GRAYBILL: Very well, Mr. Martin has proposed an amendment which would add to Section 8, after the word "trustees", language setting up the separateness of school board elections from state and county office elections.

Mr. Martin.

DELEGATE MARTIN: Mr. President, in our Executive Committee we gave consideration to the idea that perhaps the state elections, and particularly for Governor, should be in the off 2 years from the presidential election. The purpose of this amendment is to make certain that when we're discussing voting in school elections, that we have them separate and apart from other elections. I think that's—it needs no—I don't need to belabor the point, and I urge your adoption of the amendment.

CHAIRMAN GRAYBILL: Mr. Harrington.

DELEGATE HARRINGTON: Mr. Chairman. In the Education Committee this was quite a discussed item. And one of the things that was brought up—and the reason we dropped or deleted the words from the old Constitution, saying it would be a nonpartisan election held separate from any city, county, or state election—was the fact that in many counties at this time, we find that you have two elections every other year, back to back, and sometimes these elections cost ten thousand, twelve thousand dollars. And it's felt that the taxpayer has to pay for these extra elections; and by putting in the Constitution the fact that these elections cannot be held on the same day as another election, this is costing the taxpayers a great deal of money, where this money could possibly be saved if these elections could be combined. Thank you, Mr. Chairman.

way they do, the way they get it is they come up and do their lobbying and what-have-you. We'd like to stop that. And I would suggest that perhaps someone might want to amend that board if we ever get to it—that “umbrella board”, so to speak—that one State Board of Education—so that it does provide only one unified budget to the Legislature. Well, the proposed structure would provide a much-needed reform in the administration of education in Montana. The State Board of Education, as it presently exists, operates under a provision written at a time, 1889, when the educational system was fundamentally different from what it is today. The educational system of Montana in the 19th Century consisted only of primary grammar schools up to the eighth grade and a newly founded State University. Today it consists of a universal system of elementary and secondary schools and a public higher educational system composed of two major universities, four colleges, three community colleges, a number of vo-tech centers—five of them in all—and, plus, they have another vo-tech area at Bozeman. In 1889 there were less than 12,000 students in this system; in 1970 there were more than 200,000 students enrolled. At the time of statehood, the office of the Superintendent of Public Instruction consisted of one person and a clerk. The function of the office was mainly information-gathering. At present the office has a staff of a hundred and sixty-two and administers more than \$52 million for a vast array of state educational programs. The provision for a board which was appropriate to the 1889 section—situation—is clearly not appropriate today. At least the committee doesn't think so. It was not even clear that the State Board of Education was ever intended to serve as the board for the entire educational system. The phrase—and I quote—“and the various other state educational institutions”, in the existing Section 11, appears to refer only to what are commonly thought to be state-run institutions; that is to say, not local schools—in other words, the state normal schools, school for the deaf, blind, and so forth. It was only by virtue of a Montana Supreme Court interpretation in the State versus Cooney case in 1936 that this section was specifically ruled to apply to the elementary and secondary school system. In practice, the State Board of Education has devoted the great majority of its time to matters of higher education—now, one board member told us 90 percent; another board member disputed that and said 80 percent. There's a 1968 legislative study that says 85 percent—so take what you want to. At least it's the overwhelming amount of the time that's spent on higher education. There is a kind of informal division of labor between the

board and the State Superintendent, such that the lower schools are looked after by the Superintendent of Public Instruction and that the board sees its duties primarily in the field of higher education. A recent study that was concluded in 1958, the Durham Report, says: “The result is that the board's functions”—and I'm quoting—“in public education become more of the nature of troubleshooting and too little of consistent long-range planning, policy formulation, appraisal”, and the like. One major reason, therefore, for the creation of a two-board structure is the establishment of a board that will be specifically qualified for and concerned with the problems of elementary and secondary education and other institutions which may be assigned by law. The correlate of this structure is the establishment of a separate board for higher education which will be similarly qualified for and attuned to the particular problems of higher education. The necessary coordination between these two separate boards would occur in the joint board provided for in Section 9. This joint board, the State Board of Education, would meet periodically to act on matters of mutual concern to both sectors of education. Now, we did talk about this matter of “periodically”, and we thought perhaps it would be better to leave it loose, rather than say, you know, they're going to meet 5 times, 10 times a year, what-have-you. There has been some criticism about that. Also, there's been some criticism to the extent that it doesn't provide for a Chairman of this board. I would assume—I don't know, we never really discussed this as to what the committee feels who the Chairman should be—but I would assume that perhaps it would be the Governor. However, the other two boards would elect their own Chairman—why couldn't this board? Further reasons for the reorganization of the boards of education are presented in the next section. I want you to notice, in this Number 9, if you look at the old section of the Constitution, it talks about supervision and control. In this section we have left out the word “control”. Again, we want to emphasize that we want the local public school boards to have as much power as possible. Also, we want you to notice that it talks about “and other similar”—let's see, the phrasing is exactly—well, we'll go on. All right, let's go to the new public board, or the Board of Public Education, Section 10. The membership is prescribed, and its responsibilities are prescribed also. As described in the preceding comments, the greatly expanded activities, personnel, and funding involved in elementary and secondary education requires that this crucial sector of education have its own administrative board. The largest share of state funds for any one purpose goes to elementary and second-

ary education. The state administers over 25 major federal programs in education at this level. The kinds of education needed and offered are constantly changing and expanding. A board which is to cope adequately with this vast area of responsibilities must consist of members who are qualified and who have sufficient time to become knowledgeable about the particular problems and issues of public education. A board is no more capable than is a Superintendent of being competent to administer two fundamentally different areas of education. Now, another problem that's arising here, and I'm sure that if you've been reading the papers and you look at the Serrano thing and so forth, it's very, very obvious that we're going to get more federal funding. Now, there have been two studies on this. The commission—the presidential commission that was issued—the report that was issued last Monday said that we're going to get, at a minimum, 21 percent of federal funding—21 percent. Now, another intergovernmental commission that issued a report in January, a presidential commission, said that these grants will be conditional on matching or more funds. Now, if that's true—now, presently we're getting 70—7 percent federal funding. If we're going to have 21 percent federal funding, that means, then, that the state government is going to be putting in 21 percent; that gives you 42 percent. Presently the state government is putting in 27 percent. You're talking about 69 percent state and federal funding—69 percent. Now, it is my estimation from all that I know, and I'm sure that some of the members of the Revenue and Finance Committee will agree with this, since they have studied extensively, that that figure is going to be an absolute minimum. It is probably way too low. What I'm saying here, then, is that we're talking probably about anywhere from 80 to 85 percent federal and state funding that's coming, and we might as well face it. Now, with all of that money flowing through the state, don't you think we need another board to be looking at it—a board of lay people watching over this, having a check on the State Superintendent's office, and so forth? The need for a separate board for public education promises, then, to become even greater in the future. The present trends indicate the assumption of much greater role in educational financing by state and federal, possibly as much as 90 percent—and I don't want to go into that, because this is according to Serrano, and there's a variance factor there that—constitutional lawyers say there's somewhere between 10 and 12 percent, but we don't know. Well, a well-informed and representative board would provide a much-needed balance to decisions on administrative pol-

icies, and that is one of the things I want to emphasize. In this whole business of the boards, we have to keep in mind all the time that the Legislature is not going to be here in session all the time, that the representatives of the people are not going to be here administering this. And the greatest fear is the bureaucracy; the greatest fear is the bureaucracy. A large majority of witnesses who testified on the subject, including key state officials and many educators, spoke in favor of the two-board concept. As a matter of fact, every major person involved in education, like the State Superintendent of Public Instruction, the Presidents of all the University Systems, community—the university units—the community college presidents, the Montana Education Association, the largest education association in the state, and many, many other groups totally support this two-board concept. Three major studies that have been made since 1958—the Durham Report, the Peabody Report, and the Legislative Council study of 1958—all of them support the two-board concept. Not only that, at one time we had a constitutional amendment brought out—I believe it was in 1960; three of them were brought out—they were never put on the ballot, because they weren't signed by the Governor. It had nothing to do with the two-board concept. The longest-serving member of the State Board of Education, Maury Richards—many of you know him—sent us a letter, and I quote: "Please give every consideration to a two-board system. Frankly, even the most capable, dedicated board member finds it impossible to do justice to the total assignment." Numerous studies have shown that we need this. The fear has been expressed that a separate board for public education might usurp the powers of local boards. There is no reason to be concerned about such a policy—possibility—however, since the powers granted the state board would be almost identical to those now granted, and what we have just done is to guarantee the control by the local board at the local level. Indeed, the committee has actually deleted the word "control" from the powers and granted—now granted the board, so that the new section reads: "exercise general supervision over the public school system." It would be difficult to argue that this grants any additional powers to the state board at the expense of local school boards. Under existing law, vocational—let me bring up this question about where's the vocational-technical schools going to go. This has caused a lot of concern. I want to make sure, at this time, for the record, the feeling of the committee and cite a number of other things. First of all, the committee wants it categorically stated that their feeling is that they want the vo-tech schools to

CHAIRMAN GRAYBILL: Mr. Cham-
poux.

DELEGATE CHAMPOUX: Mr. Chair-
man. I move that when this committee does arise
and report, after having under consideration Sec-
tion 10 of the Education and Public Lands Com-
mission Committee Proposal, that it recommend
the same be adopted.

Mr. Chairman.

CHAIRMAN GRAYBILL: Mr. Cham-
poux.

DELEGATE CHAMPOUX: And I'm go-
ing to be brief, sir. Very briefly, if you look at this
section compared with the old section, you'll find
out that we've eliminated the word "control".
Now, we did this to alleviate any fears that the
local boards might have. This indicates, in our
mind, that the local boards should stay in control
of education at the local level. And we've indicated
this also by passing the section, last Friday, which
gives them control over local education. We use the
word only "supervise". Notice the words "such
other educational institutions as assigned by
law". Here our intention is that things shall
remain as they are presently. Now, under statu-
tory law, the vo-tech centers are assigned to this
board. It is the intent, as I've indicated before, that
this remain—the intent of the committee—remain
as it is—also, at the suggestion of Morris Driscoll,
who is the President of the Vo-Tech Center at
Butte, and other leaders of the other vo-tech cen-
ters. Now—and we're also going to indicate this in
the other board under Section 11 for the commu-
nity colleges. Now, when we get to the duties of the
Board and the State Superintendent, we had a big,
long discussion, quite a bit of deliberation. And
the possibilities, of course, were do we make the
board—give them power over the State Superin-
tendent? Now, we thought that that was probably
ridiculous, since she was an elected official. The
other alternative is, of course, do we make her,
then, in complete charge of this Board appointed
by the Governor and representing, directly, the
people? We thought that wasn't the best thing to
do either. Then we looked at the present situation
and we found that, as—at present, the duties
and—how do we word it?—yes—the duties of the
Board and the Superintendent are prescribed by
law, and so we left it the same. It has worked quite
well in the past, so this is why we left it as it is. Mr.
President, thank you.

CHAIRMAN GRAYBILL: Is there discus-

sion of Section 10?

Mrs. Eck, do you want to—

DELEGATE ECK: Mr. Chairman. In
keeping with the recommendations that George
Harper just made, I would recommend—or I will
move to add, after the word "Governor", line 10,
page 6, the words "Commissioner of Higher
Education".

Mr. Chairman.

CHAIRMAN GRAYBILL: Just a mo-
ment. Do I understand that you propose an
amendment which would add the term "Commis-
sioner of Higher Education" on line 10? So that the
sentence would read: "The Governor, Commis-
sioner of Higher Education, and State Superin-
tendent of Public Instruction shall be ex officio
nonvoting members."

DELEGATE ECK: Yes.

CHAIRMAN GRAYBILL: Very well.
Mrs. Eck has an amendment to that effect.
Mrs. Eck.

DELEGATE ECK: Mr. Chairman. Ob-
viously, the idea of the Commissioner of Educa-
tion really belongs in the next section on Board of
Regents. But our thinking was that each of these
boards should have an executive officer of equal
status and that if the Superintendent of Schools is
to be an ex officio officer on the Board of Regents
as listed—and I think that she should be—also the
Commissioner of Education should be an ex offi-
cio officer on the Board of Public Education in
order to provide the coordination among these
groups. We also, in looking at this, can see, as
George had said, that the Board of Education
itself, sitting as a joint body, should do more than
just take care of matters of common interest and
make final decisions upon the budget—that,
really, there's a lot of planning, evaluating, policy-
making that probably should be done as one joint
body. Now, you can say that this is implied—and I
think, indeed, it is—by a budget-making duty, but
on the other hand, it would be very possible to
circumvent any central planning and central
evaluation in policymaking. It could be that these
two boards would just come together as one to—to
really haggle over the budget, and I don't think
that this is what any of us have in mind here. So
far as the need for a Commissioner of Education
rather than an Executive Officer, I think that
probably, except as a semantic maneuver, it really
doesn't make much difference. It's true the Execu-
tive Officer could be truly a person with as much

have two boards. We've voted on that Saturday, and we spent a full day discussing it. Now, when we discussed whether the Superintendent of Public Instruction should be elective or appointive, she appeared and testified at great length about the duties of her office, how challenging they were and how great they were. And we toured her office, and we toured the annexes downtown where we have many other offices. And right now, her office is one of the biggest. I don't know, if there was a challenged matched between the Highway Department and Superintendent's office, exactly who would win, but it would be close. And then, we also have all the additional federal funding that we're going to have to look forward to coming. And there are bills before the United States Congress now, and these are going to be involved and have to be administered. So I think that the Superintendent's position that she should not get involved in the higher education, other than incorrelating to it, is very well taken, very well thought out on her part, and that it is a tremendously big job—just your financing, your public and elementary education, all your special programs. Therefore she should be on the Board of Education and on the Board of Regents. Now, the Executive Secretary; we've provided for an Executive Secretary in our proposal, the majority proposal. The name won't change it. We have him already. You're going to have to have an Executive Secretary. You can't have a board under as big a project as this now. Our board—right now, our Board of Regents—one member testified before our committee, and, I hope in a nonsarcastic manner, I asked if—how many units had been visited by this particular one. I said—well, they visited—only been on 2 years—they visited two units of the University System and one vo-tech. Really left me kind of cold, you know—I mean, as big a problem as this is. It's—if there's any way that they would be freer to devote more time to higher education, I think we should make it possible. It's an area that there's a lot of difference of opinion, but we thrashed it out very thoroughly Saturday. This is the majority, the democratic process. We decided we're going to have two boards, we want to make them as workable as we can. So it seems that a Commissioner of Education is a nice name—or Higher Education. I think one other point we should have clarified is the amount of time the two boards spend. A lot of discussion was given to that, and I think we

should have that cleared up as we go along. It was discussed that they didn't spend much time on lower education. And what's the reason for that? Well, it's very, very simple. We've got local school

boards that handle that. There's local school boards run the high schools and the grade schools. There's nothing for the Board of Education to do with grade schools, high schools, and elementary except approve of the curriculum and that sort of thing. Except one other thing—we have that great, expanding vo-tech program. It's our thought that should stay with the Board of Education. And as that program expands, it may justify this second board by itself. It's a great program, it's an expanding program, and I would be hopeful that we get a board and take some of the weight off Mr. Driscoll's shoulders and help he and the other people with this program, who battled it in this educational field pretty much by themselves to get it through. So I think your second board, your Board of Education and your Board of Regents, is just as workable as any plan anyone else has here. No one has come up with a better plan, and the majority has approved this plan. So I would be hopeful that we can proceed along the line. I'm kind of partial to Mr. Harper's thing as making it one article and making it three subsections, which would tie it all together, maybe, a little bit clearer. So I would support the Commissioner of Higher Education being on the Board of Education, as a nonvoting member, so they would keep all these things together. I think the Governor should be on this board. The Governor testified before our committee. He said he didn't know too much about what was going on in education, and he thought he should. And I think he should be on that board. That doesn't mean he has to attend all the time, as a nonvoting member, but it means that he can sit in on those meetings and keep abreast of that for his budget message and the total program for the State of Montana. So I'm hopeful that we can proceed with this the way it is. I don't think you're going to come up with better—anything better. You could discuss the problems, as we did for a month in the committee. We don't have a solution. If this will implement getting this educational thing off the ground, where it will be more flexible and where it will open the door for a total program for the educational process of the State of Montana, I think it would be a good thing. I don't think we can do more. I think Mr. Garlington said the doctrine—the—well, we call it the "Powder River Latin Doctrine"—is one you want to be concerned with. I was concerned over the weekend even about putting a unified budget in that article Saturday, because it might be easily construed to be—that that's all they were intended for, and I sure don't think it is. I'm wondering, if we put in some other language, if that will then be a limiting

DELEGATE HARPER: And now I am offering no amendment to those Sections—10 and 11.

CHAIRMAN GRAYBILL: Ten would become sub. 2 and 11 would become sub. 3.
Mr. Mahoney.

DELEGATE MAHONEY: Mr. Chairman, I was wondering for a while if the—Delegate Harper still had two boards, but I see now we still have two boards. Everything—all that you've done is going to let these two meet on—together. I think this is all—now, I think this problem—and we've probably debated a long time—I don't want to take a great length of time, but I think one person has been—one outfit has been left out entirely that we've seen. We have the University System and they have their University presidents. Then we go down and we see the state administration down here, but all of a sudden we forgot these little fellows that run on—I believe it's the first Saturday in April every year—these school board trustees—and we have certainly forgot them in all of our debate today. People that have stood up—they spend nights, they spend days, they get nothing for it, all they do is get complained at every time there's a school board meeting—and these people have certainly been forgot. I wondered if there was no way we would even let this group of dedicated people throughout the State of Montana have some little say somewhere in the educational setup. I'm afraid of this thing now—that we're building a great setup—maybe I'm wrong—but I'm afraid we are building the State of Montana practically into one school district—be run out of a building up here—and that's what's going to happen to this local schools we've discussed. University—university—and I'm glad—they're great people, but we have to get the child up to the university first. This is quite a little thing, getting him up there, and I just hope—I think with one board looking over the whole situation, subservient to the Legislature—now, I want this understood—I think we should keep this—all the education under the Legislature, whether it's university or wherever it is, and—because if we're going to have statewide mill levies, the Legislature is going to have considerable to say about the appropriations, and I think we should have everything under the Legislature, and so I hope—I certainly hope Mrs. Bates' amendment prevails.

CHAIRMAN GRAYBILL: Mr. Champoux.

DELEGATE CHAMPOUX: I'm going to be very happy when you don't have to recognize me any more, believe me. Charley, I think you were out of the room the other day. We passed a section in there concerning the school boards. Were you here when we passed that? All right. So they are included, and they are in control of the local situation. Also, if you will note, the Haberdank amendment has them included in terms of getting the money and doing the stuff at the local level, so I think they have been—as a matter of fact, they are probably 200 percent more involved in this Constitution than they ever were in the last, so I believe they are well provided for.

CHAIRMAN GRAYBILL: Mr. Gysler.

DELEGATE GYSLER: Mr. Chairman, I feel that the Harper amendment certainly helps this—these three sections; however, I would just like to point out that this is one of the difficulties when in this Constitution we try to do the legislating. We are—a lot of people fought for two boards; now we're coming back and saying, "Now, this is going to be one board for here, and then they will split", and so on. This just really kind of gets you back to one, except in some respects it does a lot of tying of the hands of the people in government over the next 50 years, if this is adopted by the people. We're trying to legislate this and trying to legislate that; and sitting here today, it seems to me as though a fair amount of this document has been written to satisfy the present State Superintendent of Education. Now, maybe she will be the present Superintendent—or will be the Superintendent for the next 20 years or so, but someday somebody is going to replace her, and maybe they won't like it. I really have to agree with Mr. Davis, this morning, when he said that there are two monstrous bureaucracies, more or less, in the state government. One of them is the Highway Department, which this body did some clipping of feathers on last week, I believe it was, and the other one is the Education Department. They both spend a whale of a lot of money, and the more we get into legislating in this Education Article on the Board of Education and so on, the more we constitutionalize the bureaucracy that can happen in the Education Department. So, I—like I say, I believe Mr. Harper's amendment is an improvement, but I would certainly go for the Bates amendment—or substitute, because it leaves it free; it isn't tying anything down. People say we want to write a document for the future. How many of you know what the future is in 40 years and what the state