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MEMORANDUM

TO: Rick Bartos, Chief Counsel  
Office of the Governor

FROM: Beth Baker *Beth Baker*  
Assistant Attorney General

DATE: May 7, 1992

RE: Appeal of Board of Public Education Case

SENATE EDUCATION

EXHIBIT NO. 29

DATE 1-21-05

BILL NO. SB-10

Please respond no later than May 22, 1992.

BACKGROUND

In 1979, the Montana Legislature enacted a law allowing school districts to identify gifted and talented children and to devise programs to serve them. § 20-7-902(1), MCA. In subsequent amendments, the legislature specified that the conduct of programs to serve gifted and talented children must comply with the policies recommended by the superintendent of public instruction and adopted by the board of public education. § 20-7-903(1), MCA. See also § 20-7-904, MCA (setting forth criteria for policies of board of public education and program proposals submitted by school districts). Funding for such programs is provided by money appropriated to the superintendent for that purpose, with the requirement that a school district match any funds provided by the

superintendent with equal funds from other sources. § 20-7-903(2), MCA.<sup>1</sup>

In 1989, the Board of Public Education (the Board) adopted section 10.55.804, Administrative Rules of Montana, which became part of the Board's rules on accreditation standards. The rule provides in pertinent part:

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.

At its December 15, 1989, meeting, the Administrative Code Committee determined that section 10.55.804, ARM, was invalid because "the rule makes mandatory what the Montana Code Annotated makes discretionary." See Administrative Code Committee objection to § 10.55.804, ARM.

Upon request of the Board, the Attorney General issued an opinion concerning the apparent conflict between the Board's rule and the applicable statute. The opinion held that section 10.55.804, ARM, conflicted with the provisions of section 20-7-902(1), MCA, because the legislature expressly allowed the provision of such programs to be at the discretion of local school districts. 44 Op. Att'y Gen. No. 4 (Jan. 15, 1991) (copy enclosed). The opinion concluded that, if a local school district

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<sup>1</sup>According to the Office of Public Instruction, \$300,000 was appropriated for this purpose for each fiscal year of the current biennium. Following an eight percent reduction of that appropriation during the Special Session, that amount now stands at \$276,000 for each fiscal year. Last year, grants were made to 50 local school districts by OPI for gifted and talented programs. There are approximately 500 school districts in the State of Montana.

elects to identify gifted and talented students and to devise programs to serve them, then it must comply with the Board's policies. It was intended by the legislature, however, that such policies would address the review of programs and services to gifted and talented students, not that the Board would be granted authority to require the provision of such programs. 44 Op. Att'y Gen. No. 4, slip copy at 5. The opinion was limited to the construction of the Board's statutory authority and expressly refrained from drawing any conclusions about the Board's constitutional authority. Id. at 3.

Following issuance of the opinion, the 1991 Montana Legislature passed House Bill 116, which was signed into law by the Governor, finding that section 10.55.804, ARM, was invalid because it conflicts with section 20-7-902(1), and repealing the rule effective July 1, 1991. Given the express conflict between statute and rule, the question left open by the Attorney General's Opinion is squarely presented.

The Board brought a declaratory judgment action in district court to determine the validity of its rule, initially naming only the Administrative Code Committee (ACC) as a party defendant. Thus, the action was handled at the district court level by Legislative Council staff attorneys, and this office did not participate. The ACC sought to dismiss the suit on grounds of legislative immunity, which was denied. The Board, nonetheless, amended its complaint to name the State of Montana as an additional party defendant. Thereafter, both parties moved for summary

judgment on the merits and the immunity issue was also further briefed.

In an order entered March 12, 1992, Judge Sherlock held that the immunity issue need not be resolved in order to decide the case, since a declaratory judgment action against the State was clearly proper to test the validity of the statute. He accordingly dismissed the ACC, leaving the State of Montana as the only named defendant. On the merits, and relying on a case decided by the West Virginia Supreme Court, Judge Sherlock concluded that the Board's rule has precedence over the statute by virtue of the Board's constitutional authority of "general supervision" over the school system. Finding no ambiguity in the constitutional language governing the powers of the Board, Judge Sherlock did not consider any constitutional history in reaching his conclusion, but determined that the Board was vested with rule-making power under the Constitution and that the legislature's attempt to override that authority violated the separation of powers doctrine of Article III, section 1, of the Montana Constitution. (Montana Board of Public Education v. Administrative Code Committee, BDV-91-1072, Order and Decision, copy attached.)

#### DISCUSSION

This case presents an important question of constitutional authority of the Board *vis a vis* the powers of the state legislature. The issue requires consideration and balancing of several provisions of the Montana Constitution. First, Article III, section 1, provides for three distinct branches of government --

legislative, executive, and judicial -- and prohibits any branch from exercising any power properly belonging to either of the others unless otherwise permitted by the Constitution. The legislative power is vested in the bicameral legislature. Art. V, sec. 1, Mont. Const. The legislature is given comprehensive authority over matters of state revenue and finance. It is charged with enacting a balanced budget, Art. VIII, sec. 9, and must "insure strict accountability of all revenue received and money spent by the state" and other governmental entities, Art. VIII, sec. 12.

In matters of education, the legislature is required to "provide a basic system of free quality public elementary and secondary schools" and must "fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system." Art. X, sec. 1, Mont. Const.

Article X, section 9, establishes the State Board of Education and its composite boards, the Board of Regents and the Board of Public Education. This provision reflects the recognition of the delegates to the 1972 Constitutional Convention that a single educational board could not adequately handle matters governing both higher education and elementary and secondary (K-12) education. The delegates were particularly interested in creating an autonomous board to govern higher education within the state, and accordingly gave the regents "full power, responsibility, and authority to supervise, coordinate, manage and control the Montana

university system." Art. X, sec. 9(2)(a), Mont. Const. In contrast to this sweeping authority, the board of public education was created "to exercise general supervision over the public school system," and to have other duties "as provided by law." Art. X, sec. 9(3)(a), Mont. Const.

The district court concluded that the gifted and talented rule adopted by the Board is "well within its constitutional prerogative to exercise general supervision over the public school system." (Order and Decision at 8.) Although the court recognized the need to balance the powers of the legislature with those of the Board, it conducted no independent balancing test in reaching its conclusion, but simply determined that the words "general supervision" are clear and unambiguous and grant authority to the Board to enact rules such as the one at issue here.

The court's determination that resort need not be made to the comments of the Constitutional Convention to determine the meaning of "general supervision" is troubling, particularly in light of its failure to compare the power given the Board with the power given the regents. A reading of the pertinent constitutional provisions shows that more factors enter into the balance than were credited by the district court. Not only should the constitutional authority of the legislature and of the regents be more carefully scrutinized, but account also should be taken of section 8 of Article X, which grants "supervision and control of schools in each school district" to the local boards of trustees.

The transcripts of the Constitutional Convention indicate that the delegates did not intend to change substantively the roles of the Board of Public Education and of the local school boards in administering the public school system. As observed by Delegate Davis, the delegates intended that the "local school boards run the high schools and the grade schools," while the state board would "approve of the curriculum and that sort of thing." VI Mont. Const. Conv. at 2103 (1972). Telling are the comments of Delegate Champoux, chairman of the Committee on Education and Public Lands:

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.

Id. at 2051 (emphasis added). See also id. at 2097 (elimination of word "control" shows "intention that things shall remain as they are presently").<sup>2</sup>

With respect to education in general, the delegates were particularly concerned that the law-making body retain control of the purse strings. Hence the requirement that the funds and

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<sup>2</sup>Consistent with this expressed intention, the statutes governing the powers and duties of the Board, as well as those governing local school boards, did not change markedly after the new constitution was approved. Compare R.C.M. 1947, § 75-5607 with § 20-2-121, MCA; and R.C.M. 1947 § 75-5993 with § 20-3-324, MCA.

appropriations under the control of the regents be subject to the same audit provisions as are all other state funds. Art. X, sec. 9(2)(d), Mont. Const. The district court did not consider the potential impact of Board supremacy upon the legislature's ability to control school funding and appropriations.

There is case law to the effect that the rules of a constitutionally empowered board or commission take precedence over conflicting legislation. Most compelling of the cases is, of course, the West Virginia case relied on by the district court. West Virginia Board of Education v. Hechler, 376 S.E.2d 839 (W. Va. 1988). There, construing a provision in the state constitution giving "general supervision of the free schools of the State" to the West Virginia Board of Education, the court held that a rule setting forth minimum requirements for design and equipment of school buses was within the board's authority and could not be subjected to provisions of the state's Administrative Procedure Act. Other courts have found similar authority in commissions given broad authority under their states' constitutions. See, e.g., Airboat Ass'n of Florida, Inc. v. Florida Game and Fresh Water Fish Commission, 498 So.2d 629 (Fla. Ct. App. 1986) (commission endowed by state constitution with power to "exercise the regulatory and executive powers of the state" had exclusive legislative authority to adopt rules, and legislature was constitutionally prohibited from adopting conflicting statutes); Hubbard v. Department of City Civil Service, 466 So.2d 772 (La. Ct. App. 1985) (constitutional grant of "broad and general rule-

making" powers to commission precluded legislature from enacting conflicting statute). In some respects, however, cases from other jurisdictions are not particularly helpful given the unique language and history of the Montana Constitution. Although the West Virginia Constitution does require the state legislature to provide "for a thorough and efficient system of free schools," it contains no provision similar to the Montana Constitution's grant of authority to the Board of Regents. Further, the rule at issue in Hechler concerning school buses was found to be "integral to the day-to-day operation of schools" and thus within the board's powers of "general supervision." 376 S.E.2d at 842. The rule at issue here may be distinguishable.

Given the unique provisions of the Montana Constitution, Judge Sherlock's ruling could have far-reaching impacts. If, as he concluded, "general supervision" includes the power to overrule substantive legislation regarding the provision of programs within the school system, how broad is a local school board's authority for "supervision and control" within the district? The Montana Supreme Court has determined that such power to supervise and control does not allow widely disparate funding between individual school districts. Helena Elementary School Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989). Rather, the legislature is responsible for providing the basic educational system, which must provide equal educational opportunity throughout the districts.  
Id.

By failing to consider such factors as the distinction in power intended between the Board of Public Education and the Board of Regents; the impact of its interpretation on the authority of local boards; and the potential to thwart the legislature's ability to keep control of the purse strings, the district court did not conduct the proper balancing process to determine the extent of the Board's constitutional authority. If the case is appealed, we will argue that the legislature, having the ultimate responsibility to provide for a basic system of free quality public education, the obligation to fund such a system, and exclusive control of the purse strings, defines the scope of the educational system in Montana. The Board of Public Education supervises the system created by the legislature. The constitution prohibits the legislature from derogating the role of the Board in public education or from granting supervisory powers to another agency, but it is constitutionally empowered with the duty to set forth the substantive provisions of the educational system.

As a practical matter, funding and accreditation go hand in hand. Stiffer accreditation standards set by the Board could increase the "cost of doing business" and the legislature, through control of the purse and by virtue of its duty to establish the educational system, must retain ultimate authority over the educational scheme. We would not likely argue, however, that under no circumstances could the Board have promulgated a rule governing gifted and talented programs. Had the legislature remained silent on the issue, there is no prohibition against action by the Board.

Rick Bartos  
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in its discretion. But, when the Legislature steps in, we would argue that statutory enactments take precedence over Board rules.

In summary, questions about the Board's constitutional authority have been brewing for some time and this case presents an opportunity for clarification. Although there are no guarantees of how the question may be resolved, the district court's treatment of the issue has implications that go far beyond gifted and talented programs. Given the nature of the funding for such programs, this case will illustrate the difficulty of allowing Board superiority over legislative enactments when the financial impacts can be substantial.

Because of the importance of the issue and the significance of its ramifications, we have concluded that the judgment of the district court should be appealed. Please let me know by the date indicated above if the Governor thinks there are other factors meriting against an appeal.