

LEGAL REVIEW NOTE

Bill No.: HB 562

LC#: LC0518, To Legal Review Copy, as
of January 25, 2023

Short Title: Authorize establishment of
community choice schools

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See *Alexander v. Bozeman Motors, Inc.*, 356 Mont. 439, 234 P.3d 880 (2010); *Eklund v. Wheatland County*, 351 Mont. 370, 212 P.3d 297 (2009); *St. v. Pyette*, 337 Mont. 265, 159 P.3d 232 (2007); and *Elliott v. Dept. of Revenue*, 334 Mont. 195, 146 P.3d 741 (2006).*

Legal Reviewer Comments:

Article X, section 8, provides that the "supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law." Article X, section 9(3)(a), creates a "board of public education to exercise general supervision over the public school system and other such public educational institutions as may be assigned by law." The Montana Supreme Court has held that the Legislature does not have the ability to remove duties from the Board of Public Education (Board) that fall under the Board's directive to generally

supervise public educational systems. See *Board of Public Education v. Judge*, 167 Mont. 261, 268-269 (1975), holding that the Legislature could not transfer responsibility for vocational education from the Board of Public Education to the State Board of Education because the Legislature did not have the authority to alter the structure of the three constitutional boards of education where the State Board of Education was intended only to plan, coordinate, and evaluate the state's educational systems.

In Section 14(1)(c) and section 14(8) of HB 562, community choice schools are exempt from the provisions of Title 20, as well as any state or local rule, regulation, policy, or procedure that otherwise relates to traditional public schools and traditional local school districts. Section 14(7)(b) directs the governing board of a community choice school to set graduation requirements and award degrees and diplomas. Section 14(8) specifically exempts teachers employed at community choice schools from the teacher certification requirements in Title 20, chapter 4. As drafted, HB 562 may raise a potential constitutional question as to whether this legislative direction conflicts with the Board's exercise of general supervision over the public school system and the local boards of trustees' constitutional responsibility to supervise and control the schools in each district as prescribed by Article X, sections 8 and 9(3)(a), of the Montana Constitution.

Requester Comments:

Article X, section 9(3)(a) is maintained in HB 562, as the Board of Public Education clearly has "general supervision" over the Commission as well as all the Choice Schools.

- Section 4(1) of the bill specifically states, "The commission is attached for administrative purposes as prescribed in 2-15-121(2), except as provided in this section, and under the general supervision of the BPE as set forth in this section," and
- Section 4 (12) also clearly states, "By August 1 of each year the commission shall annually report to the state board of public education the academic performance and financial reports of each choice school authorized within the state," and
- Section 7 (10) clarifies the details of the annual report provided to the BPE as well as the Education Interim Committee. Additionally,
- Section 14(9) states the choice schools are "under control of the state of Montana." Thereby,
- The Commission will be an entity of the state created by law, appointed by elected officials (Section 4(2)), and under the general supervision of the BPE.

The case cited, *Board of Public Education v. Judge*, 167 Mont. 261, 268-269 (1975) does not apply to the Commission as proposed in HB 562. Though the Montana Supreme Court has held that the Legislature does not have the ability to remove duties from the BPE that fall under the Board's directive to generally supervise public educational systems, Authorizing Choice Schools is not an existing duty of the BPE, and therefore, the authorizing duties are neither being taken "from" the BPE nor being given "to" the Commission by the BPE; rather,

- The act of Authorizing Choice Schools and Authorizing authorizers would be created in the Legislature as a separate public education entity authorized by and under control of the State of Montana (Section 14(9)); thereby,
- The Commission will not alter the structure of the three constitutional boards of education. Additionally,
- Article X, Section 1(3) of the Montana Constitution allows for the creation of the Commission and Choice Schools as proposed in the bill because, "...the legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable."

Article X, Section 8 is also maintained in HB 562. The constitution states, "supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law." School board elections are provided for in Title 20; however, Choice Schools are exempt from Title 20 except where noted in sections 1-17 of the bill (Section 14(1)(c)). Therefore,

- HB 562 provides new law to describe how school boards are elected (Section 14(1)(f) (i-iv). Additionally,
- Choice Schools are separate from the traditional districts in which they may be physically located (Section 14(9)), and thereby are neither "in" nor "of" any district.

In summary, HB 562 outlines clearly that the Commission and all Choice Schools will be under the general supervision of the BPE and the State of Montana and must additionally report annually to the Interim Education Committee. Furthermore, the Choice School boards, though initially self-selected and independent, will be required to hold elections as outlined in HB 562 and in their own bylaws. Additionally, Choice Schools will neither be "in" nor "of" the districts in which they are physically located. And, finally, the legislature has the authority to "provide such other educational institutions...as it deems desirable" (Article X, Section 1(3)).