

ROLES AND RESPONSIBILITIES

Board of Public Education Authority

Constitution of Montana -- Article X -- EDUCATION AND PUBLIC LANDS

Section 9. Boards of education. (1) There is a state board of education composed of the board of regents of higher education and the board of public education. It is responsible for long-range planning, and for coordinating and evaluating policies and programs for the state's educational systems. It shall submit unified budget requests. A tie vote at any meeting may be broken by the governor, who is an ex officio member of each component board.

(2) (a) The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law.

(b) The board consists of seven members appointed by the governor, and confirmed by the senate, to overlapping terms, as provided by law. The governor and superintendent of public instruction are ex officio non-voting members of the board.

(c) The board shall appoint a commissioner of higher education and prescribe his term and duties.

(d) The funds and appropriations under the control of the board of regents are subject to the same audit provisions as are all other state funds.

(3) (a) 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.

(b) The board consists of seven members appointed by the governor, and confirmed by the senate, to overlapping terms as provided by law. The governor, commissioner of higher education and state superintendent of public instruction shall be ex officio non-voting members of the board.

Constitution of Montana -- Article III -- GENERAL GOVERNMENT

Section 1. Separation of powers. 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.

Montana Code Annotated 2019 – Adoption of Rules

20-2-114. Adoption of rules -- seal -- record of proceedings. The board of public education, the board of regents, and the state board of education each shall:

(1) adopt rules consistent with the constitution or laws of the state of Montana necessary for its own government or the proper execution of the powers and duties conferred upon it by law;

(2) adopt and use an official seal to authenticate its official acts; and

(3) keep a record of its proceedings.

Montana Code Annotated 2019 – Powers and Duties

20-2-121. Board of public education -- powers and duties. The board of public education shall:

- (1) effect an orderly and uniform system for teacher certification and specialist certification and for the issuance of an emergency authorization of employment by adopting the policies prescribed by **20-4-102** and **20-4-111**;
- (2) consider the suspension or revocation of teacher or specialist certificates and appeals from the denial of teacher or specialist certification in accordance with the provisions of **20-4-110**;
- (3) administer and order the distribution of BASE aid in accordance with the provisions of **20-9-344**;
- (4) adopt and enforce policies to provide uniform standards and regulations for the design, construction, and operation of school buses in accordance with the provisions of **20-10-111**;
- (5) adopt policies prescribing the conditions when school may be conducted on Saturday and the types of pupil-instruction-related days and approval procedure for those days in accordance with the provisions of **20-1-303** and **20-1-304**;
- (6) adopt standards of accreditation and establish the accreditation status of every school in accordance with the provisions of **20-7-101** and **20-7-102**;
- (7) approve or disapprove educational media selected by the superintendent of public instruction for the educational media library in accordance with the provisions of **20-7-201**;
- (8) adopt policies for the conduct of special education in accordance with the provisions of **20-7-402**;
- (9) adopt rules for issuance of documents certifying equivalency of completion of secondary education in accordance with **20-7-131**;
- (10) adopt policies for the conduct of programs for gifted and talented children in accordance with the provisions of **20-7-903** and **20-7-904**;
- (11) adopt rules for student assessment in the public schools; and
- (12) perform any other duty prescribed from time to time by this title or any other act of the legislature.

Montana Code Annotated 2019 – Standards of Accreditation

20-7-101. Standards of accreditation. (1) Standards of accreditation for all schools must be adopted by the board of public education upon the recommendations of the superintendent of public instruction. The superintendent shall develop recommendations in accordance with subsection (2). The recommendations presented to the board must include an economic impact statement, as described in **2-4-405**, prepared in consultation with the negotiated rulemaking committee under subsection (2).

(2) The accreditation standards recommended by the superintendent of public instruction must be developed through the negotiated rulemaking process under Title 2, chapter 5, part 1. The superintendent may form a negotiated rulemaking committee for accreditation standards to consider multiple proposals. The negotiated rulemaking committee may not exist for longer than 2 years. The committee must represent the diverse circumstances of schools of all sizes across the state and must include representatives from the following groups:

- (a) school district trustees;
- (b) school administrators;
- (c) teachers;
- (d) school business officials;
- (e) parents; and
- (f) taxpayers.

(3) Prior to adoption or amendment of any accreditation standard, the board shall submit each proposal, including the economic impact statement required under subsection (1), to the education interim committee for review at least 1 month in advance of a scheduled committee meeting.

(4) Unless the expenditures by school districts required under the proposal are determined by the education interim committee to be insubstantial expenditures that can be readily absorbed into the budgets of existing district programs, the board may not implement the standard until July 1 following the next regular legislative session and shall request that the same legislature fund implementation of the proposed standard.

(5) Standards for the retention of school records must be as provided in **20-1-212**.

Montana Code Annotated 2019 – School Bus Standards

20-10-111. Duties of board of public education. (1) The board of public education, with the advice of the Montana department of justice and the superintendent of public instruction, shall adopt and enforce policies, not inconsistent with the motor vehicle laws, to provide uniform standards and regulations for the design, construction, and operation of school buses in the state of Montana. The policies must:

(a) prescribe minimum standards for the design, construction, and operation of school buses consistent with:

(i) the recommendations adopted by the national conference on school transportation; and

(ii) the federal motor vehicle safety standards;

(b) prescribe standards and specifications for the lighting equipment and special warning devices to be carried by school buses in conformity with:

(i) current specifications approved by the society of automobile engineers;

(ii) motor vehicle laws; and

(iii) the requirement that all school buses have an alternately flashing prewarning lighting system of four amber signal lamps to be used while preparing to stop and an alternately flashing warning lighting system of four red signal lamps to be used while stopped in accordance with **61-9-402**;

(c) establish other driver qualifications considered necessary in addition to the qualifications required in **20-10-103**;

(d) prescribe criteria for the establishment of transportation service areas for school bus purposes by the county transportation committee that shall allow for the establishment of service areas without regard to the district boundary lines within the county;

(e) prescribe other criteria for the determination of the residence of a pupil that may be considered necessary in addition to the criteria established in **20-10-105**; and

(f) prescribe standards for the measurement of the child seating capacity of school buses, to be known as the rated capacity.

(2) The board of public education shall prescribe other policies necessary for the proper administration and operation of individual transportation programs that are consistent with the transportation provisions of this title.

Montana Code Annotated 2019 – Montana School for the Deaf and Blind

20-8-101. Montana school for deaf and blind -- state-supported special school. The school for the deaf and blind, located in the city of Great Falls, is known and designated as the Montana school for the deaf and blind and must be conducted as a separate and independent unit and special school of the state of Montana under the general supervision, direction, and control of the board of public education. However, the transfer of that school or any change in the name of the school or in the objects or purposes of the school may not be

considered or construed to impair or work any forfeiture or alteration of any rights, grants, or property made to or acquired by that school or by the state for the use and benefit of that school.

20-8-103. Board of public education rules. The board of public education shall adopt and prescribe rules as the board considers necessary and proper for the maintenance and government of the school, the admission of children in conformity with the provisions of this chapter, and the qualifications and compensation of the superintendent and teaching staff of the school, provided that the superintendent must have a ready and working knowledge of the sign language.

Montana First Judicial District Court
County of Lewis and Clark

MONTANA BOARD OF PUBLIC EDUCATION,
Petitioner,

Cause No. BDV – 91 – 1072

vs.

MONTANA ADMINISTRATIVE CODE COMMITTEE,
Respondent.

ORDER AND DECISION

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, 698 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 & Kyriess 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, 587587 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 a 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 constitutionally 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

Certification Standards and Practices Advisory Council **Authority**

Montana Code Annotated 2019 – Certification Standards and Practices Advisory Council

2-15-1522. Certification standards and practices advisory council. (1) There is a certification standards and practices advisory council allocated to the board of public education.

(2) The council consists of seven members appointed by majority vote of the board of public education.

The membership of the council must include:

(a) three teachers engaged in classroom teaching, including:

(i) one who teaches within kindergarten through grade 8;

(ii) one who teaches within grades 9 through 12; and

(iii) one additional teacher from any category in subsection (2)(a) or (2)(b);

(b) one person employed as a specialist or K-12 specialist;

(c) one faculty member from an approved teacher education program offered by an accredited teacher education institution;

(d) one person employed as an administrator, with the certification required in **20-4-106(1)(c)**; and

(e) one school district trustee.

(3) The board of public education shall select and appoint the members by June 1. If a vacancy occurs on the council, the board of public education shall appoint a person from the category of membership, as provided in subsection (2), in which the vacancy has occurred to serve the unexpired term.

(4) Members shall serve staggered 3-year terms and must be appointed so that no more than three appointments expire in any 1 year.

Montana Code Annotated 2019 – Fees for Teacher and Specialist Certificates

20-4-109. Fees for teacher and specialist certificates. (1) A person applying for the issuance or renewal of a teacher or specialist certificate shall pay a fee not to exceed \$6 for each school fiscal year that the certificate is valid. In addition to this fee, a person who has never held any class of Montana teacher or specialist certificate or for whom an emergency authorization of employment has never been issued shall pay a filing fee of \$6. The fees must be paid to the superintendent of public instruction, who shall deposit the fees with the state treasurer to the credit of the state special revenue fund account, created in subsection (2), to be used in the following manner:

(a) \$4 for expenses of the certification standards and practices advisory council created in **2-15-1522**;

(b) \$2 to the board of public education and the certification standards and practices advisory council for activities in support of the constitutional and statutory duties of the board of public education and the certification standards and practices advisory council.

(2) There is an account in the state special revenue fund. Money from fees for teacher or specialist certificates required in subsection (1) must be deposited in the account.

Montana Code Annotated 2019 – Duties of the Council

20-4-133. Duties of the council. (1) The council shall study and make recommendations to the board of public education in the following areas:

(a) teacher certification standards, including but not limited to precertification training and education requirements and certification renewal requirements and procedures;

(b) administrator certification standards, including but not limited to precertification training and education requirements and certification renewal requirements and procedures;

(c) specialist certification standards, including but not limited to precertification training and education requirements and certification renewal requirements and procedures;

(d) feasibility of establishing standards of professional practices and ethical conduct;

(e) the status and efficacy of approved teacher education programs in Montana; and

(f) policies related to the denial, suspension, and revocation of teacher, administrator, and specialist certification and the appeals process. For the purpose of preparing recommendations in this area, the council is authorized to review the individual cases and files that have been submitted to the board of public education.

(2) The council shall submit a written report annually to the board of public education with its recommendations for the above areas. The council may submit recommendations to the board of public education at other times that the council considers appropriate.

(3) The board of public education shall:

(a) at a regularly scheduled meeting, consider any recommendations and reports of the council; and

(b) approve, disapprove, or modify each recommendation of the council by majority vote of the board.