

his partners or employees, have any part in any case before the Municipal Court.

With respect to your second question, there is nothing in either the charter of the city or in Section 28 of the Home Rule Act to prevent the municipal judge from drawing salary or other compensation as municipal judge while at the same time receiving salary or other compensation for acting as attorney for the school board in the same city.

FRANK J. KELLEY,
Attorney General.

640911.1

EDUCATION, STATE BOARD OF: Member – qualifications of candidate.
PUBLIC OFFICES AND OFFICERS: Compatibility.

Persons who are registered and qualified electors of the state, as provided by Sec. 281 of Act 116, P.A. 1954, as amended, are eligible for election to the office of member of the State Board of Education.

Incompatibility exists between the following positions or offices and that of member of the State Board of Education; member of a local or intermediate board of education; superintendent of schools of a fourth-class, third-class or intermediate school district; position as teacher in a school district; and member of the administrative staff of a community college.

The offices of member of the State Board of Education and of the instructional or administrative staff of a state college or university which confers baccalaureate degrees are not incompatible.

No. 4309

September 11, 1964.

Dr. Lynn M. Bartlett
Superintendent of Public Instruction
Lansing, Michigan

You have requested my opinion on the following questions:

1. May an elected member of a local or intermediate board of education be elected to serve on the State Board of Education provided for in Section 3, Article VIII of the Michigan Constitution of 1963?
 2. May a person occupying the office of superintendent of schools of a fourth class, third class or intermediate school district, or a teacher of a local or intermediate school district, be elected to and serve on the State Board of Education, provided for under the Michigan Constitution of 1963?
 3. May a member of the instructional or administrative staff of a state college or university, or a community college, be elected to and serve on the State Board of Education, provided for under the Michigan Constitution of 1963?
1. In Article VIII, Section 3 of the Michigan Constitution of 1963, the people have provided for a state board of education to consist of 8 members who shall be nominated by party conventions and elected at

large for a term of 8 years as prescribed by law. This portion of the Michigan Constitution provides, in pertinent part, as follows:

"Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.

"The state board of education shall appoint a superintendent of public instruction whose term of office shall be determined by the board. He shall be the chairman of the board without the right to vote, and shall be responsible for the execution of its policies. He shall be the principal executive officer of a state department of education which shall have powers and duties provided by law.

* * *

"The power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section."

Section 281 of Act 116, P.A. 1954, as last amended by Act 5, P.A. 1963, Second Extra Session, M.S.A. Current Material § 6.1281, provides that no person shall be eligible to membership on the state board of education who is not a registered and qualified elector of the state of Michigan.

Act 287, P.A. 1964, provides for the organization and functions of the state board of education as constituted by the people in the Michigan Constitution of 1963, such functions to be assumed on January 1, 1965. Section 10 of the act contains the following general grant of authority to the state board of education:

"(a) Determination of the requirements for, and issuance of, all licenses and certificates for teachers in the public schools of this state.

"(b) Jurisdiction and control of the Michigan school for the deaf at Flint, the Michigan school for the blind at Lansing, and the Michigan rehabilitation institute for veterans and disabled adults at Pine Lake, including power to make rules and regulations for the schools necessary to enforce discipline, preserve health and provide for proper physical, intellectual and moral training of their pupils.

"(c) Regulation of school bus transportation, review of the annexation or attachment of nonoperating school districts to operating school districts, and the hearing of appeals from decisions on alterations of boundaries of school districts as may be provided by law.

"(d) Inspection of educational corporations as may be provided by law.

"(e) The appointment, after January 1, 1965, of the members of the state board for public community and junior colleges, as provided by law."

Act 269, P.A. 1955, as amended, being C.L.S. 1961 § 340.1 et seq.; M.S.A. 1959 Rev. Vol. § 15.3001 et seq., is known as the School Code of 1955.

Pursuant to authority conferred by Section 861 of the School Code of 1955, the state board of education may suspend a teacher's certificate where the teacher refuses, without sufficient cause, to perform a lawful contract to teach in any school in the state, a teacher's certificate being required before a teacher can enter into a contract to teach in the school district, as specified in Section 569 of the School Code of 1955.

Consideration must also be given to Section 14 of Act 287, P.A. 1964, which provides as follows:

"After June 30, 1965, a reference in any law to the powers and duties of the superintendent of public instruction is deemed to be made to the state board unless the law names the superintendent as a member of another governmental agency or provides for an appeal to the state board of education from a decision of the superintendent, in which cases the reference is deemed to be made to the superintendent of public instruction appointed under the 1963 constitution. Such superintendent of public instruction shall be responsible for the execution of the policies of the state board. The state board may delegate any of its functions to him. He shall be the principal executive and administrative officer of the state department of education."

The duties of the superintendent of public instruction, pertinent to your first question, are set forth in Section 252 of the School Code of 1955, as follows:

"(c) To require each board of education or the officers thereof to observe the laws relating to schools, to account for any pay over to the credit of the school district all moneys illegally expended or otherwise disposed of, and he shall have authority to compel such observance and accounting by appropriate legal proceedings instituted in courts of competent jurisdiction by direction of the attorney general;

"(d) To examine and audit the official records and accounts of any school district and require corrections thereof when necessary, and to require an accounting from the treasurer of any school district when deemed necessary;

"(e) To require all school districts to maintain school or provide educational facilities for all children resident in such district for at least the statutory period, and to require school boards to carry out his recommendations relative to the safety of school buildings, equipment and appurtenances, including all conditions that may endanger the health or life of the school children;

* * *

"(j) To prescribe appropriate uniform child and finance accounting records for use in the school districts of this state, and to make such rules and regulations for their adoption as he may deem necessary."

Under Section 253 of the School Code of 1955, the superintendent of public instruction is empowered to remove from office any member of any board of education who shall have illegally used or caused to be used or

disposed of, in any manner whatever, any of the public moneys entrusted to his charge, or who shall persistently and without sufficient cause refuse or neglect to discharge any of the duties of his office. This power reposed in the superintendent of public instruction will be exercised by members of the state board of education pursuant to Act 287, P.A. 1964. Thus, members of the state board of education, if they are also elected members of local school boards or intermediate boards of education, may remove themselves from office.

In Michigan the legislature has divided the state into school districts consisting of primary school districts, school districts of the fourth class, school districts of the third class, school districts of the second class, school districts of the first class, special act school districts and intermediate school districts. Each of the aforesaid school districts is governed by a board of education composed of from 3 to 7 members, as provided by law. Primary school districts are governed by a board of education composed of 3 members as prescribed by Sections 27 and 28 of the School Code of 1955. Intermediate school districts are governed by a board of education composed of either 5 or 7 members, depending upon whether or not the intermediate district is reorganized, as set forth in Sections 292a and 293a of the School Code of 1955, as added by Act 190, P.A. 1962.

The powers of the respective boards of education are enumerated in the applicable provisions of the School Code of 1955, or the controlling special act, as the case may be. From a reading of these provisions it is clear that boards of education are charged with the duty of the education of children residing in their districts.

The provisions of the Michigan Constitution of 1963, the provisions found in Act 287, P.A. 1964, and the applicable provisions of the School Code of 1955, require the conclusion that the office of member of a board of education of a school district, either primary, fourth class, third class, second class, first class, special act or intermediate, are subordinate to the Michigan state board of education. It is equally clear that the state board of education has supervisory power over the aforesaid enumerated boards of education. The nature of the duties of the respective offices of member of the state board of education and member of a district board of education are such as to render it improper from considerations of public policy for one person to retain both of them. *Weza v. Auditor General*, 297 Mich. 686. Not only are the two offices such as to make one subordinate to the other and to subject it to supervisory power, but the state board of education is empowered to remove members of local boards of education in accordance with law. A person may not simultaneously occupy two offices if in one of the offices he has the right of removal over the other. *Attorney General, ex rel. Moreland v. Common Council of the City of Detroit*, 112 Mich. 145 (1897).

While members of local or intermediate boards of education may be candidates for the office of member of the state board of education, the acceptance of the latter office would vacate the office of member of the local or intermediate board of education. *Weza v. Auditor General, supra*. Thus, persons who occupy the office of member of a local or intermediate board of education who are registered and qualified electors of the state

may seek the office of member of the state board of education. In the event that they are elected to that office, should they accept the office of member of the state board of education, they would vacate the office of member of the local or intermediate board of education.

Therefore, it is my opinion that the offices of member of the state board of education and member of a local or intermediate board of education are incompatible and may not be occupied simultaneously.

2. The board of education of a school district of the fourth class is empowered to employ a superintendent of schools pursuant to contract for a term fixed by the board and not to exceed 3 years, as set forth in Sec. 66 of the School Code of 1955. The legislature has under the aforesaid section of the School Code imposed the following statutory duties upon the superintendent of schools of said districts:

“(a) To recommend in writing all teachers necessary for the schools and to suspend any teacher for cause until the board may consider such suspension;

“(b) To classify and control the promotion of pupils;

“(c) To recommend to the board the best methods of arranging the course of study and the proper textbooks to be used;

“(d) To make reports in writing to the board and to the superintendent of public instruction annually, or oftener if required, in regard to all matters pertaining to the educational interests of the district;

“(e) To supervise and direct the work of the teachers and other employees of the board;

“(f) To assist the board in all matters pertaining to the general welfare of the school and to perform such other duties as the board may determine; and

“(g) To put into practice the educational policies of the state and of the board in accordance with the means provided by the board.”

A board of education of any school district of the third class is authorized to contract with, appoint and employ a suitable person to serve as superintendent of schools “who shall hold his office for a term fixed by the board and not to exceed 5 years,” as set forth in Section 119 of the School Code of 1955, and the statutory powers of the superintendent of schools enumerated in the statute are substantially the same as those to be exercised by a superintendent of schools in a school district of the fourth class.

The superintendent of the intermediate school district is provided for in Section 298a of the School Code of 1955, as added by Act 190, P.A. 1962. This portion of the School Code of 1955 recognizes him as the successor to the county superintendent of schools and the county commissioner of schools. In *Weza v. Auditor General*, supra, the position of county school commissioner was held to be an office created by the legislature. The powers and duties of the intermediate superintendent of schools are enumerated in Section 301a of the School Code of 1955, which provides in part as follows:

“* * * The superintendent shall have all powers and duties granted to the county commissioner of schools and county superintendent of

schools by any and all other acts unless such powers and duties are inconsistent with this chapter. The superintendent shall be the executive officer of the board and shall:

(a) Put into practice the educational policies of the state and of the board.

(b) Recommend in writing all employees and suspend any employee for cause until the board considers the suspension.

* * *

(f) Classify and control the promotion of pupils in constituent districts not employing local superintendents.

(g) Supervise and direct the work of the teachers in constituent districts not employing local superintendents.

* * *

(k) Perform such duties as the superintendent of public instruction or the board prescribes, receive all forms and communications which may be sent to him by the superintendent of public instruction, dispose of the same as directed by the superintendent of public instruction, make reports as may be required by the superintendent of public instruction and at the close of his term of office deliver all records, books and papers belonging to the office to his successor."

In order for a person to become a superintendent of schools of a school district, he is required to possess an earned baccalaureate degree from a college acceptable to the state board of education, and be the possessor of or be eligible for a teacher's certificate, or have additional qualifications equivalent thereto in accordance with standards which are determined by the state board of education, provided that the state board of education may waive the requirements for any person employed as superintendent of schools for the school year 1951-52 and subsequent years while he continues in such capacity for the same school district, as set forth in Section 573 of the School Code of 1955.

Section 10 of Act 287, P.A. 1964 empowers the state board of education to determine the requirements for and the issuance of all licenses and certificates for teachers in the public schools of this state.

An examination of the powers and duties of the superintendent of schools in fourth class school districts, third class school districts and intermediate school districts, recited above, is persuasive of the conclusion that the legislature has created the position of superintendent of schools of a local or intermediate school district as a public office, in that such officer exercises some of the sovereign power of the government for the public good.

Superintendents of schools have been held to be public officers exercising some portion of the functions of government for the public good.

Board of Education of Boyle County v. McChesney, (Ky. 1930) 32 SW 2d 26;

Benson v. Inhabitants of Town of Newfield, (Me. 1938) 1 A 2d 227;

State ex rel. Hill v. Sinclair, (Kan. 1918) 175 P 41

State ex rel. Howard v. Ireland, (Mont. 1943) 138 P 2d 569.

It is clear that the superintendents of the school districts in question execute the education policies of the state and it is equally clear that such policies shall be largely determined by the state board of education.

It must follow, therefore, that the two offices of superintendent of schools and member of the state board of education are incompatible. They may not be occupied simultaneously.

While a person occupying the public office of superintendent of schools of a local or intermediate school district may become a candidate for the office of member of the state board of education where he or she is a registered and qualified elector of the state, as provided by Section 281 of Act 116, P.A. 1954, as last amended by Act 5, P.A. 1963, Second Extra Session, *supra*, in the event that such person is elected to the office of member of the state board, acceptance of such office would serve to vacate the office of superintendent of schools of the particular school district.

Therefore, it is the opinion of the Attorney General that a person occupying the office of superintendent of schools of a school district of the fourth class, third class or intermediate district may not simultaneously occupy the office as member of the state board of education.

The state board of education is expressly empowered under Section 10 of Act 287, P.A. 1964 to "determine" the requirements for and issuance of all licenses and certificates for teachers in the public schools of this state. A comparable power in the state board of education is found in Act 202, P.A. 1903, as last amended by Act 30, P.A. 1963, Second Extra Session, being M.S.A. Cur. Mat. § 15.1111.

The Attorney General has ruled that the state board of education is lawfully empowered to revoke a teacher's certificate for any cause which would have justified the withholding of the issuance of the certificate by the state board of education. O.A.G. 1951-52, p. 293.

Under Section 861 of the School Code of 1955 statutory authority is given to the state board of education to suspend any teacher's certificate issued to any teacher who refuses, without good cause, to perform her contract to teach in any school in the state of Michigan.

The doctrine of incompatibility which operates to vacate the first office is applicable where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to hold them both at the same time. *Attorney General, ex rel. Moreland v. Common Council of the City of Detroit*, *supra*.

Teachers have been held to be employees and not public officers of school districts for the purposes of Article XVI, Section 3 of the Michigan Constitution of 1908, which barred the increase or decrease of the salary of any public officer except circuit judges after election or appointment. *Attorney General v. Board of Education of the City of Detroit*, 225 Mich. 237 (1923).

The public policy of the state of Michigan as to dual officeholding by members of the legislature was expressed in Article V, Section 6 of the Michigan Constitution of 1908, which specified that no person holding any

office under the United States or this state, or any county office except notaries public, officers of the militia and officers elected by townships, shall be eligible to or have a seat in either house of the legislature.

In the Constitution of 1963 the people have mandated in Article IV, Section 8, that

“No person holding any office, *employment or position* under the United States or this state or a political subdivision thereof, except notaries public and members of the armed forces reserve, may be a member of either house of the legislature.” (Emphasis supplied)

Thus, in the Michigan Constitution of 1963 we find a clear declaration of the public policy of the people to be that prohibition of duality in officeholding by members of the legislature extends to public employment or position as well as to public office.

While the Constitution of 1963 appears to be silent as to the problem at hand, some guidance may be obtained from the case of *Knuckles v. Board of Education of Bell County* (Ky. 1938), 114 SW 2d 511, where the court extended the consequences of the doctrine of incompatibility of offices to “public employees” as persons occupying public positions where between the two public positions an incompatibility at the common law exists in that one position is subordinate to the other. In *Knuckles*, supra, the same person was a teacher and also a deputy superintendent of schools. The deputy superintendent of schools had the power to appoint or remove a teacher. The court found the duties of the two positions to be in conflict and incompatible.

Because the state board of education not only is empowered by law to prescribe the requirements for and the issuance of teacher certificates, as well as the power to suspend teachers' certificates and to revoke them for cause, the position of teacher is subordinate to the office of member of the state board of education. In addition, it is possible for a member of the state board of education to pass upon his own case to either suspend or revoke his own certificate.

Sound public policy compels the conclusion that a person holding the position of teacher in a school district in the state of Michigan should not exercise the power of determining the standards for his own certification as a teacher. Further, the same person should not be allowed to pass upon his own case to suspend or revoke his certificate as a teacher. Greater conflict with the public interest could scarcely exist.

Under the authority in *Knuckles*, supra, I am constrained to hold that an irreconcilable conflict of interest exists between the office of member of the state board of education and the position of teacher in a school district in the state of Michigan. These two may not be occupied simultaneously.

Therefore, it is the opinion of the Attorney General that persons holding positions to teach in school districts in the state of Michigan under certificates issued by the state board of education may not simultaneously occupy the office of member of state board of education. Election to and acceptance of the office of member of state board of education of a teacher holding a teaching position in a school district would compel vacation of the position of teacher in such school district in Michigan.

3. Your third question relates to instructional and administrative staff members of state colleges and universities, including community colleges.

While the people have reposed leadership and general supervision over all public education, including adult education and instructional programs in state institutions in the state board of education, in accordance with Article VIII, Sec. 3 of the Michigan Constitution of 1963, the people have expressly denied this general authority over those state institutions of higher education granting baccalaureate degrees.

It must follow that persons holding positions on the instructional or administrative staff of state colleges or universities granting baccalaureate degrees, being otherwise qualified in law, are eligible for election to and may accept the office of member of the state board of education without vacating their position with the respective state college or university granting baccalaureate degrees.

There can be no question but that the University of Michigan, Michigan State University and Wayne State University confer baccalaureate degrees upon their graduates. The respective boards of control of Central Michigan University, Eastern Michigan University, Northern Michigan University and Western Michigan University are empowered under Section 4 of Act 48, P.A. 1963, Second Extra Session, being M.S.A. Cur. Mat. § 15.1120(4), to confer degrees. Section 2 of Act 70, P.A. 1885, as last amended by Act 49, P.A. 1963, Second Extra Session, being M.S.A. Cur. Mat. § 15.1312, confers a comparable power upon the board of control of Michigan Technological University to confer degrees. The board of control of Ferris State College is likewise authorized to confer degrees under Sec. 3 of Act 114, P.A. 1949, as amended by Act 22, P.A. 1963, Second Extra Session, being M.S.A. Cur. Mat. § 15.2143. The board of control of Grand Valley State College is also empowered to confer degrees under Section 3 of Act 120, P.A. 1960, as last amended by Act 24, P.A. 1963, Second Extra Session, being M.S.A. § 15.1852(3).

Subject to the approval of the superintendent of public instruction, as set forth in Section 791 of the School Code of 1955, *supra*, certain school districts are authorized by resolution of their respective board of education to establish community college departments of the school district. With the exception of school districts of the first class, such community college departments cannot offer collegiate courses embracing more than two years of collegiate work. It is clear that under Article VIII, Sections 3 and 7 of the Michigan Constitution of 1963, the state board of education has general supervisory power over such collegiate programs.

The Attorney General has ruled that school districts operating community college departments are not required to hire certificated persons only to teach in community college departments of school districts and that the state board of education is without statutory power to certificate such teachers. O.A.G. 1961-62, p. 239.

Community colleges are also operated by community college districts organized pursuant to provisions of Act 188, P.A. 1955, being C.L.S. 1961 § 390.871, et seq.; M.S.A. 1959 Rev. Vol. and 1963 Cum. Supp. § 15.615(11) et seq. Act 188, P.A. 1955 was last amended by Acts 184 and 237, P.A. 1964. Under Section 1 of the act, as last amended by Act 237,

P.A. 1964, the creation of the community college district cannot be authorized by the electors thereof until the superintendent of public instruction grants his approval with the advice and counsel of the state board of education.

Sec. 4(9) of Act 188, P.A. 1955, as last amended by Act 237, P.A. 1964 empowers the board of trustees of the community college district to hire as an administrator or director of the community college a person possessing at least an earned bachelor's degree from a college acceptable to the state board of education and be the possessor of or eligible for a teacher's certificate issued by the state board of education or have the educational qualifications equivalent thereto as determined by standards prescribed by the state board of education, or have an earned doctor's degree from an accredited college or university.

While the state board of education is not authorized by law to certificate teachers in community colleges operated by community college districts, O.A.G. 1961-62, p. 239, the board of trustees is empowered to hire teachers meeting qualifications as have or may be established by the state board of education under Section 7 of Act 188, P.A. 1955, as last amended by Act 78, P.A. 1963.

Community colleges operated by boards of trustees of community college districts are prohibited by law from conferring baccalaureate degrees under Section 2 of Act 188, P.A. 1955, supra, as last amended by Act 237, P.A. 1964.

Public community and junior colleges are authorized by Article VIII, Section 7 of the Michigan Constitution to be governed by locally elected boards but subject to the authority of the state board of education and a state board for public community and junior colleges appointed by the state board of education to serve in an advisory capacity to the state board of education concerning general supervision, planning and annual appropriations for such colleges. The legislature has provided for the establishment of the state board for public community and junior colleges in Act 193, P.A. 1964.

A study of the general supervisory authority of the state board of education over community colleges, both those operated by community college district boards of trustees or as community college departments under the direct control of boards of education of school districts, as declared by the people in the Michigan Constitution, Article VIII, Sections 3 and 7, and in the general statutes of this state that are cited in this opinion, makes it abundantly clear that the office of member of the state board of education and positions on the administrative staff of community colleges are incompatible and cannot be occupied by the same person simultaneously. The reasoning employed in support of the answer to the second question is applicable and need not be restated here.

While the state board of education may prescribe the qualifications for members of the instructional staff of community colleges operated by boards of trustees of community college districts, the state board of education does not have the power to pass upon the individual certification of instructional staff members of community colleges operated by the board of education of a school district or by the board of trustees of the community college

district, nor is it authorized to revoke or suspend the right to teach in such institutions. A possible conflict of interest then between the office of member of the state board of education and the position of instructional staff member of a community college under the general supervisory power of the state board of education is remote and does not serve to bar the same person from occupying the two positions simultaneously.

Persons who are otherwise qualified to seek the office of member of the state board of education, upon their election and acceptance of that office will vacate positions on the administrative staffs of community colleges. Since the two positions are incompatible, they may not be occupied simultaneously.

FRANK J. KELLEY,
Attorney General.

640917.1

MUNICIPALITIES: Consolidation.

CITIES: Home Rule.

TOWNSHIPS: Consolidation.

Consolidation procedures discussed and applied to two cities and four adjoining townships; affirmative vote required in all affected categories; new city resulting from consolidation organizes through charter commission elected as provided by Sec. 15 of Home Rule Act.

No. 4311

September 17, 1964.

Hon. Harry A. DeMaso
State Representative
40 South Lavista Boulevard
Battle Creek, Michigan

You have requested opinion on several questions arising out of proposed consolidation of four townships and two cities in the Battle Creek area.¹ You state that the City of Battle Creek, a home rule city, is made up of portions of four townships; and that the City of Springfield is contiguous to the City of Battle Creek. The City of Springfield consists of a portion of the Township of Battle Creek. It has been proposed that petitions calling for the consolidation of the four townships and two cities be circulated in order to place the question of said consolidation on the ballot.

In connection with this proposal, the following questions are submitted for opinion:

1. Does the Home Rule Act permit consolidation of these units?

¹ The case of *Charles Hall, Plaintiff and Appellee and City of Battle Creek, Intervening Plaintiff versus Calhoun County Board of Supervisors*, involving a related but distinct question has been submitted and is awaiting the decision of the Supreme Court as of the date of this opinion. There, plaintiff sought mandamus to compel the supervisors to call an election upon petition praying for annexation to the City of Battle Creek of all of the territory encompassed within the City of Springfield. Appellant sought relief from judgment of the trial court ordering the writ to issue.