

660601.1

STATE BOARD OF EDUCATION: Power to appoint superintendent of public instruction.

The Constitution of 1963 created a new and distinct public office of superintendent of public instruction, the power of appointment being given to the state board of education with the broadest power of determination. Under the Constitution, therefore, the legislature has no power to prescribe qualifications for the office of superintendent of public instruction. Therefore, the last sentence of Section 251 of the School Code of 1955, when it purports to fix the qualifications of the superintendent of public instruction, violates Article VIII, Section 3 of the Constitution of 1963.

No. 4530

June 1, 1966.

Mr. Thomas J. Brennan, President
State Board of Education
2228 Guardian Building
Detroit, Michigan

You have requested my opinion on the following questions:

"1. Whether Section 251 of Act 269 of the Public Acts of 1955 is repugnant to Article VIII, Section 3 of the Michigan Constitution of 1963 and, therefore, unconstitutional?

"2. If the Act still has full force and effect, what is the meaning of the term 'teacher' as the legislature has employed it in Section 251 of Act 269 of the Public Acts of 1955?"

The people created the constitutional office of Superintendent of Public Instruction by means of Article XI, Section 2 of the Michigan Constitution of 1908, which provided in pertinent part:

"He shall have general supervision of public instruction in the state. . . . His duties and compensation shall be prescribed 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.

Section 251 of the School Code of 1955 provides:

"The superintendent of public instruction shall have general supervision of general instruction in all public schools and in all state institutions that are educational in their character, as follows: The university of Michigan, the Michigan state college of agriculture and applied science, the Michigan school for the deaf, the Michigan school for the blind, the boys' vocational school, the girls' training school, the several Michigan home and training schools, and any similar institution that may hereafter be created. He shall maintain his office at the seat of the state government. *He shall be a graduate of a university, college or state normal school of good standing, and shall have had at least 5 years' experience as a teacher or superintendent of schools.*" (Emphasis supplied)

The Michigan Constitution of 1963 was adopted by the people in April of 1963 and became effective on January 1, 1964.

The constitutional office of superintendent of public instruction was created by the people in Article VIII, Section 3 of the Michigan Constitution of 1963. This portion of the Constitution reads, in 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 of 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." (Emphasis supplied)

In Article III, Sec. 7 of the Michigan Constitution of 1963, the people have provided that statute law in force at the time of the effective date of the Constitution not repugnant to the Constitution shall remain in force until the statute expires by its own limitations, or is changed, amended or repealed.

While the people have retained the public office entitled the superintendent of public instruction in the Michigan Constitution of 1963, a comparison of the applicable provisions of Article VIII, Sec. 3 of the 1963 Constitution with Article XI, Sec. 2 of the Michigan Constitution of 1908, discloses that the general supervisory power over education formerly vested in the superintendent of public instruction under the 1908 Constitution is now reposed in the State Board of Education and requires the conclusion that the people have created a wholly new public office of superintendent of public instruction possessed of powers and duties distinct and separate from those reposed in the superintendent of public instruction under the 1908 Constitution.

That such was the intent of the framers and the people in ratifying the Michigan Constitution of 1963, as set forth in Article VIII, Sec. 3, is readily determined by reference to the debate of the Constitutional Convention and the Address to the People. *Burdick v. Secretary of State*, 373 Mich. 578 (1964).

The debate of the Constitutional Convention is found in the Official Record, Constitutional Convention, 1961. Portions of the debate pertinent to this opinion will be cited herein by page number.

The second paragraph of Sec. 3 of Article VIII of the Michigan Constitution of 1963 was first considered by the Constitutional Convention as Sec. b. of Committee Proposal 47. As originally introduced it read:

"THE STATE BOARD SHALL APPOINT A SUPERINTENDENT OF PUBLIC INSTRUCTION WHOSE TERM OF OFFICE SHALL BE DETERMINED BY THE BOARD. HE SHALL BE THE CHAIRMAN OF THE STATE BOARD WITHOUT THE RIGHT TO VOTE, AND SHALL BE RESPONSIBLE FOR THE EXECUTION OF ITS POLICIES.

"THE SUPERINTENDENT OF PUBLIC INSTRUCTION SHALL BE CHIEF ADMINISTRATIVE OFFICER OF A STATE OFFICE OF EDUCATION WHICH SHALL BE GRANTED SUFFICIENT FUNDS AND STAFF TO CARRY ON STATE RESPONSIBILITIES FOR EDUCATION AS DETERMINED BY LAW." (1188)

Mr. Bentley, chairman of the committee on education, submitted in behalf of the committee the following reasons in support of Committee Proposal 47, which is appropriate hereto:

"Appointment by a state board assures that the superintendent of public instruction will be selected from among the most competent people available to serve in that capacity. His responsibilities would be that of directing the state educational system and acting as the executive officer of the state board of education in ministering its various functions. . . .

"This section also recognizes the superintendent of public instruction as administrative head of the state department of education. It is the intent of this committee that the superintendent of public instruction is considered the chief educational officer of the state and as such staff officer to the governor and on his administrative board." (1189)

A minority report was submitted by Delegates Hart, T. S. Brown and Douglas, which stated in pertinent part:

"The heart of the question over whether or not the state superintendent of public instruction should be elected by the people or appointed by a state board of education is the question: is Michigan to have a strong superintendent of public instruction who is to be a policymaker by dint of his own strength as the choice of the people, or are we to have a superintendent who is granted his strength and guaranteed his weaknesses by virtue of the whim of a board of education which, even if elected, will by its very nature be more difficult to attune to the public will?" (1189)

Delegate Spitler spoke for the committee on education on Sec. b. of Proposal 47 and made the following pertinent observation:

"This plan that we are submitting would permit the state board of education to select the most competent person available, whether he is in Michigan or whether he is anywhere in the nation." (1211)

Delegates Hart, T. S. Brown and Douglas offered an amendment to Sec. b., which would have stricken from the Committee Proposal the provision to appoint the superintendent of public instruction. Speaking in favor of the amendment, Delegate Hart said:

"Making this office appointive could have the effect of reducing the status of the chief state school officer, thereby minimizing both the stature of this position and the opportunity to exert the forceful leadership which is required." (1212)

As finally revised, the Hart, T. S. Brown and Douglas amendment read:

"Amend page 1, line 18, after 'Sec. b.', by striking out 'The state board shall appoint a superintendent of public instruction whose term of office shall be determined by the board.', and inserting 'The superintendent of public instruction shall be elected for a 4 year term.'"

"The remainder of the first paragraph stands as it is in the section, 'He shall be the chairman of the state board without the right to vote, and shall be responsible for the execution of its policies.'" (1214)

In the debate that ensued on the proposed amendment the question of the nature of the office of superintendent of public instruction was put in sharp focus by Delegate Judd, who said:

"I think we have no reason to fear that educational policy will be made by a group responsible to the people. If we were to elect, also, directly, the superintendent of public instruction, we would be setting up a competitive policymaking officer, independent of the board of education, who, himself, would have policymaking power simply by the fact that he is independent of everybody in the government and only responsible to the people. So we might have some dangerous conflict in the field of education between these 2 agencies.

"I think, then, that before we decide how the superintendent should be selected, we must first decide what his function is to be. Is he to be another policymaking agent, or is he to be administrative, to carry out the policies of the board? I note that the proposers of this amendment have consented to leave in the text the words that the superintendent shall be responsible for the execution of its—that is, the board's—policies. We cannot expect the kind of cooperation, with this new and more powerful policymaking board, that we should have if the superintendent is, himself, independently elected." (1214)

The following significant debate ensued:

"MR. HIGGS: And second, with regard to the comments of Delegate Judd, which I think really goes to the heart of the selective process of choosing a superintendent, what do you conceive to be the duties of this office? That is, do you conceive of these duties as principally an administrative official or do you conceive of it as a political, policymaking function?"

"MISS HART: I think it has to be a policymaking function, in part. I don't see how it can help but be a policymaking position in part. The policy of education, which would be with the advice and consent of the state board of education.

"MR. HIGGS: Would it be your thinking that it would be a shared responsibility or would it be centered in the superintendent or in the board or concurrent?"

"MISS HART: I would assume that, as it is now, the state superintendent of public instruction would consult his board, welcome their advice, but that he would be responsible. He would be a member of the top officialdom, whatever that might be when we get through with this constitution. As it is now, he is a member of the administrative board. He speaks for education. When he speaks for education, he is in a position to speak always for education, independently, for the best interests of education. I would hope that he could continue to speak that way.

"MR. HIGGS: Thank you. Fellow delegates, I would like now to address myself to the question. It seems to me that with the answers to these questions and the remarks of Delegate Downs and Delegate Douglas, we have something to get our teeth into.

"First of all, I feel compelled to support the committee in that I think that this particular amendment would result in a division of leadership. You would have, actually, 2 heads of the system. You would have the board and the superintendent, if I follow Miss Hart. There would be a great opportunity for one to say, 'That is your responsibility'; and the other to say, 'Well, you are elected, that is your responsibility.' I kind of favor the direct responsibility in the board for that reason. Secondly, I think that with regard to Delegate Downs' indicating that the official in this office should be free of political caprice and whim—at some point I picked those words out—and it seems to me that the committee proposal would offer greater stability than the amendment would offer, in that I note that the state board would be elected for the term of 8 years. This, being a much longer term than the governor or than any other elective officials, I think would build in this greater degree of stability. I think that actually when you are comparing the elective process with the appointive in this context, that Delegate Downs' point would actually limit the selection of the people in that they would actually have only 2 choices when they went to the polls; one party or the other party. That would be the first limitation.

"The second limitation would be that this man would have to be a resident of the state in order to run. I don't think we have taken anything away from the people that is rightfully theirs, as Delegate Douglas has suggested. By giving the people, through their elected representatives, a broader base for selection, we would be electing the state board and they would have available to them candidates for this office from all over the United States, wherever they could find the finest administrators possible. They could search and seek, and in the calm, deliberative atmosphere of the meetings of the board, they would be able to screen these candidates in order to determine the best available. I am not sure just how your party conventions operate, but I am not exactly sure that a party convention would be in a position to go through this careful screening process, but certainly we have given the people a broader selection through their elected representatives than your amendment would provide." (1216-1217)

It is also necessary to consider the comment made by Delegate King, who said in part:

“. . . Who is really responsible for the policy with regard to education in the state of Michigan”

“It would be my understanding—and correct me if I am wrong—that although the superintendent of public instruction should be an administrative officer responsible to the board of education, it would be my understanding that the board of education could not replace or remove the superintendent of public instruction, under the pending amendment. With this in mind—and I don’t want to draw diagrams in the air, but an analogy was drawn between business and government—at the top of any table of organizations in business you find the stockholders, and I assume that at the top of any table of organization in government, you find the voters. I don’t think that anyone would propose that the stockholders should elect the board of directors, and then also elect the president of the corporation. Why this would be ridiculous. So let’s bring this thing back into focus, what we are talking about here is a chief administrator.

“I say the board of education ought to be elected by the people. I say it ought to be a powerful coordinating group, which can bring all of the divergent factors of education in this state of Michigan together, working as a team. But I can’t, for the life of me, in the name of good government, understand how we would want to dilute this constructive step forward that we have taken by supporting any such amendment as shown on the wall at this time.” (1217-1218)

Finally, the following comment was made by Delegate DeVries:

“It is obvious that the superintendent of public instruction, from what I have heard today, is purely an administrative officer, and, as such, should be appointed and responsible to an elected board. This is what the committee proposes.” (1218)

The amendment proposed by Delegates Hart, T. S. Brown, and Douglas was not adopted. Ayes—45 Nays—82. (1219)

On second reading Delegate Hart offered the following amendment to Proposal 47:

“Amend page 1, line 21 [paragraph 2] by striking out ‘The state board of education shall appoint a superintendent of public instruction whose term of office shall be determined by the board. He’ and inserting ‘The superintendent of public instruction’; so the language will read, ‘The superintendent of public instruction shall be the chairman of the board without the right to vote, and shall be responsible for the execution of its policies.’” (2577)

In support of the amendment Delegate Hart said:

“One more point: with this provision, the superintendent of public instruction is demoted. It is not enough to say that he shall be the chief administrative officer, with the idea that he shall work in the governor’s cabinet. This superintendent will have no power of his own

right. He will be ineffectual on that board in that he can never speak for himself but only for his board: and if a new question arises, he must check with his board before he can give a definite answer. He will be in competition with those who are appointed directly by the governor and responsible, or elected, and responsible to him alone, and with men elected education will suffer." (2578)

In the debate that followed Delegate Bentley said, in response to a question raised by Delegate Douglas whether a person could be appointed to the office of superintendent of public instruction if he were not a Michigan resident:

"Mr. President, I will say to my good friend and valuable committee member—and I mean that very sincerely, Mr. Douglas—that I said when this was being discussed in committee of the whole that the state board of education would have the right to choose the highest qualified man to fill the important office of superintendent, whether he were a resident of the state or not." (2578)

The debate on the Hart amendment was summarized by Delegate Hatch as follows:

"Mr. President and ladies and gentlemen of the convention, I certainly cannot understand the minority party's position with respect to the superintendent of public instruction. I think, in this respect, the committee on education—with all due respect to that committee—made a grave error in calling this office the superintendent of public instruction. Actually, the office we are talking about is like the personnel director of the civil service commission, or the executive director under any commission. In other words, if they called him the director of public instruction, or some other name, I don't think there would be this emotional attachment to that given office.

"What the committee has done is, instead of 1 superintendent of public instruction, they have 8. They have elevated the board of education to 8 elected officials, elected on a statewide basis. Therefore, I can see no reason why the superintendent should be elected and, like the old gray mare, the superintendent of public instruction 'ain't what he used to be.'" (2578-2579)

The amendment offered by Delegate Hart was not adopted. The vote showed Ayes—29, Nays—85. (2579)

On third reading Proposal 47 became Article VIII, Sec. 3 and except for changes in phraseology made by the committee on style and drafting there were no further changes. (3146-3149)

Delegate Hart explained her no vote on Article VIII as it related to Section 3 in the following terms:

"First and foremost, we are known today throughout the United States for our excellent educational system. Today in our present constitution, we are fortunate in having a strong, independent leader of education whose power of decision is derived directly from the people and who is responsible only to the people for his conduct in office.

He is a member of the governor's cabinet and shares equal voice with the members of that cabinet. He interprets educational needs and problems to the leader of government when policy decisions are being made. He has status with the legislature because that body recognizes that he speaks with authority for the people. In our new constitution the superintendent has been demoted. He is now to be appointed by an 8 member board who serve on a staggered term basis, who are voluntary workers, unpaid, who meet perhaps once a month maybe for 1 day, maybe 2, maybe for an evening, who are widely separated one from another where communication becomes difficult. The superintendent, then, is no longer a strong, independent head directly responsible to the people but he is an executive secretary who has no final voice in educational decision making. He is a subservient agent. His position in the governor's cabinet is weakened because he no longer speaks for himself as a representative of the people. He may speak only for those whom he represents: the 8 members of the state board." (3147)

Article VIII was approved on third reading. Yeas—92, Nays—31. (3149)

The Address to the People contained the following observation concerning the office of superintendent of public instruction:

"Appointment of the superintendent of public instruction by the state board follows present day trends in other states and would assure selection from among the most competent people available. Michigan elects its superintendent under the present constitution. The superintendent would be considered as administrative head of the state department of education and as such should be a staff officer to the governor and on his administrative board." (3396)

It must be concluded that the framers of the Michigan Constitution of 1963 and the people in ratifying the fundamental charter of the state have created a new and distinct public office of superintendent of public instruction.

The people have mandated that the "state board of education shall appoint the superintendent of public instruction" in Article VIII, Section 3 of the Constitution.

In light of the considerations of the delegates to the Constitutional Convention of 1961, which have been reviewed here at some length, and the Address to the People, the constitutional term "appoint" has been manifestly used to confer upon the state board of education the broadest power of determination. *McPherson, et al., v. Blocker*, 146 U.S. 1 (1892); *State ex rel. Beeson v. Marsh*, 34 N.W. 2d 279 (Neb. 1948). The legislature, therefore, is without power to prescribe the qualifications for the office of superintendent of public instruction.

Nor has the legislature presumed to exercise powers contrary to Article VIII, Section 3, since the adoption of the Michigan Constitution of 1963.

Act 287, P.A. 1964, as last amended by Acts 317, 382 and 413 of the Public Acts of 1965, being M.S.A. 1965 Cum. Supp. § 15.1023(1) et seq., provides for the organization and functions of the state board of education.

Section 14 of the Act provides that after June 30, 1965 all references in any law to the powers and duties of the superintendent of public instruction is deemed to be made to the state board of education except where the law names the superintendent of public instruction as a member of another governmental agency, or provides for an appeal to the state board of education from the decision of the superintendent of public instruction, in which case the reference in the law shall be to the superintendent of public instruction appointed under the 1963 Constitution.

In Section 13 of Act 287, P.A. 1964, *supra*, the power of the board to appoint a superintendent of public instruction is recognized by the legislature, but no qualifications for the office are prescribed, as indeed they could not be without offending the Constitution.

Section 251 of the School Code of 1955, *supra*, must then be read with Section 14 of Act 287, P.A. 1964, *supra*. The references to the powers and duties of the superintendent of public instruction, set forth in Section 251, are reposed in the state board of education. The last sentence of Section 251, when it purports to fix the qualifications of the superintendent of public instruction, is offensive to Article VIII, Section 3 of the Michigan Constitution of 1963.

My conclusion is supported by the decision of the Michigan Supreme Court in *Attorney General, ex rel. Cook v. O'Neil*, 280 Mich. 649 (1937), which held that the legislature was without power to fix qualifications for eligibility for a constitutional public office.

The Attorney General has ruled that the legislature could not lawfully determine the qualifications for eligibility for the constitutional office of delegate to the Constitutional Convention. O.A.G. No. 3588, 1961-1962, p. 50.

Under these authorities it is abundantly clear that the legislature is without authority to fix requirements for eligibility for office of public instruction.

Therefore, after fair and thorough analysis, it is the opinion of the Attorney General that the qualification requirements for the office of superintendent of public instruction, prescribed in Section 251 of the School Code of 1955, *supra*, are repugnant to the Michigan Constitution of 1963 and are unconstitutional.

The answer to your first question makes an answer to your second question unnecessary.

FRANK J. KELLEY,
Attorney General.