

## Opinion No. 61

**CONSTITUTIONS AND CONSTITUTIONAL LAW; Amendment of:  
Chapter 191, Laws of 1959, effect of—STATE BOARD OF EDUCA-  
TION; Powers; effect of Chapter 191, Laws of 1959—Chapter  
191, Laws of 1959—Article XI, Section 11, Montana  
Constitution**

**Held: The acceptance of Chapter 191 of the Laws of 1959 by the voters would not in any way change or increase the power of the State Board of Education over the free public common schools and would not in any way diminish the authority or powers of local school boards or shift any of that power and authority to the State Board of Education.**

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May 27, 1960

Mr. Eugene C. Tidball  
Executive Director  
Montana Legislative Council  
Capitol Building  
Helena, Montana

Dear Mr. Tidball:

You have requested my opinion whether the proposed constitutional amendment creating a separate board of education and a board of regents (Chapter 191, Laws of 1959) will deprive local school boards of any of the powers which they now have or compel the newly created board of education to assume any duties which they do not now have under the present constitutional provision.

Our present constitutional provision, Article XI, Section 11, provides as follows:

"The general control and supervision of the state university and the various other state educational institutions shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law. The said board shall consist of eleven members, the governor, state superintendent of public

instruction, and attorney general, being members *ex-officio*; the other eight members thereof shall be appointed by the governor; subject to the confirmation of the senate, under the regulations and restrictions to be provided by law."

If Chapter 191 is placed in force by the voters at the coming election, Article XI, Section 11 will then be amended to read:

"The general control and supervision of the public, free, common schools shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law. The said board shall consist of eight (8) members, appointed by the governor; subject to the confirmation of the Senate, under the regulations and restrictions to be provided by law. The general control and supervision of the University of Montana shall be vested in a board of regents, whose powers and duties shall be prescribed by law. The said board shall consist of eight (8) members, appointed by the governor, subject to confirmation of the Senate, under the regulations and restrictions to be provided by law."

Your question is actually whether the separate board of education which will exercise general control and supervision of the public free common schools will have greater powers over the common schools than the present board of education.

It should be noted at the outset that the operative wording of the old and new sections is identical. The present Section 11 places "the general control and supervision of the state university and the various other state educational institutions . . ." in the state board of education. The amended section as executed will place "the general control and supervision of the public free common schools . . ." in the newly constituted board of education. The general control and supervision of the university system will be placed in a separate board of regents.

The words "general control and supervision" are carried forward unchanged, so the construction placed upon those words by our Supreme Court when construing them in the present section is binding here.

Our Supreme Court over thirty years ago decided that the present language of Section 11, Article XI, places general control and supervision of every part of our educational system in the state board of education. In the case of *State ex rel. Stephens v. Keaster*, 82 Mont. 126, 266 Pac. 387, the contention was made that Section 11 gave the state board of education general control and supervision of the state university system only and did not give it general control and supervision over district and high schools. The court denied the contention and said:

"Counsel for respondents contend that, the Constitution having given the State Board of Education general control and super-

vision of the state educational institutions and provided that the powers and duties of the state board shall be prescribed and regulated by law, there is not only no authority for the enactment by the legislature, for the state board, of any provisions for any powers or duties other than such as may be connected with the board's control and supervision of the state educational institutions but that the legislature, impliedly, is prohibited from enacting any other. We do not agree with the contention. The fact that the legislature may appear to be especially empowered to make for the state board rules and regulations for its control of the state educational institutions does not prohibit the legislature from providing for the state board other duties in regard to educational matters . . ."

In a later case, *State ex rel. School District No. 29 vs. Cooney*, 102 Mont. 521, 59 Pac. (2d) 48, the court outlined the duties of the state board of education as follows:

"The State Board of Education is a constitutional board (Art. XI, Sec. 11); that section of the Constitution provides in part: 'The general control and supervision of the state university and the various other state educational institutions shall be vested in a State Board of Education, whose powers and duties shall be prescribed and regulated by law. The said board shall consist of eleven members.' The following mandate is imposed upon the legislature by the Constitution: 'It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free, common schools.' (Art. XI, Sec. 1.) The State Board of Education is a part of the executive department of the state government. (*State ex rel. Public Service Commission v. Brannon*, 86 Mont. 200, 283 Pac. 202, 67 A.L.R. 1020.) The provision of the Constitution first above mentioned vests in the state board general control over and supervision of all state educational matters, including district and high schools."

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"The structure outlined in the mandatory provisions of the Constitution heretofore quoted looking to the establishment of a system of free public schools, and perfected by legislative Act, is built around the State Board of Education and the Superintendent of Public Instruction. Both of these state agencies are executive in character. The Constitution provides, and this court has said in the cases cited, that the state board has general supervision of all institutions of learning that are public in nature—that is, schools maintained in whole or in part at public expense . . ."

These decisions leave no doubt that the general control and supervision of the public free common schools is now in the state board of education. The proposed new Section 11 re-enacts this language without change.

Both the present and proposed sections provide that the control and supervision of the board is subject to the regulations or provisions provided by law. The legislature has provided a complete system of regulations and restrictions outlining in detail the powers, duties and functions of the state board of education in regard to the common schools and all local boards of trustees. None of the provisions concerning the common schools and local school boards will be changed or altered by the enactment of Section 11 as amended by Chapter 191, Laws of 1959.

It is therefore my opinion that the acceptance by the voters of Chapter 191 of the Laws of 1959 would not in any way change or increase the power of the state board of education over the free public common schools and would not in any way diminish the authority or powers of the local school boards or shift any of that power or authority to the state board of education.

Very truly yours,  
FORREST H. ANDERSON  
Attorney General