

Opinion No. 87-36

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OPINION OF: HAL STRATTON, Attorney General

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TO: Alan D. Morgan, Superintendent of Public Instruction, Department of Education, Education Building, Santa Fe, New Mexico 87501-2786

QUESTIONS

May the department of education implement the provisions contained in article XII, section 6, paragraph E of the New Mexico Constitution notwithstanding the lack of legislation transferring the powers now vested in the office of education to the department of education?

CONCLUSIONS

Yes.

ANALYSIS

Article XII, section 6, paragraph E of the New Mexico Constitution provides: "Upon adoption of this amendment, all functions relating to the distribution of school funds and financial accounting for the public schools shall be transferred to the state department of public education to be performed as provided by law." The people of New Mexico approved this amendment at the general election on November 4, 1986. This office advised the department of education ("department") by letter dated December 16, 1986, that additional legislation to implement the amendment was not required, because there existed in place extensive public school finance laws. The office recommended, however, the enactment of specific laws to transfer the powers now vested in the office of education to the department to prevent any future question concerning the department's authority to perform the transferred functions.

Legislation to accomplish this transfer was introduced in the 1987 legislature, but failed to pass. To effect an orderly transition and uninterrupted performance of the office of education's duties, the secretary of finance and administration ("secretary") and the department's superintendent of public instruction ("superintendent") entered into a memorandum of understanding on January 1, 1987, to carry out the transfer. Further, the 1987 legislature enacted chapter 355, an appropriations measure, that appropriated monies to the department to accommodate the additional functions that the constitutional amendment required to be performed.

The Public School Finance Act, Sections 22-8-1 to 22-8-42 NMSA 1978, provides extensive regulation of public school budgets; imposes accounting requirements upon public schools; provides for distributions to school districts from the public school fund; provides a method of calculating program cost and the state equalization guarantee distribution; provides for transportation and supplemental distributions; and provides remedies for mismanagement, improper recording, or improper reporting of public school funds. Section 22-8-3 NMSA 1978 provides:

A. The "office of education" is created within the department of finance and administration.

B. Subject to the authority of the secretary of finance and administration, the administrative and executive head of the office of education is the "director of the office of education." The director shall be appointed by the secretary of finance and administration with the governor's consent. Wherever in Chapter 22, Article 8 NMSA 1978 there appear the terms "chief," "chief of public school finance" or "director of public school finance" they shall be construed to mean the director of the office of education.

Miscellaneous references to chief, public school finance division, or the director of public school finance appear at Sections 22-9-6, 22-11-3, 22-20-1, 22-23-5 and 22-4-6 NMSA 1978. The question is whether the state department of public education may perform the functions appearing, in large part, in the Public School Finance Act without specific legislation construing the terms "chief," "chief of public school finance," "director of public school finance," or "director of the office of education" to mean the department and its superintendent.

The Supreme Court of New Mexico in *State ex rel. Chavez v. Sargent*, 18 N.M. 627, 139 P. 144 (1914), held that article XI, section 6 of the constitution, was not self-executing. The provision states in part: Subject to the provisions of this constitution, and of such requirements, rules, and regulations as may be prescribed by law, the state corporation commission shall be the department of government through which shall be issued all charters for domestic corporations...; and through which shall be carried out all the provisions of this constitution relating to corporations and the laws made in pursuance thereof..... All charters, papers and documents relating to corporations on file in the ... commissioner of insurance... shall be transferred to the office of the commission." The Court found lacking any statutory duties imposed on the corporation commission regulating performance of these duties, but addressing the constitutional amendment, stated: "Had the section provided that the chairman of the Corporation Commission or any member thereof should have and exercise until otherwise provided by law, all the powers exercised by the Superintendent of Insurance..., then this section would be self-executing and no legislation would be required to carry it into effect." 18 N.M. at 633, 139 P. at 146. See *Mitchell v. National Sur. Co.*, 206 F. 807 (D.N.M. 1913) (as to insurers other than corporations, functions of the superintendent are left intact).

In the situation at hand, article XII, section 6(E) expressly provides that the department shall perform all functions required to distribute school funds and to account for the

public schools' finances. It also removes such exercise of these functions from the ambit of other governmental bodies' authority. Likening this situation, in part, to an abolition of a governmental body, many courts have held that such abolition by constitutional amendment is self-executing, in that it occurs upon adoption of the amendment. See, e.g., *Carter v. Burson*, 230 Ga. 511, 198 S.E.2d 151 (1973) (holding that a constitutional amendment abolished the state treasurer's office upon the amendment's adoption); *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93, 99 (1974) (observing that the legislature validly might reassign the duties of the state treasurer's duty where a constitutional amendment abolished the office, but also that "had the constitution provided for this reassignment [of duties of the treasurer] its mandate would prevail"); *State ex rel. Nelson v. Jordan*, 104 Ariz. 193, 450 P.2d 383 (1969) (holding that a constitutional amendment abolished the state auditor's office, but delaying its order ousting the auditor until a successor could assume the auditor's duties to avoid public inconvenience).

The will of the people, as expressed in their constitution, is the state's supreme law. *State ex rel. Sedillo v. Anderson*, 53 N.M. 441, 210 P.2d 626 (1949). In construing the constitution, we must ascertain the framers' intent and objectives. In *Re Generic Investigation into Cable TV*, 103 N.M. 345, 707 P.2d 1155 (1985). Further, a constitutional provision is self-executing if it supplies the necessary rule by which the right given may be enjoyed or the means by which the duty imposed may be enforced. *Cottonwood Gulch Foundation v. Gutierrez*, 102 N.M. 667, 699 P.2d 140 (Ct.App. 1985). A constitutional provision imposing a duty upon an officer requires no legislation to exact performance of such duty. *State ex rel. Delgado v. Romero*, 17 N.M. 81, 124 P. 649 (1912).

In article XII, section 6(E), the people expressed their intention to effect a transfer of public school accounting and public school fund distribution duties to the department "upon adoption of this amendment." Several statutes amply provide for the performance of these duties and the necessary rules to enforce performance of these duties. We conclude, therefore, that implementing legislation is not necessary to authorize specifically the department to perform the functions that article XII, section 6(E) transfers to it.

ATTORNEY GENERAL

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