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**BEFORE THE SUPREME COURT OF THE STATE OF IDAHO**

IDAHO SUPERINTENDENT OF PUBLIC  
INSTRUCTION SHERRI YBARRA, in  
her official capacity,

Petitioner,

v.

THE LEGISLATURE OF THE STATE OF  
IDAHO, BY REPRESENTATIVE SCOTT  
BEDKE, in his official capacity as  
SPEAKER OF THE HOUSE OF  
REPRESENTATIVES, *et al.*,

Respondents.

Supreme Court Docket No. 47991-2020

**IDAHO STATE BOARD OF  
EDUCATION'S AND DEBBIE  
CRITCHFIELD'S RESPONSE TO  
THE VERIFIED PETITION FILED  
APRIL 27, 2020**

## I. INTRODUCTION

The 2020 Idaho Legislature promulgated, and the Governor signed into law, two appropriation bills, Senate Bill 1409<sup>1</sup> and Senate Bill 1410<sup>2</sup>, that appropriated funding to relocate eighteen employees of the Technology Group from the State Department of Education (“SDE”) to the Office of the State Board of Education (“OSBE”). The Senate Bill 1409 appropriation includes a “transfer of 18.00 FTP and \$2,714,800 to centralize IT and data management from the Department of Education to the Office of the State Board of Education.” S.B. 1409 Statement of Purpose, 65th Leg., 2nd Sess. (Idaho 2020), available at: <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1409SOP.pdf>. Similarly, the appropriation for the Superintendent of Public Instruction (“Superintendent”) “removes 18.00 FTP and \$2,714,800 to move IT and data management to the Office of the State Board of Education.” S.B. 1410 Statement of Purpose, 65th Leg., 2nd Sess., at 1 (Idaho 2020), available at: <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1410SOP.pdf>. The eighteen employees work with the Idaho System for Educational Excellence (“ISEE”), a data reporting system used to collect data for various purposes. *Verified Pet. for a Decl. of Unconstitutionality and a Writ of Mandamus and/or Prohibition by Original Juris. and Request for Expedited Hearing* (“Petition”) at 8 ¶ 21. This appropriation is consistent with the statutory authority granted to the OSBE regarding the collection of student data. Idaho Code § 33-133(2).

Matt Freeman has been the Executive Director of the State Board of Education (“the Board”) since June 2015. *Declaration of Matt Freeman in Support of Idaho State Board of Education’s and Debbie Critchfield’s Response to the Verified Petition Filed April 27, 2020*

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<sup>1</sup> The text of Senate Bill 1409 is currently available at: <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1409.pdf>.

<sup>2</sup> The text of Senate Bill 1410 is currently available at: <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1410.pdf>.

(“Declaration”) at 2 ¶ 1. He notes that “ISEE is one component of the three pronged statewide longitudinal data system” and it “allows for longitudinal tracking of student data through all levels of the public education system and into the workforce.” Declaration at 2 ¶ 4. The data generated by the ISEE system is “used to assist the Board in its governance of the public school system and support the responsibilities of the OSBE and SDE.” *Id.*

Significantly, “ISEE was created with grant funding obtained by OSBE and developed with SDE under the authority of the Board” pursuant to the authority of Idaho Code 33-120(2). Declaration at 3 ¶ 8. In 2009, the OSBE, acting on behalf of the Board as the state educational agency, acquired funding for the ISEE from federal grants, as well as from some state funding. *Id.* at 2 ¶ 6. The OSBE is responsible, pursuant to Idaho Code 33-133(2) to make decisions regarding the collection of student data. *Id.* at 3 ¶ 9. The Board has fulfilled this responsibility, in part, by creating a data management council to make recommendations regarding the “oversight and development of the statewide longitudinal data system, and to oversee the creation, maintenance and use of the system.” *Id.* ¶ 11. The management council is populated with representatives from the OSBE, the SDE, the Idaho Department of Labor, higher educational institutions and school districts, among others. *Id.*

As a result of the appropriation bills, Mr. Freeman expects that the eighteen Technology Group employees will continue to perform their current functions with the student longitudinal data system. *Id.* at 4 ¶ 19. They will likely continue to work at their current location, and the data they collect will continue to be available to the Superintendent and the SDE, as well as other stakeholders. *Id.* ¶¶ 20-21. No effort has been made to take control over those employees prior to July 1, 2020, when the appropriation bills take effect, although Mr. Freeman has attempted to begin planning with the Superintendent for the transition. *Id.* ¶ 24. The Board intends to follow

the direction of the legislature and make the transition as seamlessly as possible. *Id.* ¶ 25. The transition will not result in the supervision of the Superintendent by Mr. Freeman or any other OSBE or Board staff person. *Id.* at 5 ¶ 26.

In response to the appropriation bills, the Superintendent filed her Petition with this Court, seeking an order that Senate Bill 1409 and Senate Bill 1410 are unconstitutional. In addition, the Superintendent asks this Court to issue a writ of mandamus compelling the Board to not interfere with the Superintendent's control and supervisory authority over employees of the Technology Group for the fiscal year 2021, and requiring the Board to continue to provide to the eighteen employees their compensation package and related rent and operating expenses as set forth in SB 1409. Similarly, the Superintendent seeks a writ of prohibition that attempts to accomplish the same ends – prohibiting the Board from interfering with Superintendent's control and supervisory authority over the employees of the Technology Group, and from withholding compensation from those employees.

The Superintendent asserts that without the ability to control the eighteen employees within the SDE, she “is prevented from performing her constitutional duties.” Pet. at 2 ¶ 3. The constitutional duties upon which the Superintendent bases her Petition allegedly arise out of article IV, section 1 of the Idaho Constitution and the “inherent authority” in her position as Superintendent. Pet. at 3 ¶ 8. To support the existence of this “inherent authority”, the Superintendent reaches back to pre-statehood territorial statutes to cite “Chapter IV, Title II, Article II of the Laws of the Territory of Idaho (1866)”, and “the Revised Statutes of Statutes [sic] Idaho Territory, Title III, Chapter II, Sections 630-631, (1887).” Pet. at 5-6 ¶¶ 15, 16.

According to the Superintendent, article IV, section 1 of the Idaho Constitution incorporates into the Constitution those duties set forth in the territorial statutory schemes, and

that the Superintendent “is solely entitled and fully required to exercise those same roles as inherent duties and implied powers of the constitutional office of the Superintendent”, to the “extent that such powers do not conflict with any specific provisions of the current Idaho Constitution.” Pet. at 6-7 ¶ 17. Based on the territorial statutes, the Superintendent claims that her position was imbued with the authority to either “exercise a general supervision over such schools as may be established by law” or to “superintend the public schools in the Territory.” *Id.* at 5-6 ¶¶ 15, 16. The Superintendent attempts to equate the duties set forth in territorial statutes to her responsibilities relating to the ISEE system, alleging that such responsibilities are constitutional in nature. *Id.* at 10-13, ¶ 29.

Per the Superintendent, in 1866 the territorial statutes provided that the duties of the Superintendent were “to be performed ‘with the advice and subject to the supervision’ of the Territorial Board”, *id.* at 5 ¶ 15, while the 1887 statutory duties “were to be performed ‘by and with the advice and consent of the Legislative Council’ instead of the Territorial Board of Education.” *Id.* at 5-6 ¶ 16.

The relief requested by the Superintendent is incongruous in that she asks this Court to rule that SB 1409 and SB 1410 are unconstitutional, yet issue a writ directing the Board on how to spend the funds appropriated by those bills. However, if the bills are unconstitutional, then there are no funds available to fund the eighteen positions, so a writ cannot issue directing the Board to spend the funds in any manner. Of course, if those bills are unconstitutional, then there is no need for a writ to issue. Similarly, if the bills are a constitutional exercise of legislative and Board authority, then no writ should issue.

The core tenet of the Superintendent’s argument is simply false as it conflicts with the express language of Article IX, section 2 of the Constitution granting general supervisory powers

over Idaho's public schools to the Board. Neither the Constitution nor the current statutory scheme authorize the Superintendent to exercise general supervision over or to superintend the public schools of Idaho, or to require that the appropriation for and control over Technology Group remain in the SDE. Rather, upon the adoption of the Idaho Constitution, the general supervision of public schools has fallen to the Board. As also provided by the Constitution, the Board has those duties prescribed by law. Those duties include control over the student longitudinal data system that is at issue in the Superintendent's Petition. Because the Board, not the Superintendent, has the constitutional and statutory authority to control the student longitudinal system, the appropriation bills are not unconstitutional and the Petition should be denied.

## I. ARGUMENT

### A. The Idaho Constitution authorizes the Board, not the Superintendent, to oversee the public schools of Idaho.

Contrary to the assertions of the Superintendent, the Idaho Constitution does not prohibit the Board from overseeing the eighteen employees working on the student longitudinal data system. Rather, the constitution grants the Board the power to do so. From statehood, control of the public schools of Idaho has clearly rested with the Board, not the Superintendent, as reflected in the initial version of article IX, section 2 of the Idaho Constitution:

Board of Education. The general supervision of the public schools of the state shall be vested in a board of education, whose powers and duties shall be prescribed by law; the superintendent of public instruction, the secretary of state and attorney general shall constitute the board, of which the superintendent of public instruction shall be president.

Idaho Const. art. IX, § 2 (1889). As noted in section 2, the Board's powers and duties are "prescribed by law." *Id.* Article IX, section 2 was amended in 1912 to change the makeup of the Board:

Board of Education. The general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education, the membership, powers and duties of which shall be prescribed by law. The state superintendent of public instruction shall be ex officio member of said board.

See 1911 Idaho Sess. Laws 791, H.J.R. No. 30, ratified Nov. 5, 1912. The amendment did not alter the fact that the Board, not the Superintendent, has the general power of supervision over Idaho's public school system, or the fact that the Board's powers and duties are to be prescribed by law. The amendment diminished the power of the Superintendent by reducing the role as Board "president" to that of an ex officio member and requiring the legislature to otherwise determine the Board membership. Pursuant to Idaho Code section 33-102, seven of the eight Board members are appointed by the Governor.

Article IX, section 2 renders meritless the Superintendent's argument that the appropriation bills are unconstitutional because she has supervisory authority or control over the public school system or the Technology Group based on pre-statehood territorial statutes. Unsurprisingly, this Court has noted that "Idaho Const. art. 9, § 2 clearly vests *in the Board of Education* governance over all state educational institutions and the public school system of Idaho." *Evans v. Andrus*, 124 Idaho 6, 10, 855 P.2d 467, 471 (1993) (emphasis in original) (citing *Cameron v. Lakeland Class A School District No. 272, Kootenai County*, 82 Idaho 375, 382, 353 P.2d 652, 656 (1960); *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 612, 308 P.2d 225, 231 (1957); *Davis v. Moon*, 77 Idaho 146, 153, 289 P.2d 614, 618 (1955)).

Given the power of the Board by article IX, section 2 of the Constitution, the Superintendent's reliance on article IV, section 1 for her implied constitutional powers is clearly misplaced. Additionally, Article IV, section 1 provides, in pertinent part, that the executive officers, of which the Superintendent is one, "shall perform such duties as are prescribed by this

Constitution and as may be prescribed by law[.]” Nowhere in the Constitution or in the current statutory scheme is the Superintendent given control over the public school system or student longitudinal data systems. Rather, the Constitution and statutory authority grants control over the public school system to the Board. For this reason alone, the Petition should be denied.

It is true that the legislature “may not prevent a constitutional officer from performing his constitutional duties.” *Williams v. State Legis. of State of Idaho*, 111 Idaho 156, 157, 722 P.2d 465, 466 (1986) (citing *Wright v. Callahan*, 61 Idaho 167, 178, 99 P.2d 961, 965 (1940)).

However, neither the legislature nor the Board is preventing the Superintendent from performing her constitutional duties in this case, and therefore *Williams* and *Callahan* are inapposite.

In *Williams*, the State Auditor, for the first time, sought funds from the legislature to perform post-audits of state expenditures. *Id.* Previously, the legislature had created the Office of the Legislative Auditor to perform that function. *Id.* Through use of a line item appropriation, the legislature failed to appropriate the funds requested by the State Auditor, but did provide funds to the Legislative Auditor to perform post-audits of state expenditures. *Id.* The State Auditor filed a declaratory judgment action against the legislature, the Legislative Auditor and the Governor, claiming the legislature violated the State Auditor’s constitutional powers by refusing to appropriate funds for the State Auditor to conduct post-auditing of state spending. *Id.*, 111 Idaho at 156-57, 722 P.2d at 465-66. The district court issued a permanent injunction ordering that the authority for the post-audit function resided with the State Auditor. *Id.*

On appeal, this Court looked to the Idaho Constitution to determine whether it granted the State Auditor the power to perform post-audit functions. *See id.*, 111 Idaho at 157, 722 P.2d at 466. As is the case with the Superintendent, the Court noted that article IV, section 1 created the position of State Auditor and provided that the constitution and the legislature prescribe the



duties the Auditor is to perform. *Id.* This Court observed that the Constitution does not set forth express powers for the Auditor, and does not distinguish between pre-audit and post-audit duties. *Id.*

In reaching its decision, this Court relied on *Wright*, which “held that the State Auditor has implied constitutional powers and duties equivalent to those of the Territorial Controller pursuant to title 1, ch. VII, § 205 of the Revised Statutes of the Idaho Territory of 1887.” *Williams*, 111 Idaho at 157, 722 P.2d at 466 (citing *Wright*, 61 Idaho at 177, 179-80, 99 P.2d at 964-66). The issue in *Williams*, then, was “whether the post-audit function was included in the statutory duties of the Territorial Controller.” *Id.* This Court found that “[w]ithout doubt, the Territorial Statutes authorized the Territorial Controller to perform some post-audit functions.” *Id.*, 111 Idaho at 158, 722 P.2d at 467. This Court also found that the statutes in effect in 1986 empowered the State Auditor to perform such functions. *Id.* Thus, this Court held that preventing the State Auditor from “performing his constitutional duties through use of a line-item appropriation bill was unconstitutional.” *Id.*, 111 Idaho at 161, 722 P.2d at 470.

In *Wright*, the State Auditor challenged the 1939 Idaho legislature’s creation of the Office of the Comptroller by seeking a writ of prohibition to prevent the comptroller from exercising the powers granted to the comptroller by statute. *Wright*, 61 Idaho 167, 99 P.2d at 962. The State Auditor asserted that the comptroller would, pursuant to the challenged statutory authority, “usurp and perform powers and duties vested in the State Auditor by the Constitution[.]” *Id.* The district court found for the State Auditor, holding the legislation unconstitutional because by creating the office of the comptroller, the legislature took the State Auditor’s constitutional duties and transferred them to another officer. *Id.*, 99 P.2d at 963. Based on that finding, the district court issued a peremptory writ to the comptroller, “prohibiting him from exercising any

of the duties and functions designated and prescribed for the office of Comptroller by Chapter 113, Laws 1939.” *Id.*

On appeal, this Court looked to the constitutional debates to see if any significance lay in the use of the word “auditor” instead of “comptroller” in article IV, section 1. *Id.* Finding that the terms were identical, the Court determined that the duties of the auditor under article IV, section 1 were “lifted...out of the 1887 statute, together with its appurtenant powers and duties, and placed the whole in Section 1.” *Id.*, 99 P.2d at 965. This Court observed that “the legislature may prescribe duties in addition to those prescribed by the constitution, provided those prescribed by the legislature do not conflict with the duties either expressly or impliedly prescribed by the Constitution.” *Id.* Because this Court determined that the legislature was transferring powers and duties from the State Auditor, as those duties were defined in the territorial statutes, to the newly created Office of the Comptroller, this Court affirmed the trial court’s issuance of a peremptory writ against the Comptroller. *Id.*, 99 P.2d at 967.

*Williams* and *Wright* are inapposite for the simple reason that the Idaho Constitution grants the Board general supervision of the state educational institutions and public school system of the state of Idaho. Given this constitutional mandate, there is no basis upon which to reach back to territorial statutes to determine whether the Board or the Superintendent has supervisory control of the public school system or the student longitudinal data system.

Further, this Court has interpreted *Wright* to “merely [mean] that upon the creation by Const. art.4, § 1, of the office of state auditor, that office became impliedly vested with those powers and duties theretofore held and exercised by the territorial ‘controller’ as set out in Rev. Stats., Idaho, 1887, §§ 205, 222.” *Padgett v. Williams*, 82 Idaho 28, 35, 348 P.2d 944, 948 (citation omitted), supplemented, 82 Idaho 114, 350 P.2d 353 (1960). In other words, just

because the territorial duties of the State Auditor were implied into Article IV, section 1, that does not mean that the same holds true for the Superintendent. Further, based on Article XXI, section 2 of the Idaho Constitution, those implied powers and duties may be changed by statute.

This Court has stated that “[r]ights guaranteed by our constitution are those specifically enumerated therein or which existed at common law or by statute at the time our constitution was adopted.” *Craig v. Lane*, 60 Idaho 178, 89 P.2d 1008, 1009 (1939) (citations omitted), overruled on other grounds by *Coffin v. Cox*, 78 Idaho 111, 298 P.2d 742 (1956). However, that does not mean that those statutes or common laws are out of reach of the legislature, which has constitutional authority pursuant to article XXI, section 2<sup>3</sup>, to amend or change such laws. As this Court has stated, “[b]y the provisions of that section the Legislature has the right and authority to alter any law which still remained in force after the adoption of the Constitution.” *Butler v. City of Lewiston*, 11 Idaho 393, 83 P. 234, 236 (1905).

For example, in *Padgett*, the State Auditor refused to process payment for the services of an attorney appointed by the board of highway directors to represent its interests. 82 Idaho at 31, 348 P.2d at 945. The attorney filed an original proceeding before this Court, seeking a writ of mandate compelling the State Auditor to pay him by warrant charged against the appropriation for the board of highway directors. *See id.* In response, the State Auditor argued that payment was inappropriate because:

“[O]nly the attorney general of the state of Idaho, or his duly appointed assistants, can represent the state highway board in the courts of this state, and that the appointment of plaintiff as legal advisor to said board is an infringement on and an invasion of the duties, rights and powers constitutionally imposed on and vested in the attorney general; that the appointment of plaintiff as legal advisor to the Idaho board of highway directors by said board is without

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<sup>3</sup> “All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force until they expire by their own limitation or be altered or repealed by the legislature.” Article XXI, section 2.

constitutional or statutory authority; that our constitution, art. 4 § 1, in establishing the office of attorney general, vested in that office all powers and duties held and exercised by said office under the common law and vested therein by statutes in existence at the time of the adoption of our constitution; further, that the legislature cannot deprive the attorney general of any of these powers and duties, abolish his office, or transfer his powers and duties, or any part thereof, to any other office or officer.

*Id.*, 82 Idaho at 34, 348 P.2d at 947 (emphasis added). This Court recognized that the “office of the attorney general was first created by the territorial legislature in 1885” and that the General Laws, Territory of Idaho, 13<sup>th</sup> Session., 1884-1885, Section 3 thereof provided, in part:

‘It shall be the duty of the Attorney-General appointed under the provisions of this act to...act as legal advisor of all Territorial officers[.]’

*Id.* This Court noted that statute was repealed in 1887 and replaced with a statute that imposed duties upon the Attorney General that were, at the time of *Padgett*, identical to those set forth in Idaho Code section 67-1401. *Id.*, 82 Idaho at 35, 348 P.2d at 947-48.

The State Auditor, relying on *Wright*, argued “that art. 4, § 1 vested in the office of attorney general all powers and duties held and exercised by said office at common law, and by statutes in existence at the time of the adoption of our constitution”. *Id.*, 82 Idaho at 35, 348 P.2d at 948. This Court rejected that argument, stating:

We cannot agree with defendant's interpretation of [the Wright] decision. The holding in the Callahan case merely means that upon the creation by Const. art. 4, § 1, of the office of state auditor, that office became impliedly vested with those powers and duties theretofore held and exercised by the territorial ‘controller’ as set out in Rev. Stats., Idaho, 1887, §§ 205, 222. See also, *Monson v. Boyd*, Idaho, 348 P.2d 93.

Assuming, arguendo, that the decision in *Wright v. Callahan*, supra, is correct, even in light of Idaho Const. art. 21, § 2, which provides:

‘All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force until they expire by their own limitation or be altered or repealed by the legislature.’

it by no means follows that the office of attorney general became impliedly vested with common law powers upon the adoption of our constitution, which were not thereafter subject to legislative change.

*Id.*, 82 Idaho at 35–36, 348 P.2d at 948. This Court determined “that the office of attorney general is not constitutionally vested with any common law powers and duties that are immune to legislative change.” *Id.*, 82 Idaho at 36, 348 P.2d at 948.

Based on statutes in effect at the time of its decision, which statutes granted the power to the board of highway directors exclusive control over its employees, to include hiring its own attorney, this Court ruled that the board of highway directors had the authority to hire its own attorney. *Id.* In other words, in spite of the apparent statutory requirement at the time the Idaho Constitution was adopted that a state agency be represented by the Office of the Attorney General, this Court held that the board of highway directors could hire its own counsel based on statutory authority promulgated subsequently to the adoption of the Constitution.

Thus, *Williams* and *Wright* are of no help to the Superintendent for the simple reason that in contrast to the territorial statutes, article IX, section 2 of the Constitution squarely places “general supervision of the state educational institutions and public school system” with the Board, not the Superintendent. Therefore, regardless of the language in the territorial statutes giving the Superintendent the authority to “exercise general supervision” or “superintend” over the public school system, the Constitution clearly removed that duty from the Superintendent and gave it to the Board. Additionally, article XXI, section 2 specifically authorizes the legislature to repeal or alter the statutes in effect at the time the State Constitution was adopted. To the extent the territorial statutes could be interpreted to grant authority for the Superintendent to control the Technology Group, the legislature has the constitutional authority to alter that authority by granting it to the Board and OSBE.

From a review of the arguments made at the Constitutional Convention, such as this Court did in *Wright*, the intent to remove the general supervision of the public schools from the territorial Superintendent and transfer it to the Board is evident. 1 PROCEEDINGS & DEBATES OF THE CONST. CONVENTION OF IDAHO, 1889, at 644-46 (I. W. Hart, ed. 1912). A Mr. Morgan proposed an amendment to article IX, section 2 so that it would read as follows:

The general supervision of the public schools of this state shall be vested in a superintendent of public instruction, whose duties shall be prescribed by law.

*Id.* at 644. Mr. Morgan argued that having one officer set education policy would be better than a three-person board consisting of, in addition to the Superintendent, the Attorney General and the Secretary of State, each of whom would not have sufficient time to perform their duties. *See id.* at 645.

Others argued, as did a Mr. Hasbrouck:

I think it is placing too much responsibility and even too much power in a matter that is of such importance as this is, in one man, and I think he needs this advisory board.

*Id.* at 644. Similarly, a Mr. McConnell argued:

I think there would be no harm in his having some advisors – I can't see any harm in it. It is a common custom to have a state board of education in some states. But I don't believe in leaving it to one man – the entire management and control of schools, any more than I would the management of a university entirely in the hands of one man.

*Id.* From a Mr. Mayhew:

I do not care about entering into any discussion of this question, but I have observed this, so far as the discussion has gone, that there is but one question in it at all – in every argument advanced by the gentlemen, and that is this: Are three heads better than one, or three heads better than two? I think they are and therefore should be accepted.

*Id.* at 646. The amendment proposed by Mr. Morgan obviously failed (*see id.*), and the final version of section 2, as originally adopted, leaves no doubt that the Superintendent does not have

the implied or inherent power of general supervisory control or power over Idaho's public schools.

Based on the straight forward language in article IX, section 2 of the Constitution, the Board, not the Superintendent, has general supervisory control over Idaho's public school system. The Constitution does not bestow upon the Superintendent any powers or duties that support her argument that SB 1409 and SB 1410 violate or usurp her constitutional powers. The Superintendent has no implied powers that overcome the mandate of Article IX, section 2 of the Constitution, and her Petition should be denied.

**B. Based on statutory authority, the Board has the authority to control employees of the Technology Group.**

Consistent with article IX, section 2 of the Constitution, the legislature has specifically granted the Board the authority "to provide for and implement a student information management system." Idaho Code § 33-120(2). In specific relation to student longitudinal data systems, the "executive office of the state board of education" is the entity responsible for "implementing the provisions of this act" and "[a]ll decisions relating to the collection and safeguarding of student data". Idaho Code § 33-133(2) (emphasis added). This is precisely the type of data collection over which the Superintendent wrongfully claims to have constitutional jurisdiction. *See* Pet. at 12 ¶ 21. "Student educational record" includes "all information directly related to a student and recorded and kept in the data system as that term is defined." Idaho Code § 33-133(1)(k). "Data system" is defined as "the state's elementary, secondary and postsecondary longitudinal data systems." Idaho Code § 33-133(1)(d).

The Board is also statutorily required to, among other duties, "[c]reate, publish and make available a data inventory and dictionary or index of data elements with definitions of individual student data fields currently in the student data system", to include "[a]ny individual student data

required to be reported by state and federal education mandates.” Idaho Code § 33-133(3)(a).

The SDE has access to the student data system. Idaho Code § 33-133(3)(b)(i). Thus, regardless of whether the eighteen Technology Group employees are relocated to the OSBE, the Superintendent will still have access to the same data as before.

The legislature is clearly empowered to grant authority over student longitudinal data systems to the Board and the OSBE. When considering the statutory authority provided by the legislature to the Board, “[i]t must be kept in mind that the Constitution of the State of Idaho is not a delegation of power to the legislature but is a limitation on the power it may exercise, and that the legislature has plenary power in all matters for legislation except those prohibited by the constitution.” *Idaho Press Club, Inc. v. State Legis. of the State*, 142 Idaho 640, 642, 132 P.3d 397, 399 (2006) (quoting *Idaho Tel. Co. v. Baird*, 91 Idaho 425, 428, 423 P.2d 337, 340 (1967)). Additionally, “[t]here is no question but that the legislature may, in the exercise of its plenary power, create an office or offices not established by the constitution and not prohibited by either the Federal or State Constitution.” *Smylie v. Williams*, 81 Idaho 335, 339, 341 P.2d 451, 453 (1959).

Nothing in the Idaho Constitution prohibits the legislature from promulgating legislation shifting employees of the Technology Group from the SDE to the OSBE. The legislature has seen fit to provide the Board with the authority to control and supervise data systems such as the student longitudinal data system. This is consistent with the fact that “[i]n interpreting Art. 9, Sec. 1, of the Idaho Constitution, this Court has repeatedly held that the Legislature has the primary and fundamental duty to establish and maintain a system of public education.”

*Thompson v. Engelking*, 96 Idaho 793, 807, 537 P.2d 635, 649 (1975) (citing *Am. Nat’l Bank of*



*Idaho Falls v. Jt. Indep. Sch. Dist. No. 9, Madison County*, 96 Idaho 793, 537 P.2d 635 (1975))  
(remaining citations omitted).

In addition to the authority granted to the Board by article IX, section 2 of the Idaho Constitution, the legislature has reinforced, by statutory authority, that the Board has “general supervision, governance and control of the public school systems[.]” Idaho Code § 33-101. The Board has the power to perform “all duties prescribed for it by the school laws of the state[.]” Idaho Code § 33-107(1). It also has the power of “general supervision, through its executive departments and offices, of all entities of public education supported in whole or in part by state funds[.]” Idaho Code § 33-107(3).

For “the purposes of section 20, article IV, of the constitution of the state of Idaho, the state board of education and all of its offices, agencies, divisions and departments [are] an executive department of state government.” Idaho Code § 33-101. The OSBE is an executive agency of the Board, and the Board has the power to appoint an “executive officer” who shall have such “duties and powers as prescribed” by the Board and “not otherwise assigned by law”. Idaho Code § 33-102A. The Superintendent “may” be appointed “executive officer”. *Id.* However, there is no requirement that she be so appointed. The SDE is also an executive agency of the Board. Idaho Code § 33-125. The Superintendent is the “executive secretary of the board for all elementary and secondary school matters[.]” Idaho Code § 33-102.

The Board has the supervision and control of all school districts in Idaho. Idaho Code § 33-116. The Board can assign to its executive officer, the Superintendent as Executive Secretary or another administrator, “such powers as said officers require to carry out and administer the policies, orders and directives of the board[.]” Idaho Code § 33-107(4)(a). Further, the Board can assign or delegate to its executive officer “such powers as he requires...to perform duties

and render decisions prescribed to the state board involving the exercise of judgment and discretion that affect the public schools in Idaho.” Idaho Code § 33-107(4)(b).

The Board has the power “to make rules for its own government and the government of its executive departments and offices; and upon recommendations of its executive officers, to appoint to said departments and offices such specialists, clerks and other employees as the execution of duties may require, to fix their salaries and assign their duties.” Idaho Code § 33-105(1). The power to appoint specialists and other employees would include the OSBE and SDE as executive departments of the Board. The Board also has the authority to prepare a budget of necessary expenditures for its executive departments and “shall have control of all moneys appropriated” for those expenditures. Idaho Code § 33-106.

In contrast to the Board’s powers and duties, the Superintendent is the executive officer of the SDE, and is responsible “for carrying out policies, procedures and duties authorized by law or established by the state board of education for all elementary and secondary school matters[.]” Idaho Code § 33-125 (emphasis added). The Board has the authority to determine how the SDE will be organized, “acting on the recommendations of the executive secretary [Superintendent].” Idaho Code § 33-126.

The Board may also delegate or assign to the Superintendent, “if necessary to enhance effectiveness and efficiency, such powers as [she] requires to perform duties and render decisions prescribed to the state board involving the exercise of judgment and discretion that affect the public schools in Idaho[.]” Idaho Code § 33-107(4)(d). The Superintendent is to “faithfully execute the duties devolving upon him or delegated to him by said board concerning all elementary and secondary school matters under the control of the board except institutions of higher education.” Idaho Code § 67-1504. Specific powers and duties of the Superintendent and







