Transference of authority for teacher licensure from Board of Education to independent licensure board is inconsistent with constitutional mandate charging Board with general supervision of Commonwealth’s school system.

The Honorable Mitchell Van Yahres
Member, House of Delegates
August 8, 2002

Dear Delegate Van Yahres:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issue Presented

You ask whether, under the Constitution of Virginia, the General Assembly may lawfully establish and designate a professional licensing board, independent from the Board of Education, as the entity responsible for the licensure of teachers.

Response

It is my opinion that transferring responsibility for teacher licensure from the Board of Education to an independent licensure board would violate the mandatory provision of Article VIII, § 4 of the Constitution of Virginia, vesting general supervision of the Commonwealth’s schools in the Board.

Background

During the 2002 Session of the General Assembly, you introduced House Bill 1011, which would have created an independent professional licensure board for teachers by eliminating the Advisory Board on Teacher Education and Licensure and establishing the Virginia Professional Standards Board for Education.\(^1\) The Professional Standards Board would license teachers and other professional staff, a responsibility presently held by the Board of Education.\(^2\) Under the proposed legislation, the Board of Education would continue to license principals and supervisors and determine eligibility for appointment as division superintendent.\(^3\)

The legislation provides that the Governor shall appoint teachers, administrators, representatives of higher education and the business community, and parents to serve on the Professional Standards Board.\(^4\) The Professional Standards Board would also include as ex officio nonvoting members, the Superintendent of Public Instruction, the Director of the State Council of Higher Education, and the Chancellor of the Virginia Community College System, or their respective
designees. The Professional Standards Board would have authority to promulgate regulations pursuant to the Administrative Process Act, §§ 2.2-4000 through 2.2-4033, adopt standards for teacher preparation programs, establish and collect licensure fees, employ an executive director, and appoint advisory committees.9

During the 2002 Session of the General Assembly, the House Committee on Education passed by indefinitely House Bill 1011.10 You relate that the committee debate centered on the constitutionality of the bill. It is this debate that prompts your inquiry.

**Applicable Authorities**

Under Article VIII, § 1 of the Constitution of Virginia, the General Assembly ultimately is responsible for the public educational system in Virginia.11 Article VIII, § 4 of the Constitution vests "[t]he general supervision of the public school system ... in [the] Board of Education."12 The Board is "virtually the only administrative agency of state government in Virginia that is of constitutional stature."13

The powers and duties of the Board of Education are outlined in Article VIII, § 5. The Board is vested with the power to "divide the Commonwealth into school divisions," report to the Governor and General Assembly "concerning the condition and needs of public education in the Commonwealth", certify to local school boards "a list of qualified persons for the office of division superintendent of schools", and "approve textbooks and instructional aides and materials for use in courses in the public schools of the Commonwealth." Finally, "[s]ubject to the ultimate authority of the General Assembly, the Board shall have primary responsibility and authority for effectuating the educational policy set forth in [Article VIII], and it shall have such other powers and duties as may be prescribed by law."18

**Discussion**

The Constitution of Virginia signifies the consent of the people to be governed.19 In giving that consent, the citizens of the Commonwealth have placed certain duties, responsibilities and powers in various branches and departments of government. The Virginia Constitution delineates the duties and responsibilities of the Board of Education in Article VIII. Constitutional provisions are either self-executing, mandatory or directory. A self-executing provision does not require enabling legislation for its enforcement.20 A mandatory provision declares or imposes a duty or requirement that must be followed.21 A directory provision sets forth procedures or "confer[s] discretion on the legislature" for its implementation.22

The Supreme Court of Virginia has not squarely addressed the nature of Article VIII, § 4, or of § 7, which charges local school boards with "[t]he supervision of schools in each school division." The Court's decisions concerning Article VIII, § 7, however, leave no room to doubt that both provisions are mandatory rather than self-executing.23

The Court has determined that it is unconstitutional to take away a power, conferred on local school boards by the General Assembly, that is "essential and indispensable" to the supervision of schools vested in local school boards by the
Constitution.  Similarly, there cannot be a conferral of authority contrary to the Board’s constitutionally mandated general supervision and its charge as the primary body to effectuate the education policy of the Commonwealth, at least if the delegation is of a function that is "essential and indispensable" to its power of supervision.

It is evident that, if the General Assembly determines that provision should be made for teacher licensure, that function is essential and indispensable to the Board of Education’s general supervision of the Commonwealth’s public school system. Alternatively, the Board of Education could determine that teacher licensure is essential and indispensable to effectively carrying out the Commonwealth’s educational policy, and the General Assembly could disagree. Such disagreement, however, could only result in the General Assembly directing that there be no teacher licensure, rather than establishing the responsibility for licensure in an entity other than the Board of Education. Teachers are in the classroom every school day effectuating Virginia’s educational policies. Determining who shall become a teacher is essential and indispensable to ensuring that the Commonwealth’s children receive a quality education. Taking that power away from the constitutionally created body charged with the general supervision of the Commonwealth’s public school system and placing it in an independent board created by the General Assembly and appointed by the Governor would violate the mandatory provision of Article VIII, § 4 of the Constitution of Virginia, vesting general supervision of the schools in the Board of Education. Ensuring that teachers meet the licensing requirements of the Commonwealth is an integral part of supervising Virginia’s public education system and "effectuating the educational policy set forth in [Article VIII of the Constitution of Virginia]."

If enacted, House Bill 1011 would have divested the Board of Education of its teacher licensure function, thus stripping it of all authority to exercise its judgment in a matter that is essential and indispensable to the supervision of the Commonwealth’s public school system. Divesting the Board of the power to license teachers and lodging it in the Professional Standards Board would deprive the Board of Education of the exercise of an essential and indispensable function. In essence, this would strip the Board "of any or all authority to exercise its judgment in the matter." The power of general supervision of the Commonwealth’s public school system would indeed be hollow if the Board of Education were not to have the ultimate decision concerning teacher licensure. Recognizing this, the General Assembly has authorized the Board of Education to prescribe regulations governing teacher licensure.

Conclusion

Accordingly, it is my opinion that transferring responsibility for teacher licensure from the Board of Education to an independent licensure board would violate the mandatory provision of Article VIII, § 4 of the Constitution of Virginia, vesting general supervision of the Commonwealth’s schools in the Board.

2 See id. (amending and reenacting § 22.1-253.13:3(C)).
3 See id. (amending and reenacting § 22.1-253.13:3(C)).
4 See id. (adding § 22.1-305.3(B)).
5 See id. (adding § 22.1-305.3(B)).
6 See id. (adding § 22.1-305.5(11)).
7 See id. (adding § 22.1-305.5(6)).
8 See id. (adding § 22.1-305.5(5)).
9 See id. (adding § 22.1-305.6).
10 House Bill 1011 was passed by indefinitely on January 28, 2002. See id. (summary).
14 "The State Corporation Commission is also a creature of the Constitution, but it is far more than an administrative agency." Id. at 913 n.1.
16 Id. art. VIII, § 5(b); see also Va. Code Ann. § 22.1-18 (LexisNexis Supp. 2002).
17 Id. art. VIII, § 5(c); see also Va. Code Ann. § 22.1-60 (LexisNexis Supp. 2002).
18 Id. art. VIII, § 5(d); see also Va. Code Ann. § 22.1-238 (LexisNexis Supp. 2002).
19 See id. art. I, § 3.
20 "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Newport News v. Woodward, 104 Va. 58, 61-62, 51 S.E. 193, 194 (1905) (citation omitted).
21 16 C.J.S. Constitutional Law § 52, at 137 (1984) ("Mandatory constitutional provisions are binding on all departments of the government.").
22 Albemarle Oil Co. v. Morris, 138 Va. 1, 10, 121 S.E. 60, 62 (1924).
24 See Parham, 218 Va. at 957-59, 243 S.E.2d at 472-73.
25 The School Board in Parham requested that the Court "abandon the 'essential-indispensable function' test employed in Howard ... in favor of an approach which recognizes that § 7 of Article VIII encompasses any function, 'essential ... or otherwise,' related to the supervision of schools." 218 Va. at 958 n.6, 243 S.E.2d at 473 n.6. The Court declined to consider the request, however, "[b]ecause ... we are satisfied that the function involved here is essential and indispensable." Id.
26 Although the Board of Education is responsible for carrying out the educational policy of the Commonwealth, this charge is subject to the ultimate authority of the General Assembly. See Va. Const. art. VIII, § 5(e). Once the General Assembly has made the decision to pursue a certain educational policy, e.g., the licensure of teachers, it may not then place the implementation of that policy, if it involves general supervision, in the hands of an entity other than the Board of Education.
27 Va. Const. art. VIII, § 5(e).
28 Howard v. School Board, 203 Va. at 58, 122 S.E.2d at 894.
Va. Code Ann. § 22.1-298 (LexisNexis Supp. 2002); see also § 22.1-305.2 (Michie Repl. Vol. 2000) (establishing Advisory Board on Teacher Education and Licensure whose advice and recommendations are not binding on Board of Education). Additionally, recognizing that teacher licensure is desirable for a quality educational system, and in implementing § 2 of Article VIII, the General Assembly has provided in the statewide standards of quality that the Board of Education "shall … establish requirements for licensure of teachers." Section 22.1-253.13:3(C) (LexisNexis Supp. 2002). Thus, the General Assembly has further acknowledged the key supervisory role of the Board in teacher licensure.