

STATE OF MICHIGAN  
DEPARTMENT OF ATTORNEY GENERAL



P.O. Box 30212  
LANSING, MICHIGAN 48909

**DANA NESSEL**  
ATTORNEY GENERAL

August 28, 2023

Dr. Michael F. Rice, Ph.D.  
State Superintendent  
608 West Allegan Street  
P.O. Box 30008  
Lansing, MI 48909

Re: Executive Order 2023-6

Dear Dr. Rice:

I am writing in response to your August 9, 2023, letter in which you ask, on behalf of the State Board of Education, for an opinion “to provide constitutional clarity regarding Governor Gretchen Whitmer’s Executive Order 2023-6 creating the Michigan Department of Lifelong Education, Advancement and Potential (MiLEAP).” For the reasons to be discussed, I believe that an opinion providing “clarity” on potentially overlapping authority of the Board of Education and MiLEAP is premature, but as you requested, I have reviewed the issue and wanted to personally “share [my] related thoughts.”

As set out in your letter, the essence of the question posed is whether Executive Order 2023-6<sup>1</sup> (the EO) conflicts with the authority granted to the Board of Education (the Board) under Article VIII, Section 3 of the Constitution, which provides, in part, that “[l]eadership and general supervision over all public education . . . is vested in a state board of education,” and that the Board “shall serve as the general planning and coordinating body for all public education, including higher education . . . .” Whereas the EO, in section 1(a), states, in part, that “MiLEAP will establish and implement a statewide vision for life-long

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<sup>1</sup> As reported by the media, the Executive Office of the Governor (the EOG) consulted with a team of assigned attorneys from the Department of Attorney General regarding Executive Order 2023-6. In an abundance of caution and to avoid any appearance of impropriety should a dispute arise, I neither reviewed nor weighed in on the division-level legal advice and guidance the team provided to the EOG. And the team is screened from involvement in reviewing and responding to your opinion request.

education from preschool to postsecondary. Its responsibilities include expanding equitable access to quality, affordable programs and services and improving outcomes for all Michiganders in early learning and care and higher education.” The concern raised is that there is potentially overlapping authority over public education that runs afoul of the Board’s constitutional authority.

At this point, the EO is not yet effective and therefore has not been implemented by MiLEAP. And the Board acknowledges that, at this point, there is only the *potential* for overlap in the future, and no specific set of facts was provided for review. As a result, the only review that can be conducted is a facial one, and such a review leads to a clear answer as to the facial constitutionality of the EO.

The standard for finding an EO unconstitutional on its face is a high one. Specifically, an EO is unconstitutional on its face only when “no set of circumstances exists under which the [EO] would be valid. The fact that the [EO] might operate unconstitutionally under some conceivable set of circumstances is insufficient.” *Straus v Governor*, 459 Mich 526, 543 (1999) (cleaned up). Here, at various points, the EO speaks of a “shared vision,” “collaborating” with state leaders, “developing a shared action plan,” and being a “partner with the Department of Education and the State Board of Education, complementing their existing long-term planning efforts . . . .” And perhaps most importantly, the EO, in section 9(a), specifically states that, “[n]othing in this Executive Order should be construed to diminish the constitutional authority of the State Board of Education . . . .” Therefore, the plain language of the EO indicates that it is intended to create a spirit of cooperation, coordination, and collaboration between MiLEAP and the Board that will complement the Board’s activities, while also specifically precluding MiLEAP from infringing on the Board’s constitutional authority. If that intent is honored, it creates a set of circumstances under which the EO would be valid. As a result, the EO is clearly not unconstitutional on its face.

That said, after the EO becomes effective in December and MiLEAP begins to “implement its vision,” there could be actions taken by MiLEAP that the Board contends infringe on its constitutional authority. It is at that point, where a specific set of facts exists, that an opinion may be appropriate. Unless and until such a situation arises, however, issuing any type of opinion on potentially overlapping authority of the Board and MiLEAP is premature.

Again, this letter should not be construed as any type of opinion, as I believe that, on its face, the EO presents no constitutional concern warranting the issuance of an opinion, but I also wanted to personally respond to you and the Board with my reasons for that belief. However, if questions do arise about an actual, non-

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hypothetical situation where MiLEAP is allegedly encroaching on the Board's constitutional realm, those questions can be presented and will be reviewed to determine whether an opinion is appropriate.

In the meantime, and as always, should you or the Board have an issue on which you would like guidance from our office in the form of something short of an opinion, please do not hesitate to contact our Health, Education, and Family Services Division.

I hope that you find my thoughts on these issues to be helpful.

Sincerely,

A handwritten signature in blue ink that reads "Dana Nessel". The signature is written in a cursive style with a large initial "D".

Dana Nessel  
Attorney General