

Trustees—Schools—Attorneys—County Attorneys.

School trustees have authority to employ counsel to recover money from the county because the county attorney is disqualified from appearing on either side of the controversy.

T. H. Burke, Esq.,
County Attorney,
Hardin, Montana.

January 9, 1926.

My dear Mr. Burke:

You have requested my opinion whether a school district has authority to employ counsel to represent its interests in a case brought by a school district against the county treasurer.

The general rule is stated in 35 Cyc., 952, as follows:

“A school district ordinarily has statutory power, through its proper boards or officers to employ counsel to represent it in suits brought by or against it or any of its officers involving the interests of the district, and this power may be implied from the power to sue. But such power does not authorize school officers to employ counsel at the public expense to defend a fraud perpetrated by such officers upon the district; nor has the president of a school board power to bind the board by employing an attorney and authorizing him to enter judgment in behalf of the district on a bond held by the district. Where the school district has a right to require the services of the city or district attorney, it has no authority to incur expense in the employment of other counsel.”

While it is true that under section 1328, R. C. M. 1921, the county attorney is made the legal adviser of school trustees, under the facts submitted by you the county attorney would obviously have been disqualified from appearing on behalf of the school district for the reason that he is also made the legal adviser of the county treasurer against whom the action was brought and under such circumstances the district would be in the same situation as if we had no statute making the county attorney its legal adviser.

The following cases hold that a district had the right to employ counsel to assist its regular attorney:

Fleischman vs. Graves, 193 N. Y. Supp. 816;
State ex rel Brandeis vs. Melcher, 127 N. W. 241.

If a school district has the right to employ counsel to assist its regular counsel, then I see no reason why it may not employ counsel to protect its interests in litigation when the county attorney is disqualified from acting as its attorney.

It is, therefore, my opinion that the board of trustees of school district No. 17H had authority to employ counsel in the action referred to by you.

Very truly yours,

L. A. FOOT,

Attorney General.