

County High School Board — County Agency — Special Counsel—County High School—Schools.

A county high school is an agency of the county and cannot employ special counsel except where the county attorney is disqualified.

Mr. Donovan Worden,
County Attorney,
Missoula, Montana.

September 28, 1931.

My dear Mr. Worden:

You have submitted the following questions:

“1. Is the county attorney of the counties the legal adviser of the county high school boards?”

“2. Do county high school boards have authority to employ special counsel?”

You have not indicated any specific facts under which the county attorney might be the legal adviser of high school boards or under which a high school board might have authority to employ special counsel.

The statutes relative to the duties of the county attorney are sections 4819, 4820 and 4821, and with respect to school districts section 1328; also with respect to bond issues of school districts section 23 of chapter 147 of the laws of 1927.

Under section 4819 the county attorney must "give when required, and without fee, his opinion in writing to the county, district, and township officers, on matters relating to the duties of their respective offices."

Under section 4820 the county attorney is made the legal adviser of the board of county commissioners; he must oppose all claims and accounts against the county which are unjust or illegal.

Section 4821 provides: "If the board of county commissioners, without authority of law, order any money paid as a salary, fees, or for any other purposes, and such money has been actually paid, * * * the county attorney is empowered, and it is his duty, to institute an action in the name of the county against such person or persons to recover the money so paid."

The county attorney is also the legal adviser of the county superintendent of schools and of the school trustees. (Section 1328.)

The answers to your questions depend upon the character of the county high school board. If the county high school is a county institution or agency the above statutes are very definite as to the duty of the county attorney with respect thereto. However, it is not an easy matter to determine just what character of public corporation or agency the county high school is. The county high school is not an agency or instrumentality intended to assist the county in carrying out any of the purposes for which counties were created under the constitution. The constitution contemplated that the state should be divided into counties and the counties should be divided into school districts. The counties were to be created as governmental agencies of the state and school districts were created for strictly educational purposes.

In *State ex rel Henderson vs. Dawson County*, 87 Mont. 122, 286 Pac. 125, the supreme court of this state went somewhat into the history of county high schools for the purpose of attempting to determine their character. Quoting from page 133 of 87 Montana the court said:

"In 1899 the legislature provided for the establishment of free county high schools by a vote of the electors of the county, and for which trustees were to be appointed by the board of county commissioners; these trustees were empowered to 'bond the county' for the purpose of building and equipping a county high school building. (Laws 1899, p. 59.) Under this Act it would seem the legislature intended to make such a high school a county institution in all essentials. This Act was, however, amended in 1901 so as to take the appointment of trustees out of the hands of the county commissioners and, in effect, to place control of the high school in the hands of the county superintendent of schools (Laws 1901, p. 6), thus making the county a sort of sublimated school district for high school purposes, but still leaving the method of financing the building and equipment of necessary accommodations, as before, by the issuance

of 'county bonds.' Control over these matters was later returned to the board of county commissioners (Sec. 921, Rev. Codes, 1907)."

A study of the various provisions of the statute with reference to county high schools and their boards of trustees will disclose that the county, or its governing board, the board of county commissioners, has very little supervision over the county high school.

Under section 1271 the board of trustees has power to keep a record of all official acts done by the board and to keep a full record of all warrants issued against moneys belonging to the county high school. Payments of money can only be made by warrants drawn against said funds belonging to the county high school. Section 1271 also provides that the board of trustees shall have power and it shall be their duty "to proceed, as soon as practicable after their appointment, and qualification, to select at the place designated as the location for the county high school, the best site that can be obtained, and the title thereto, upon securing said site by purchase or otherwise, shall vest in the county; the trustees shall then proceed to make purchase of material and to let such contracts for necessary school buildings as they may deem proper." They have power "to lease * * * suitable buildings for the use of the high school while the new buildings are in process of erection, or to contract with the trustees of the local school district, or any other parties, for the use of suitable buildings for high school purposes for such time as may be deemed best for the interests of the county;" and "to employ for a period of not exceeding two years some suitable person to take charge of said school; and to furnish such assistant teachers as they deem necessary, and to designate the salaries that shall be paid; to adopt courses of study; to admit pupils without tuition; to admit pupils from other counties and to provide textbooks."

Under section 1275 "the trustees shall make an estimate of the amount of funds needed for building purposes, for payment of teachers' wages, and for the payment of contingent expenses, and they shall present to the board of county commissioners a certified estimate of the rate of tax required to raise the amount desired for such purposes, and the board of county commissioners must levy such tax as other county taxes are levied."

Under these provisions the board of trustees of the county high school have all the power, including the levying of taxes, of the board of trustees of any ordinary school district. The money when collected from the taxes is paid into a special fund and held for the credit of the county high school and can be used for no other purpose. The board of county commissioners in all matters concerning the county high school has no such supervisory powers over the board of trustees that they have over county officers.

At one time in the early history of the county high school the board of high school trustees was constituted a body corporate with powers to sue and be sued (Senate Bill No. 27, 1901). This provision, however, was subsequently repealed.

The only conclusion, however, that can be drawn from the powers granted to the high school board is that it is some sort of public corpora-

tion created for educational purposes with the right to impose upon the county a county-wide tax and to use the limitation provided by the constitution for county indebtedness as a credit for the purpose of erecting county high school buildings and issuing bonds.

It is my opinion that the county high school board performs its various functions and duties as agents of the county and to that extent the members of that board are county officers. Therefore, the county attorney is the legal adviser of the board and such board has no authority in itself to employ special counsel. In a case where the county attorney is disqualified for any reason or where there is a controversy between the county high school board and the board of county commissioners the former board would undoubtedly have the right to be represented by special counsel and to pay him from its funds.

Very truly yours,

L. A. FOOT,

Attorney General.