

Opinion No. 24-3766

June 9, 1924

BY: MILTON J. HELMICK, Attorney General

TO: Requested by: Miss Isabel Eckles, Superintendent of Public Instruction, Santa Fe, New Mexico.

Municipal Boards of Education May Employ Attorneys.

OPINION

{*141} This inquiry arises under the following circumstances:

Municipal school boards in the larger cities of New Mexico are constantly confronted with many vexatious questions concerning building contracts, land matters and other things involving the care and preservation of the property of the school district which {*142} require the supervision of a trained lawyer and inquiry is made whether or not a municipal school board has the right to retain an attorney by the year for the purpose of handling such legal matters.

By Section 902, Chap. 148, S. L. 1923 municipal schools are governed by a board of education having like powers over the schools of the district as those possessed by the county boards of education of the rural schools. These duties, among others, include the power "to sue and be sued, contract and acquire and dispose of school property pursuant to law." (Sec. 801, Chap. 148, Laws 1923). There is no officer charged with the duty of representing municipal boards in legal matters. Representation of municipal boards is not among the duties of either the Attorney General or the District Attorney or the City Attorney.

The question asked here has been before the courts many times and the decisions have been practically unanimous. It may be safely stated that school districts which are authorized to contract and to sue may employ attorneys where there is no statute making it the duty of any officer to appear for them. *State v. Aven*, 70 Ark. 291, 67 S. W. 752; *Burgess v. School District*, 1000 Mass. 132. See also notes Annotated Cases 1918A 502 and L. R. A. 1917D 246. In 24 R. C. L. page 597 it is said:

Broadly speaking, a school district having the power to sue and be sued may employ an attorney if the employment is necessary for the protection of public interests committed to it. The power to employ includes the power to compensate.

Even in cases where it is the duty of a prosecuting attorney imposed by statute, to serve independent district boards of education, it has been held that such statute does not deprive district boards of the implied power to employ other counsel or additional counsel. *Mollohan v. Cavender* 75 W. Va. 36, 83, S. E. 78, Annotated Cases 1918A

499. The Supreme Court of Georgia in the case of Taylor v. Matthews, 75 S. E. 166, held that a school district which is empowered to sue and be sued and make contracts and acquire land could properly employ an attorney to represent it. The court said:

But, while the expenditure of public school funds is confined to public schools, we are of the opinion that in the conduct of the public schools the proper authorities (such as the trustees of a school district) may, in their discretion, make any expenditure of the funds which is absolutely necessary for the proper maintenance of the school intrusted to their charge. They might properly expend a portion of the money in repairing or improving the school building, or in fitting it with proper appliances and conveniences. They might insure the school property against loss by fire, and pay the premium from the school fund. By a parity of reasoning we have no hesitation in holding that funds derived from local taxation within a school district may properly be expended by the trustees of the district in protecting or preserving the right of local taxation for educational purposes by the employment of an attorney, or in other legitimate expenses necessary for presenting their rights in the adjudication of the case.

{*143} As I have pointed out, municipal school boards in New Mexico are not furnished with any official legal advisor but they are nevertheless expected to contract, acquire land, safeguard the property rights of the district and, in proper cases, to sue in the courts. In view of the authorities heretofore cited I have no hesitation in reaching the conclusion that municipal boards of education in New Mexico may properly retain an attorney and pay him from the school fund.