

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL  
State of California

BILL LOCKYER  
Attorney General

---

OPINION	:	No. 02-1005
	:	
of	:	April 25, 2003
	:	
BILL LOCKYER	:	
Attorney General	:	
	:	
ANTHONY S. DA VIGO	:	
Deputy Attorney General	:	
	:	

---

THE HONORABLE CAROL LIU, MEMBER OF THE STATE ASSEMBLY, has requested an opinion on the following questions:

1. May a county board of education appoint outside counsel in addition to in-house counsel to provide unrestricted, independent advice to the board?

2. May a county board of education contract with outside counsel to provide advice to the board when (1) in-house counsel has a conflict of interest, (2) in-house counsel has failed to render timely advice in a particular matter, (3) the services being sought are in addition to those usually, ordinarily and regularly obtained from in-house counsel or (4) the board desires a second legal opinion from that provided by in-house counsel in a particular matter?

## CONCLUSIONS

1. A county board of education may not appoint an outside counsel in addition to in-house counsel to provide unrestricted, independent advice to the board.

2. Depending upon the facts in a particular matter and subject to statutory conditions, a county board of education may contract with outside counsel to provide advice to the board when (1) in-house counsel has a conflict of interest, (2) in-house counsel has failed to render timely advice in a particular matter, (3) the services being sought are in addition to those usually, ordinarily and regularly obtained from in-house counsel or (4) the board desires a second legal opinion from that provided by in-house counsel in a particular matter.

## ANALYSIS

A county board of education (“board”) generally approves the budget of the county superintendent of schools (“superintendent”), sets the salary and provides offices for the superintendent, and employs persons to provide special services to the board, among other duties and responsibilities. (See Cal. Const., art. IX, §§ 3.1-3.3.; Ed. Code, §§ 1000-1097; *Board of Education v. County of San Luis Obispo* (1981) 126 Cal.App.3d 320; 85 Ops.Cal.Atty.Gen. 77, 77-81 (2002); 79 Ops.Cal.Atty.Gen. 155, 157-158 (1996); 72 Ops.Cal.Atty.Gen. 25, 26-27 (1989); 31 Ops.Cal.Atty.Gen. 170, 171-172 (1958).)<sup>1</sup> The superintendent generally oversees the schools of the county, enforces the course of study, audits the expenditures of school districts, and conducts teacher institutes, among other duties and responsibilities. (See Cal. Const. art. IX, §§ 3-3.1; §§ 1200-1350; 85 Ops.Cal.Atty.Gen., *supra*, at pp. 77-80; 74 Ops.Cal.Atty.Gen. 116, 118-119 (1991); 72 Ops.Cal.Atty.Gen., *supra*, at pp. 28-30; 65 Ops.Cal.Atty.Gen. 305, 306-308 (1982).)

The two questions presented for analysis concern the authority of a board to receive legal services in specified circumstances.

### 1. Appointment of Legal Counsel

The first question to be addressed is whether a board may appoint more than one legal counsel. We conclude that it may not.

---

<sup>1</sup> All references hereafter to the Education Code are by section number only.

The governing statute requiring our interpretation is section 35041.5, which provides:

“Anything in a city, county, or city and county charter to the contrary notwithstanding, the governing board or boards of any school district may, in lieu of appointing an administrative advisor pursuant to Section 35041, or any county board of education or any county superintendent of schools may, appoint a legal counsel and fix and order paid the counsel’s compensation as an employee or as an independent contractor. The duties of the legal counsel may include rendering legal advice to the superintendent of schools, the county board of education, and to other officers and employees of the school district or districts and other board of the district or governing boards of the districts, and serving as the legal counsel of the superintendent of schools, the county board of education, and the district or districts in the preparation and conduct of a school district litigation and administrative proceedings, and rendering advice in relation to school bond and tax increase measures and prepare all legal papers and forms necessary for the voting of school bonds and tax increase measures in the district or districts. The legal counsel shall have been admitted to practice law in the state, and shall not be required to have any certification qualifications. The term ‘legal counsel’ as used herein includes a solo practitioner, partnership, or a law corporation.

“The county board of education and the superintendent of schools of the same county shall appoint the same legal counsel.”

Section 35041.5 constitutes both a grant and a limitation of power. We note generally that with respect to a statutory grant of authority, there is an implied negative: no power may be exercised which is in excess of the granted authority. (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 196; 85 Ops.Cal.Atty.Gen. 181, 185 (2002).) Moreover, a legislative articulation of specific statutory authorization in one respect indicates the absence of such authority in related respects. (*Safer v. Superior Court* (1975) 15 Cal.3d 230, 238; 85 Ops.Cal.Atty.Gen., *supra*, at p. 185.)

Here, section 35041.5 authorizes the board to appoint “a legal counsel.” The phrase “a legal counsel” is singular, including when it refers to “a solo practitioner, partnership, or a law corporation.” The superintendent is to have “the same legal counsel.”<sup>2</sup> We apply section 35041.5 according to its express terms. (See *Curle v. Superior Court* (2001) 24

---

<sup>2</sup> We are not asked to address the situation where a board and a superintendent wish to appoint different legal counsel.

Cal.4th 1057, 1063; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977; *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 623, 633; *Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1087.) No dual legal counsels are authorized.

We note that under section 35160, a board “may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law . . . .” (See §§ 35160.1, 35160.2.) Since we conclude that the appointment of two legal counsels would contravene the terms of section 35041.5, the authority granted in section 35160 may not be exercised in a manner “inconsistent” therewith. (See *Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1017-1019; *Howard Jarvis Taxpayers Assn. v. Whittier Union High School Dist.* (1993) 15 Cal.App.4th 730, 734-735; *California School Employees Assn. v. Del Norte County Unified Sch. Dist.* (1992) 2 Cal.App.4th 1396, 1404.) We have previously observed that “while the powers of a school district [which is granted the same powers as a board in section 35160] are broad, they may not be exercised in a manner that is in conflict, inconsistent, or preempted by state law.” (83 Ops.Cal.Atty.Gen. 40, 41 (2000); see 84 Ops.Cal.Atty.Gen. 5, 8-9 (2001).) In this regard, we note that a school district’s control over a program or activity may be precluded by the preemptive existence of another comprehensive statutory plan. (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 591 [“the local districts are denied control over many aspects of teachers’ terms of employment by detailed provisions in the Education Code governing such matters . . . .”]; see also *Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 890; 81 Ops.Cal.Atty.Gen. 218, 221 (1998).)

It is concluded that a board may not appoint outside counsel in addition to in-house counsel to provide unrestricted, independent advice to the board.

## 2. Contracting For Special Legal Services

The second inquiry is whether a board may contract with outside counsel to provide advice to the board under specified circumstances. We conclude that it may.

Section 1042 is the governing statute requiring our interpretation, and it provides as follows:

“County boards of education may:

“.....

“(d) Contract with and employ any persons for the furnishing to the board of special services and advice in financial, economic, accounting, engineering, legal, or administrative matters, if these persons are specially trained and experienced and competent to perform the special services required. The board may pay from any available funds such compensation to these persons as it deems proper for the services rendered.

“.....”

Hence, as distinguished from section 35041.5, section 1042 is limited to the furnishing of “special services and advice” in legal matters if the persons hired “are specially trained and experienced and competent to perform the special services required.”

We have previously examined similar language in related statutes. (76 Ops.Cal.Atty.Gen. 86, 87-89 (1993); 71 Ops.Cal.Atty.Gen. 266, 272 (1988).) In our 1988 opinion, we stated:

“‘Whether the function in question may be classified as a special service is ultimately a question of fact. While no similar case has been found, it has been held, for example, that hospital management (*Darley v. Ward, supra*, 136 Cal.App.3d 614), research and development (*Calif. Sch. Emp. Assn. v. Sunnyvale Elementary Sch. Dist.* (1973) 36 Cal.App.3d 46), and special counsel as prosecutor where the city attorney had not been vested with prosecutorial powers (*Montgomery v. Superior Court* (1975) 46 Cal.App.3d 657; compare *Jaynes v. Stockton* (1961) 193 Cal.App.2d 47), are special services.’ . . . .” (*Id.* at p. 272.)

In *Darley v. Ward* (1982) 136 Cal.App.3d 614, 627-628, the court described the criteria for determining the nature of special services:

“‘Whether services are special requires a consideration of factors such as the nature of the services, the qualifications of the person furnishing them and their availability from public sources. (*Jaynes v. Stockton* (1961) 193 Cal.App.2d 47, 51-52.) Services may be special because of the outstanding skill or expertise of the person furnishing them. (*Kennedy v. Ross* (1946) 28 Cal.2d 569, 574; *Jaynes v. Stockton, supra*, 193 Cal.App.2d at p. 52.) Whether services are special is a question of fact. (*California Sch. Employees Assn. v. Sunnyvale Elementary Sch. Dist.* (1973) 36 Cal.App.3d 46,61; *Jaynes v. Stockton, supra*, 193 Cal.App.2d at p. 53.)’ ”

Accordingly, the test as to whether legal services provided to a board would be “special services” for purposes of section 1042 would depend on “ ‘the nature of the services; the necessary qualifications required of a person furnishing the services; and the availability of the service from public sources.’ ” (See *Service Employees Internat. Union v. Board of Trustees* (1996) 47 Cal.App.4th 1661, 1673.)

Here, we believe that a board may exercise its authority under section 1042 to contract for legal services when such services, for reasons beyond the board’s control, are “unavailable” from its own legal counsel due to disqualification, inability, refusal or otherwise. The contract may be awarded based upon the qualifications of the person furnishing the services, including “outstanding skill or expertise.” Each situation must be examined on its own merits.

In so construing the language of section 1042, we give meaning to each of its terms while providing consistency with the provisions of section 35041.5. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159; *Harry Carian Sales v. Agricultural Labor Relations Bd.* (1985) 39 Cal.3d 209, 233; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22; *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844.)<sup>3</sup>

It is concluded that a board may contract with outside counsel to provide advice to the board when (1) in-house counsel has a conflict of interest, (2) in-house counsel has failed to render timely advice in a particular matter, (3) the services being sought are in addition to those usually, ordinarily, and regularly obtained from in-house counsel, and (4) the board desires a second legal opinion from that provided by in-house counsel in a particular matter. Whether the board’s authority to contract may be exercised in a particular case would depend upon the relevant facts and subject to the conditions specified in section 1042.

\*\*\*\*\*

---

<sup>3</sup> Similar to our analysis of the first question, we find that the authority granted to a board under the terms of sections 35160-35160.2 may not be exercised beyond the scope of the grant of authority contained in section 1042 or in a manner inconsistent with the conditions and limitations contained in the latter statute.