

Note from the Attorney General's Office:

1983 Op. Att'y Gen. No. 83-038 was overruled in part by
2008 Op. Att'y Gen. No. 2008-032.

OPINION NO. 83-038**Syllabus:**

Pursuant to R.C. 309.10, a school board may hire "in-house" legal counsel, provided that such counsel is paid by the school board from the school fund.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 22, 1983

I have before me your request for my opinion concerning the authority of various types of school districts to hire "in-house" legal counsel. Your letter reads, in relevant part, as follows:

Section 3313.35, Revised Code provides that: "[i]n city school districts, the city solicitor shall be the legal advisor and attorney for the board thereof. . ." However, in the case of a city that has adopted a charter pursuant to Ohio Constitution Article XVIII, Section 7, which does not either directly or indirectly impose on its legal officer the duty to act as the legal advisor and attorney for the city school district, Section 3313.35, Revised Code does not operate to impose such a duty. 1970 O.A.G. No. 70-081, 1954 O.A.G. No. 3644, and 1934 O.A.G. No. 2478. In effect, then, if a city law director has no duty to represent a city school district, such district does not have a statutory legal counsel.

Based on the foregoing, you have submitted the following questions:

- 1) Does such city school district, under its power to hire and compensate administrative and nonteaching employees granted by Sections 3319.02 and 3319.081, respectively, have the authority to hire "in-house" legal counsel?
- 2) Would any other type of school district—local, exempted village, or joint vocational—have such authority?

There is a general statutory scheme in Ohio under which a city law director is designated as legal adviser to the board of education of a city school district and a county prosecutor is designated as legal adviser to other boards of education. R.C. 3313.35 states:

Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. In joint vocational school districts the legal adviser shall be the prosecuting attorney of the most populous county containing a school district which is a member of the joint vocational school district. When such civil action is between two or more boards in the same county, the prosecuting attorney shall not be required to act for either of them.

In city school districts, the city director of law shall be the legal adviser and attorney for the board thereof, and shall perform the same services for such board as required of the prosecuting attorney for other boards of the county. Such duties shall devolve upon any official serving in a capacity similar to that of prosecuting attorney or city director of law for the territory wherein a school district is situated regardless of his official designation. In a district which becomes a city school district pursuant to section 3311.10 of the Revised Code, the legal adviser shall be the solicitor or director of law of the largest of the municipal corporations all or a part of which is included within the school district boundaries. No compensation in addition to such officer's regular salary shall be allowed for such services.

As your letter notes, however, an exception to this scheme has been recognized in the case of a city which, pursuant to Ohio Const. art. XVIII, §7, has adopted a charter that designates the duties of the law director but does not, directly or indirectly, impose upon the law director the duty to advise the board of education. As was stated in 1954 Op. Att'y Gen. No. 3644, p. 135 (syllabus, paragraph 2):

In case a city has adopted a charter pursuant to Section 7 of Article XVIII of the Constitution, which does not either directly or indirectly impose on its legal officer the duty to act as the legal adviser and attorney of the board of education, Section 3313.35, Revised Code, will not operate to impose such duty. Opinion No. 2478, Opinions of the Attorney General for 1934, page 435, approved and followed.

See 1979 Op. Att'y Gen. No. 79-100; 1970 Op. Att'y Gen. No. 70-081; 1934 Op. Att'y Gen. No. 2478, vol. I, p. 435. See generally State ex rel. Grandview Heights City School District Board of Education v. Morton, 44 Ohio St. 2d 151, 339 N.E.2d 663 (1975) (where charter provides that city solicitor shall perform duties imposed upon city solicitors by the general laws of the state, the city solicitor must provide free legal services to the city school district).

It follows from the foregoing that, when a city school district is located in a city that has adopted such a charter, the city school district has no statutory legal counsel. Your first question is whether such a city school district may, under its power to hire and compensate administrative and nonteaching employees, hire "in-house" legal counsel.

My predecessors have addressed the question whether such a city school district, having no statutory legal counsel, may obtain legal services. Op. No. 70-081 concluded that, where a city charter does not impose upon the law director the duty of providing services for the city board of education, the board may enter into an arrangement to pay the city law department reasonable compensation for legal services, and may contract with private law firms for specific legal services to assist or supplement the services provided by the city law director. That opinion relied on 1954 Op. No. 3644 (syllabus, paragraph 3) ("[a] board of education of a city school district may lawfully employ, and pay from the funds of the school board, legal counsel to assist or supplement the services provided to the school district by the city solicitor") which, in turn, relied on 1933 Op. Att'y Gen. No. 1392, vol. II, p. 1250, and Knepper v. French, 125 Ohio St. 613, 183 N.E. 869 (1932), a case discussed therein.

In Knepper v. French, the Ohio Supreme Court considered G.C. 4761, the predecessor to R.C. 3313.35, together with G.C. 2916, 2917, 2918, predecessors, respectively, to R.C. 309.08, 309.09, and 309.10. R.C. 309.08 sets forth the general prosecutorial authority of the county prosecuting attorney. R.C. 309.09 designates the county prosecuting attorney as legal adviser of county officers and boards and provides that they may require written opinions or instructions from him in matters connected with their official duties. It states specifically: "He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is

a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code."¹

R.C. 309.10 goes on to provide: "Sections 309.08 and 309.09 of the Revised Code do not prevent a school board from employing counsel to represent it, but such counsel, when so employed, shall be paid by such school board from the school fund."

The court in Knepper v. French found that the predecessors to R.C. 309.08, 309.09, 309.10, and 3313.35 were in pari materia and that the provisions of G.C. 2918, currently appearing in R.C. 309.10, operate as an exception to the other sections and give a board of education authority "to employ counsel other than the prosecuting attorney to represent it in litigation or matters involving legal controversy." 125 Ohio St. at 616, 183 N.E. at 870. Relying on this case, 1933 Op. No. 1392 concluded, in the syllabus:

Under authority of Knepper vs. French, 123 O.S. 613, a board of education of a city, village or rural school district may employ attorneys other than the city solicitor or prosecuting attorney to pass upon the legality of a transcript of proceedings relating to the issuance of bonds, providing such attorneys are paid by the board of education from the school fund.

R.C. 309.10 has, thus, been construed as authorizing school boards—including city school boards—to hire counsel other than the county prosecutor or city solicitor. See 1980 Op. Att'y Gen. No. 80-064 (syllabus) ("[p]ursuant to R.C. 309.10, the school board of a joint vocational school district may employ counsel of its choice, rather than relying on the county prosecutor of the most populous county in the joint vocational school district, provided that such counsel is paid from school funds"); 1961 Op. Att'y Gen. No. 2678, p. 690; 1958 Op. Att'y Gen. No. 2685, p. 537 at 539 ("it seems well settled that the board of education is authorized to employ additional counsel either to assist or act in place of the prosecuting attorney, or to take his place in case for any reason he fails or refuses to represent the board"); 1937 Op. Att'y Gen. No. 1160, vol. II, p. 2014. In addition, it has been recognized that there may be matters which do not come within the duties of a county prosecutor or city law director but for which the services of an attorney are necessary or desirable, and that a board of education may employ the city law director (or another attorney) to undertake such matters. See 1938 Op. Att'y Gen. No. 3441, vol. III, p. 2323 (preparation of legal papers required for board of education to proceed with issuance of bonds); 1926 Op. Att'y Gen. No. 3903, p. 555; 1923 Op. Att'y Gen. No. 634, vol. I, p. 508 (preparation of abstracts of title of property); cf. 1949 Op. Att'y Gen. No. 456, p. 170 (because of conflict of responsibilities, school board may not employ prosecuting attorney for the preparation of proceedings leading to the issuance and sale of bonds). See generally 1954 Op. No. 3644. The authority of a school board to hire legal counsel is, of course, limited to matters in which the board has an official interest. See 1965 Op. Att'y Gen. No. 65-66 (school board of city school district may not expend public funds for legal fees for services rendered in defense of a member of the school board charged with nonfeasance, malfeasance, and misfeasance where the board has no official interest in the adjudication of the charges); 1955 Op. Att'y Gen. No.

¹ R.C. 305.14 states:

The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.

The board of county commissioners may also employ legal counsel, as provided in section 309.09 of the Revised Code, to represent it in any matter of public business coming before such a board, and in the prosecution or defense of any action or proceeding in which such board is a party or has an interest, in its official capacity.

4734, p. 29 at 31 ("under the provisions of Section 309.10, Revised Code, a board of education may employ counsel to represent it in any proceeding in which the board has a legitimate interest"); 1937 Op. Att'y Gen. No. 1046, vol. II, p. 1819.

You have asked specifically whether a city school district which has no statutory legal counsel may hire "in-house" legal counsel. Your question concerns the distinction between hiring a lawyer as an employee and obtaining legal services pursuant to a contract with a lawyer or firm that is not on the school district's payroll. See generally Council v. Douglas, 163 Ohio St. 292, 126 N.E.2d 597 (1955) (setting forth test for distinguishing the relationship of principal and agent or master and servant from the relationship of employer and independent contractor). While most of the cases and opinions discussed above deal with the authority to obtain outside legal services by contract, see, e.g., Op. No. 70-081, none rules out the possibility of simply hiring an attorney as an employee, see, e.g., 1954 Op. No. 3644 (syllabus, paragraph 3) (approving and following 1933 Op. No. 1392) ("[a] board of education of a city school district may lawfully employ, and pay from the funds of the school board, legal counsel to assist or supplement the services provided to the school district by the city solicitor"). The argument that R.C. 309.10 operates to authorize a board of education to employ counsel other than the city law director or prosecuting attorney applies equally to contracts with outside firms and to employment of "in-house" counsel. See generally State ex rel. Sigall v. Aetna Cleaning Contractors of Cleveland, Inc., 45 Ohio St. 2d 308, 345 N.E.2d 61 (1976) (absent an intent to circumvent the civil service system, a state university may obtain custodial services either pursuant to a contract with an independent contractor or by hiring civil service employees); Webster's New World Dictionary 459 (2d college ed. 1976) (defining "employ" as meaning "4. to engage the services or labor of for pay; hire"); cf. Ohio Ethics Commission, Advisory Op. No. 75-011 (as used in R.C. 102.04(A), "employed by" includes persons hired as employees but does not include independent contractors). I find, therefore, that a city school district which has no statutory legal counsel does have the authority to hire "in-house" legal counsel.

Your letter expressly references R.C. 3319.02 and 3319.081 as possible sources for the authority to hire "in-house" legal counsel. Since I find that the authority to hire such counsel is derived from R.C. 309.10, I find it unnecessary to discuss R.C. 3319.02 and 3319.081.

Your second question is whether school districts other than city school districts—specifically, local, exempted village, and joint vocational school districts—have a similar authority to hire "in-house" legal counsel. I believe that the discussion contained in Knepper v. French and the analysis adopted in 1933 Op. No. 1392 and later opinions require the conclusion that all school boards—including those which you have mentioned, as well as city school boards, whether or not they have statutory legal counsel—may hire "in-house" legal counsel. See generally Op. No. 80-064 (school board of joint vocational school district may employ counsel of its choice); 1961 Op. No. 2678 (local board of education may employ legal counsel other than the county prosecuting attorney); 1954 Op. No. 3644 (board of education of city school district may employ legal counsel to assist or supplement the services provided by the city solicitor); 1933 Op. No. 1392 (board of education of a village or rural school district may employ attorneys other than the city solicitor or prosecuting attorney). As was stated in 1961 Op. No. 2678, at 693: "Thus, it appears to be well settled that Section 309.10. . . is governing as to the right of a school board to hire private counsel; and. . . that section places no restriction upon employment of counsel except that payment shall be paid from the school fund. . . ."

It is, therefore, my opinion, and you are hereby advised, that, pursuant to R.C. 309.10, a school board may hire "in-house" legal counsel, provided that such counsel is paid by the school board from the school fund.