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MEMORANDUM

DATE: September 21, 2016

TO: Ben Rarick
Executive Director
State Board of Education

FROM: Linda Sullivan-Colglazier, *LAS-C*
Assistant Attorney General

SUBJECT: **Role of Legal Counsel to the Board**

You have asked me for information regarding the role of the Assistant Attorney General assigned to provide legal representation to the State Board of Education (SBE) in order to assist the Executive Committee in the possible development of a new section in the "Board Norms."

First, I thought it would be helpful to provide some general background information on the role of the Office of the Attorney General. The authority for the Attorney General to provide legal representation to state agencies, boards, and commissions is both Constitutional and statutory. In a 2013 letter to the Directors of State Agencies, Boards, and Commissions, Nicholas Brown, General Counsel to the Governor explained:

[T]he Office of the Attorney General serves as the exclusive source of legal representation for state agencies, boards and commissions. Two statutes outline these duties and the specific functions assigned exclusively to the Attorney General's Office. First, RCW 43.10.030 lists the Attorney General's powers, including representing the state in all court proceedings, advising state officers on all legal questions related to their duties, and drafting contracts and other legal documents. Second, RCW 43.10.040 states that "The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions"

Letter from Nicholas Brown, Gen. Counsel, Wash. State Governor's Office, to the Dirs. of State Agencies, Bds., and Comm'ns. (December 20, 2013) (on file with author).

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Each agency, board, and commission has an Assistant Attorney General (or several) assigned to provide representation and advice. In developing guidelines for members' interactions with their assigned Assistant Attorney General (AAG), here are a few general concepts for the executive committee to consider.

- The assigned AAG represents the full board as a body, not individual members. Because of this, it may be best to have the board establish a process or protocol where requests for legal advice come through a specified person or group such as the Board Chair, executive committee, or the Executive Director.
- The AAG is the board's legal advisor, not the decision maker for board actions or policy. In that role, the AAG will strive to stay neutral.
- As legal advisor, the AAG can research and give legal advice on substantive and procedural issues. The AAG can provide options on courses of action and address the legal implications, strengths, and weaknesses of those options but generally cannot tell the board which option to pursue. The AAG can advise the board whether a particular action would be outside of the board's authority or illegal. The AAG can also tell the board whether a viable legal argument in support of a particular position exists, and if it might be vulnerable to legal challenge.
- In litigation, the assigned AAG represents the board in court or other forums. The AAG determines the specific legal tactics to be taken, but will consult with and update a contact such as the Board Chair, Executive Director, or Executive Committee member as requested.
- Consultation on litigation and advice given by the assigned AAG to the board is attorney/client privileged communication and is legally protected from disclosure. Therefore, to protect that privilege, it is generally best that board members not ask for litigation consultation or legal advice from the AAG in an open meeting where the privilege would be waived. An obvious exception is when the board needs advice on a procedural issue during a meeting.
- To protect the attorney/client privilege, legal advice can be given in an executive session (if it falls within the criteria for an executive session) or in writing in a clearly designated Attorney/Client Privileged memorandum. Written advice sometimes is preferable so the issue can be thoroughly researched and documented. Other times if quick response time is a concern, oral advice may be sufficient.
- Although your assigned AAG may or may not be a subject matter expert on K-12 education law, they can research an issue and also consult with others in the Attorney General's Office to provide consistent advice across agencies and over time.

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Additionally, AAGs are trained and experienced in legal research, statutory interpretation, options-based advice giving, procedural and process issues for boards and commissions, and general state government law, such as the Open Public Meetings Act, Public Records Act, and rulemaking under the Administrative Procedure Act.

I would be happy to assist the board in drafting the board norms for working with their assigned AAG. Please let me know if you have any questions or need additional assistance on this issue.

LS-C/CG