

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL  
State of California

GEORGE DEUKMEJIAN  
Attorney General

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OPINION	:	No. CV 78-121
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of	:	<u>March 22, 1979</u>
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Anthony S. Da Vigo	:	
Deputy Attorney General	:	
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SUBJECT: MASTER PLAN FOR SPECIAL EDUCATION—Services of teachers hired under the Master Plan for Special Education are discussed as well as specifications for probationary and permanent employees. The Master Plan for Special Education was a categorically funded project of undetermined duration.

The Honorable Gilbert W. Boyne, County Counsel, County of Stanislaus, has requested an opinion on the following questions:

1. Were teachers who were hired under the Master Plan for Special Education either prior to or after July 1, 1978, hired to perform services conducted under a contract between the governing board of a school district and another public agency, to wit, the county superintendent of schools?

2. What is a “categorically funded project of indeterminate duration” within the meaning of Education Code section 44909? Prior to July 1, 1978, was the Master Plan for Special Education a categorically funded project of indeterminate duration?

3. Do teachers who were hired under the Master Plan for Special Education prior to July 1, 1978, have a right to be retained after said date as probationary employees and

to have their service prior to said date included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as permanent employees?

4. Does a teacher hired to perform services conducted under contract with public or private agencies, or other categorically funded projects of indeterminate duration, or a regional occupational program, under a contract providing that continued employment is subject to availability of funds or the continuation of such contract with public or private agencies, but which, through mistake, inadvertence or neglect designated the teacher's status as "probationary" rather than "temporary," have a right, as a probationary employee, to have his service included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee?

The conclusions are:

1. Teachers who were hired under the Master Plan for Special Education either prior to or after July 1, 1978, were not hired to perform services conducted under a contract between the governing board of a school district and another public agency.

2. A "categorically funded project of indeterminate duration" within the meaning of Education Code section 44909 is a project the continuance of which beyond a certain date is not established or known in advance, i.e., which is subject to some future contingency such as the enactment of further enabling legislation, and which is specially funded according to the specific class or classes therein designated. Prior to July 1, 1978, the Master Plan for Special Education was a categorically funded project of indeterminate duration.

3. Teachers who were hired under the Master Plan for Special Education prior to July 1, 1978, have a right to be retained after said date as probationary employees; such teachers may also have their services prior to said date included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as permanent employees provided that such persons have served under the specially funded project for at least 75 percent of the number of days the regular schools of the district by which they are employed are maintained.

4. The right of a teacher hired to perform services conducted under contract with a public or private agency, or another categorically funded project of indeterminate duration, or a regional occupational program, to have his service included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee is governed by the express provisions of Education Code sections 44909 and 44910, respectively, and not otherwise.

## ANALYSIS

The first inquiry is whether teachers who were hired under the Master Plan for Special Education either prior to or after July 1, 1978, were hired to perform services conducted under a contract between the governing board of the school district and the county superintendent of schools. The purpose of the inquiry is to determine the applicability of section 44909 of the Education Code<sup>1</sup> which provides as follows:

“The governing board of any school district may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted *under contract with public or private agencies*, or other categorically funded projects of indeterminate duration. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees.

“Whenever any certificated employee in the regular educational program is assigned to a special categorically funded project of indeterminate duration and the district employs an additional credentialed person to replace such certificated employee, the replacement certificated employee shall be subject to the provisions of Section 44918.

“This section shall not be construed to apply to any regularly credentialed employee who has been employed in the regular educational programs of the school district as a probationary employee before being subsequently assigned to any one of these programs.” (Emphasis added.)

The California Master Plan for Special Education is a program adopted by the State Board of Education and administered by the Superintendent of Public Instruction to better

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<sup>1</sup> Hereinafter, all section references are to the Education Code unless otherwise indicated.

meet the educational requirements of individuals with exceptional needs. (§§ 56301, 56310.) Under guidelines established by the Superintendent of Public Instruction (§ 56312, subd. (b)) the governing board of a school district is required, in cooperation with and subject to the approval of the county superintendent of schools, to develop a local comprehensive plan for the education of all individuals with exceptional needs residing in the district. (§§ 56314, 56315, 56316.) Such local comprehensive plans must be reviewed by the Superintendent of Public Instruction and approved by the State Board of Education (§§ 56310, subd. (c); 56312, subd. (c)) and must satisfy the specifications of section 56330. Provisions for appropriate qualified staff must be included within the local plan. (§ 56330, subd. (o).)

In view of the foregoing, it is concluded that qualified personnel for the instruction of individuals with exceptional needs are employed under the local comprehensive plans to perform services conducted pursuant to a statutorily mandated program and not pursuant to any contract between the governing board of a school district and the county superintendent of schools.

The foregoing conclusion applies to teachers hired prior to July 1, 1978, as well as to those hired after July 1, 1978. On that date, the statutes pertaining to educational services for individuals with exceptional needs were amended in various respects. (Stats. 1977, ch. 1247.) Essentially, the experimental pilot program was converted to an on-going regular program. (§ 56301; Stats. 1977, ch. 1247, § 10.) However, the provisions cited above remain substantially unchanged.

The second inquiry concerns the meaning of the term “categorically funded project of indeterminate duration” within the purview of section 44909 which pertains to the performance of services conducted “under contract with public or private agencies, or other categorically funded projects of indeterminate duration.” The term “category” refers to a class, group, or classification of any kind, and may connote a division of the dependent population whose needs are attended to by specific government measures. (Webster’s Third New Internat. Dict. (1961) p. 352.) “Categorically funded” refers to the authorization and allocation of funds according to specific categories. “Indeterminate” duration refers to a period of time which is not clearly established or known in advance. (*Cf.* Webster’s Third New Internat. Dict. (1961) p. 1148.) Based on the foregoing, a “categorically funded project of indeterminate duration” within the context of section 44909 is a project the continuance of which beyond a certain date is not established or known in advance, i.e., which is subject to some future contingency such as the enactment of further enabling legislation, and which is specially funded according to the specific class or classes therein designated.

The further inquiry is whether the Master Plan for Special Education was, prior to July 1, 1978, a categorically funded project of indeterminate duration. Prior to July 1, 1978, section 56301 provided in part:

“ . . . it is the intent of the Legislature that the comprehensive restructuring of current educational programs for individuals with exceptional needs required by this chapter should be systematically implemented in no more than 10 local comprehensive plans during fiscal years 1975–76, 1976–77, and 1977–78. Thereafter, statewide implementation of this chapter shall be determined by the Legislature.”

Thus, the Master Plan for Special Education was a project the continuance of which, beyond the 1977–78 fiscal year, was contingent upon the enactment of further enabling legislation. Moreover, funds for such project, i.e., for the implementation of each of the local comprehensive plans thereunder were specially allocated under section 56360 for the educational needs of the certain class of individuals defined in section 56302, subdivision (c). It is concluded, therefore, that the Master Plan for Special Education was, prior to July 1, 1978, a categorically funded project of indeterminate duration.

The third inquiry is whether teachers who were hired under the Master Plan for Special Education prior to July 1, 1978, have a right to be retained after said date as probationary employees and to have their service prior to said date included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as permanent employees.<sup>2</sup> Since the Master Plan for Special Education was, prior to July 1, 1978, a categorically funded project of indeterminate duration, the status and rights of teachers hired thereunder are governed by the provisions of section 44909. Under the express terms of that section, such teachers may have their service prior to July 1, 1978, included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as permanent employees only if (1) such persons have served under the specially funded project for at least 75 percent of the number of days the regular schools of the district by which they were employed are maintained, and (2) such persons were subsequently employed as probationary employees in a position requiring certification qualifications. The principal issue remaining is whether such teachers have the right to be retained after July 1, 1978, as probationary employees.

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<sup>2</sup> The inquiry refers to teachers “who were hired under the master plan.” Neither the inquiry nor the following discussion pertains to any regularly credentialed teacher who had been employed to teach in the regular educational programs of the school district as a probationary employee before being subsequently assigned to perform services conducted under a categorically funded project of indeterminate duration. (*Cf.* § 44909.)

Section 44909 provides that such persons may be terminated at the expiration of a contract with an outside agency or of a specially funded project without regard to other requirements of the Education Code respecting the termination of probationary or permanent employees. This section has been interpreted to mean that a teacher subject to its provisions may be discharged without regard to other requirements of the Education Code (see §§ 44949, 44955) only where the reason for the discharge is the expiration of a contract with an outside agency or of a specially funded project. (*Hart Federation of Teachers v. William S. Hart Union High Sch. Dist.* (1977) 73 Cal. App. 3d 211, 215–216.) Thus, the purpose and intent of section 44909 is to give school districts flexibility in the operation of special educational programs to supplement their regular program and to relieve them from having a surplus of probationary or permanent teachers when project funds are terminated or reduced. (*Kamin v. Governing Board, etc.* (1977) 72 Cal. App. 3d 1014, 1018.) As previously noted, the Master Plan for Special Education expired as a pilot program on June 30, 1978. Nevertheless, the Master Plan was converted, without substantial modification in its purpose or design, to an on-going regular program effective July 1, 1978. (§ 56301; Stats. 1977, ch. 1247, § 10.) It appears, therefore, that the expiration of the pilot program did not have the effect of leaving a school district with a surplus of probationary or permanent teachers. The termination of teachers hired under the pilot program was not compelled by virtue of any termination or reduction of project funds. Consequently, the provisions of section 44909 pertaining to termination of employment do not apply to such teachers. The termination of any such person must be accomplished only in accordance with the other provisions of the Education Code respecting the termination of certificated employees. In the absence of such proceedings, such a teacher has a right to be retained after said date as a probationary employee. (*Cf.* § 44915; *Hart Federation of Teachers v. William S. Hart Union High Sch. Dist.*, *supra*, at pp. 214–215.) It is concluded that teachers who were hired under the Master Plan for Special Education prior to July 1, 1978, have a right to be retained after said date as probationary employees; such teachers may also have their service prior to said date included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as permanent employees provided that such persons have served under the specially funded project for at least 75 percent of the number of days the regular schools of the district by which they are employed are maintained.

The final inquiry is whether a teacher hired to perform services conducted under contract with a public or private agency, or another categorically funded project of indeterminate duration, or a regional occupational program, under a contract providing that continued employment is subject to availability of funds or the continuation of such contract with the public or private agency, but which, through mistake, inadvertence or neglect designated the teacher's status as "probationary" rather than "temporary," has the right, as a probationary teacher, to have his service included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent

employee.<sup>3</sup>

Section 44909 pertaining to services conducted under contract with public or private agencies, or other categorically funded projects of indeterminate duration provides in pertinent part as follows:

“. . . Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications.”

Section 44910 pertaining to services conducted at regional occupational centers or programs, provides in pertinent part that such services “shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district.”

The prohibitions set forth in sections 44909 and 44910 are not subject to modification by virtue of the perceived classification status of such employees. Moreover, statutory provisions controlling the terms and conditions of public employment cannot be circumvented by purported contracts in conflict therewith. (*Miller v. State of California* (1977) 18 Cal. 3d 808, 813–814.) It is concluded that the right of a teacher hired to perform services conducted under contract with a public or private agency, or another categorically funded project of indeterminate duration, or a regional occupational program, to have his service included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee is governed by the express provisions of sections 44909 and 44910, respectively, and not otherwise.

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<sup>3</sup> Again, the inquiry refers only to those teachers who were hired to perform the specified services and not to those who were previously employed in the regular programs and subsequently assigned to the specified services. (*Cf.* §§ 44909, 44910.)