September 5, 2007

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Superintendent of Public Instruction
Ohio Department of Education
25 South Front Street
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SYLLABUS: 2007-027

Whether or not a board of education receives poverty-based assistance for all-day kindergarten under R.C. 3317.029(D) or (J), it has no authority to charge tuition to resident parents whose children attend all-day kindergarten classes in the school district.

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OPINION NO. 2007-027

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Dear Superintendent Zelman:

You have requested the opinion of the Attorney General concerning the authority of boards of education to charge tuition for all-day kindergarten programs. You specifically ask:

1. If a school district receives state funding for all-day kindergarten, may the district require that resident parents pay tuition on a sliding fee scale?

2. May a school district that does not receive state funding for all-day kindergarten require that resident parents pay tuition for any portion of an all-day kindergarten course?

By way of background, you have informed us that:

> [P]ursuant to O.R.C. § 3317.029, qualifying [school] districts may receive poverty-based assistance (PBA) funding as a supplement to their basic state aid. If a district receives state PBA payments that are designated for all-day kindergarten programs, the district must use those funds exclusively for all-day kindergarten. *See* O.R.C. § 3317.029(D) and Rule 3301-35-06(C) of the Ohio Administrative Code.
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> . . . .
>
> It has come to our attention that districts that receive PBA funds are, in an effort to cover the cost of all-day kindergarten, charging resident parents tuition on a sliding fee scale. Is there authority for this practice? Our second question clearly is more general than our first, and it would apply in the context of any school district that operates an all-day kindergarten program. Some of these districts would argue that they can charge tuition for full-day, everyday

kindergarten because only half-time kindergarten is mandatory under Ohio law for districts that do not receive PBA funding to provide all-day kindergarten.

For the reasons that follow, we conclude that a board of education of a school district that provides an all-day kindergarten program is without authority to charge tuition to resident parents whose children attend all-day kindergarten classes in the school district.

Boards of Education

To answer your questions, we must first note that boards of education of school districts are "limited in the exercise of their powers to such as are clearly and distinctly granted." *State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 134 N.E. 655 (1921) (syllabus, paragraph two). Whether a board of education may charge tuition on a sliding scale for all-day kindergarten, therefore, depends upon whether it has been granted such authority by statute.

You have not specified which of the various types of school districts and school boards with which you are concerned. Because city school districts, local school districts, and exempted village school districts generally operate under similar statutory provisions, this opinion will address the authority of such school districts and their boards of education.[1] Each such district is under the control of its board of education. *Cline v. Martin*, 94 Ohio St. 420, 426, 115 N.E. 37 (1916) ("the administration and control of schools is . . . vested . . . in a board of education for each school district"). *See generally, e.g.*, R.C. 3313.47 (stating, in part, "[e]ach city, exempted village, or local board of education shall have the management and control of all of the public schools of whatever name or character that it operates in its respective district").

Authority of School District Receiving Funding Under R.C. 3317.029 to Charge Tuition for All-Day Kindergarten

We now turn to your first question, which asks: "If a school district receives state funding for all-day kindergarten, may the district require that resident parents pay tuition on a sliding fee scale?" To answer your question, it will be useful first to examine R.C. 3317.029 and the obligations it imposes upon school districts that receive state funds under that statute.[2]

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[1] As noted in 2003 Op. Att'y Gen. No. 2003-019 at 2-145 n.1, cooperative education school districts, joint vocational school districts, and educational service centers are subject to some, but not all, of the statutes that generally apply to city school districts, local school districts, and exempted village school districts. The powers and duties of the former require separate analysis and will not be addressed in this opinion. Rather, the references herein to school districts and boards of education are limited to city, local, and exempted village entities.

[2] R.C. 3317.029 was recently amended by Am. Sub. H.B. 119, 127th Gen. A. (2007) (eff., in part, June 30, 2007). As provided in uncodified section 815.03 of Am. Sub. H.B. 119, the amendment of R.C. 3317.029, not being subject to referendum, goes into immediate effect when

Concerning the distribution of poverty-based assistance by the Ohio Department of Education, R.C. 3317.029(B) states: "The department of education shall compute for each school district for *poverty-based assistance* the sum of the computations made under divisions (C) to (I) and (K) of this section and shall pay that sum to the district in accordance with [R.C. 3317.022(A)]." (Emphasis added.) One of the computations included in the poverty-based assistance sum described in R.C. 3317.029(B) is an amount payable to the school districts described in R.C. 3317.029(D)[3] to fund all-day kindergarten programs. R.C. 3317.029(B). As prescribed by R.C. 3317.029(M):

> (1) Each school district wishing to receive any funds under division (D) of this section shall submit to the department of education the number of students attending all-day kindergarten when reporting formula ADM under [R.C. 3317.03].
>
> (2) Each school district that receives a payment under division (D) of this section shall *first utilize funds received* under that division *to provide all-day kindergarten*.[4] (Emphasis and footnote added.)

Thus, R.C. 3317.029(M)(2) requires a school district that receives funds under R.C. 3317.029(D) to first use those fund to provide all-day kindergarten.

Additional funds for all-day kindergarten may be distributed to certain school districts in accordance with R.C. 3317.029(J), which states, in pertinent part:

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the act becomes law. Thus, we are examining R.C. 3317.029, as amended by Am. Sub. H.B. 119.

[3] R.C. 3317.029(D) states:

> A payment for *all-day kindergarten* if the poverty index of the school district is greater than or equal to 1.0 or if the district's three-year average formula ADM exceeded seventeen thousand five hundred. In addition, the department shall make a payment under this division to any school district that, in a prior fiscal year, qualified for this payment and provided all-day kindergarten, regardless of changes to the district's poverty index. The department shall calculate the payment under this division by multiplying the all-day kindergarten ADM by the formula amount. (Emphasis added.)

[4] As used in R.C. 3317.029, the term "all-day kindergarten" means "a kindergarten class that is in session five days per week for not less than the same number of clock hours each day as for pupils in grades one through six." R.C. 3317.029(A)(7). *See generally* 5 Ohio Admin. Code 3301-35-06(D) (stating, in part, "[t]he school day for students in grades one through six shall include scheduled classes, supervised activities or approved educational options for *at least five hours*, excluding the lunch period" (emphasis added)).

> This division applies only to school districts that receive more than ten thousand dollars under this section. Each such district *shall* use funds paid under this section *only for one or more of the following* purposes:
>
> (1) To provide *all-day kindergarten* to children in the district's all-day kindergarten ADM;[5]
>
> . . . .
>
> (7) For increased classroom learning opportunities by increasing the amount of instructional attention received per pupil in *kindergarten* through third grade, either by reducing the ratio of students to instructional personnel or by increasing the amount of instruction and curriculum-related activities by extending the length of the school day or the school year.
>
> . . . .
>
> A school district may apply to the department, in the form and manner prescribed by the department, for a waiver to spend funds paid under this section for programs not described in divisions (J)(1) to (11) of this section. The waiver application shall specify the rationale for the alternative expenditure and the intended benefits for disadvantaged students. If the department grants the waiver, the district may use funds paid under this section to implement the alternative program. (Emphasis and footnote added.)

Absent a waiver granted by the Ohio Department of Education, R.C. 3317.029(J) thus limits a school district's use of funds it receives under division (J) of R.C. 3317.029 to the purposes enumerated therein, including the provision of all-day kindergarten for children in the district.[6]

Accordingly, R.C. 3317.029 limits a school district that receives funds under division (D) to using those funds only to provide all-day kindergarten, while a school district that receives funds under division (J), absent a waiver granted by the Ohio Department of Education, may use such funds only for the purposes listed in division (J), including all-day kindergarten. Nothing in R.C. 3317.029, however, addresses a school district's authority to charge tuition to fund the cost

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[5] For purposes of R.C. 3317.029, "all-day kindergarten ADM [average daily membership]" means "the number of students reported under [R.C. 3317.03] as enrolled in all-day kindergarten, excluding any kindergarten students reported under division (B)(3)(e), (f), or (g) of that section." R.C. 3317.029(A)(9).

[6] R.C. 3317.029(O) states:

> If at any time the superintendent of public instruction determines that a school district receiving funds under division (D) of this section has enrolled fewer than the number of all-day kindergarten students reported for that fiscal year, the superintendent shall withhold from the funds otherwise due the district under this section a proportional amount as determined by the difference in the certified all-day kindergarten ADM and the actual all-day kindergarten ADM.

of providing all-day kindergarten beyond the sums received by the school district under R.C. 3317.029(D) or (J). We must, therefore, examine the statutory scheme governing the operation of school districts by their boards of education to determine whether such boards otherwise possess the authority to charge resident parents tuition for the attendance of their children in all-day kindergarten classes, whether or not the school district receives poverty-based assistance for all-day kindergarten under R.C. 3317.029(D) or (J). Because your second question asks about the authority of a school board that does not receive poverty-based assistance for all-day kindergarten under R.C. 3317.029(D) or (J), the following discussion also addresses the concerns expressed in your second question.

General Obligation of School Districts to Provide Free Education

In accordance with R.C. 3313.48, "[t]he board of education of each city, exempted village, local, and joint vocational school district *shall provide* for the *free education* of the *youth of school age* within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof." (Emphasis added.) *See generally Ass'n for the Defense of Central High School v. Columbus Bd. of Educ.*, 10 Ohio App. 3d 126, 460 N.E.2d 725 (Franklin County 1983) (discussing the scope of the free education rights granted by R.C. 3313.48).

The duty of a school district to provide various grades at schools within its district is described in R.C. 3311.29(A), which states, in part, "no school district shall exist which does not maintain within such district public schools consisting of grades kindergarten through twelve and any such existing school district not maintaining such schools shall be dissolved." Division (A) of R.C. 3311.29 also prohibits the Superintendent of Public Instruction from distributing funds under R.C. 3317.022-.025 (state funding of school districts) to a school district that, absent exception granted by the State Board of Education, does not maintain schools with grades kindergarten through twelve. Thus, R.C. 3311.29 requires that, absent exception granted by the State Board of Education, each city, local, and exempted village school district maintain schools that provide, among other grades, kindergarten.

The General Assembly has specifically described the duty of a school district to admit pupils to its schools and the matter of tuition in R.C. 3313.64, which states, in pertinent part:

> (B) Except as otherwise provided in section 3321.01 of the Revised Code for admittance to kindergarten and first grade, a *child who is at least five* but under twenty-two years of age and any handicapped preschool child *shall be admitted to school* as provided in this division.
>
> (1) *A child shall be admitted to the schools of the school district in which the child's parent resides*.
>
> (2) A child who does not reside in the district where the child's parent resides shall be admitted to the schools of the district in which the child resides if any of the following applies:

> (a) The child is in the legal or permanent custody of a government agency or a person other than the child's natural or adoptive parent.
>
> (b) The child resides in a home.
>
> (c) The child requires special education.
>
> (3) A child who is not entitled under division (B)(2) of this section to be admitted to the schools of the district where the child resides and who is residing with a resident of this state with whom the *child has been placed for adoption shall be admitted to the schools of the district where the child resides unless* either of the following applies:
>
> (a) The placement for adoption has been terminated.
>
> (b) Another school district is required to admit the child under division (B)(1) of this section.
>
> Division (B) of this section does not prohibit the board of education of a school district from placing a handicapped child who resides in the district in a special education program outside of the district or its schools in compliance with Chapter 3323. of the Revised Code.
>
> (C) *A district shall not charge tuition for children admitted under division (B)(1) or (3) of this section*. If the district admits a child under division (B)(2) of this section, tuition shall be paid to the district that admits the child . . . . (Emphasis added.)

Thus, R.C. 3313.64(C) prohibits a school district from charging tuition for a child, as described in R.C. 3313.64(B), who is admitted to school in accordance with R.C. 3313.64(B)(1) in the district in which the child's parent resides.

School District's Powers and Duties with Respect to Providing Kindergarten Classes

Your questions specifically concern a school district's provision of all-day kindergarten. As provided, in part, by R.C. 3321.05: "Any school district *may* operate all-day kindergarten or extended kindergarten, but no district shall require any student to attend kindergarten for more than the number of clock hours required each day for traditional kindergarten by the minimum standards adopted under section 3301.07 of the Revised Code." (Emphasis added.) Thus, R.C. 3321.05 authorizes, but does not require, a school district to operate all-day kindergarten. *See generally Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage").

As provided by 5 Ohio Admin. Code 3301-35-06(C):

> Students in kindergarten shall be offered *at least two and one-half hours* per day of classes, supervised activities or approved educational options, excluding the lunch period. School districts that receive "disadvantaged pupil

> impact aid" funds for all-day kindergarten shall offer *five hours per day*, excluding the lunch period. (Emphasis added.)

While this rule requires that kindergarten students be provided a minimum of two and one-half hours per day of classes, supervised activities, or approved educational options, the rule requires those school districts that receive "disadvantaged pupil impact aid" funds[7] for all-day kindergarten to provide five such hours per day. *See generally* R.C. 3321.01(E) (imposing upon each board of education the duty to fix the schedule of times and the length of the school day for kindergarten classes).

No statute, however, authorizes a board of education, whether or not it receives poverty-based assistance under R.C. 3317.029(D) or (J), to charge tuition to resident parents whose children attend all-day kindergarten classes in the school district. In contrast, there are many statutes that expressly authorize a school district to charge tuition in specific circumstances. *See, e.g.*, R.C. 3313.52 (stating, in part, that a "board of education of a city, exempted village, or local school district may organize evening schools," and that, "[a]ny person more than eighteen years old may be permitted to attend evening school upon such terms and upon *payment of such tuition as the board prescribes*" (emphasis added)).[8] Specifically concerning the authority to charge

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[7] The term "disadvantaged pupil impact aid" funds, as that phrase is used in rule 3301-35-06, is not defined by rule or by statute. We note, however, that former R.C. 3317.029(B)(1), Sub. H.B. 699, 126th Gen. A. (2006) (eff., in part, March 29, 2007), described part of the calculation for determining the amount of a school district's poverty-based assistance, as follows: "[t]he amount the district received in fiscal year 2005 for *disadvantaged pupil impact aid* pursuant to [uncodified] Section 41.10 of Am. Sub. H.B. 95 of the 125th general assembly, as amended, minus the amount deducted from the district under Section 16 of Am. Sub. S.B. 2 of the 125th general assembly that year for payments to internet- and computer-based community schools." (Emphasis added.) As recently amended by Am. Sub. H.B. 119, R.C. 3317.029(B) no longer uses the phrase "disadvantaged pupil impact aid" in describing the amount payable thereunder, but, instead, uses the term "poverty-based assistance." *See generally* note 2, *supra*. Because rule 3301-35-06 was adopted prior to the amendment of R.C. 3317.029(B) in Am. Sub. H.B. 119, we now read the phrase "disadvantaged pupil impact aid," as used in the rule, as referring to "poverty-based assistance," the term currently used in R.C. 3317.029.

[8] *See also, e.g.*, R.C. 3323.142 (stating, in part, "[w]hen a school district places or has placed a child with a county MR/DD board for special education, but another district is responsible for tuition under [R.C. 3313.64 or R.C. 3313.65] and the child is not a resident of the territory served by the county MR/DD board, the board *may charge* the district responsible for tuition with the educational costs in excess of the per pupil amount received by the board under Chapter 3317. of the Revised Code" (emphasis added)); R.C. 3327.06(B) (stating, in part, "[w]hen the board of education of a city, exempted village, or local school district admits to the schools of its district any pupil who is not entitled to be admitted to the district's schools under [R.C. 3313.64(B) or (F), R.C. 3313.645, or R.C. 3313.65] for whose attendance tuition is not an

tuition on a graduated basis, R.C. 3313.646 provides, in pertinent part: "A board of education *may establish fees or tuition*, which may be graduated in proportion to family income, for participation in a *preschool program*. In cases where payment of fees or tuition would create a hardship for the child's parent or guardian, the board may waive any such fees or tuition." (Emphasis added.) No statute provides similar authority with respect to a school district's all-day kindergarten program. In light of the numerous instances in which the General Assembly has authorized boards of education to charge tuition for attendance at its schools, we must conclude that the General Assembly did not intend to authorize such boards to charge tuition under other circumstances, including their offering of all-day kindergarten. *See generally State ex rel. Enos v. Stone*, 92 Ohio St. 63, 110 N.E. 627 (1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result).

Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised that, whether or not a board of education receives poverty-based assistance for all-day kindergarten under R.C. 3317.029(D) or (J), it has no authority to charge tuition to resident parents whose children attend all-day kindergarten classes in the school district.

Respectfully,

MARC DANN
Attorney General

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obligation of the board of another district of this state, *such board shall collect tuition for the attendance of such pupil from the parents or guardian of the pupil*" (emphasis added)).