

October 13, 1994

OPINION NO. 94-070

The Honorable David E. Bowers
Allen County Prosecuting Attorney
Court of Appeals Building, Suite 302
204 North Main Street
Lima, Ohio 45801

Dear Prosecutor Bowers:

You have requested an opinion on several issues relating to the admission of a child to the public schools. Your specific questions are these:

- 1.If a child has been placed in the temporary care and custody of a Children Services Board, and the Residential Care Facility operated by the Children Services Board is located in a school district other than the child's home school district (parent's residence), must that child attend school in the district in which the Residential Care Facility is located?
- 2.If a child who has been placed in the temporary care and custody of a Children Services Board is allowed to attend a school district other than the district in which the Residential Care Facility is located, then may the Children Services Board acting in "loco parentis" determine the school district ... which the child shall attend?
- 3.If a Children Services Board is authorized to determine the school district to which a child is sent, must the school district in which the Residential Care Facility is located be part of any contractual agreement for such attendance to another school district?

In a telephone conversation, a representative of your office has stated that, in the situation in question, a number of children have been placed by a court in the temporary care and custody of a county children services board. The children live in a residential care facility operated by the board. The residential care facility is located in unincorporated township territory within a local school district; the children's parents reside in a city and the children attended school in the city school district before they were placed with the county children services board. The central issue is whether the children continue to be entitled to admission to schools of the city school district, or whether they are entitled to attend only the schools of the local school district in which the residential care facility is located. Some of the children are in need of special education, and the provisions governing those children are also addressed in this opinion.

It is assumed for purposes of this opinion that the children are receiving the education provided by the public school system. Attendance at a private school is not considered, except to the extent that placement in such a school may be part of a program provided by a public school system. *See generally* R.C. 3323.04 (placement in special education programs). You have not asked specifically about the payment of tuition or allocation of other costs of educating the children and those issues are not addressed in this opinion. *See, e.g.*, R.C. 2151.357; R.C. 3313.64(C).

Public Education in Ohio

Ohio Const. art. VI, §2 requires the General Assembly to make provisions to "secure a thorough and efficient system of common schools throughout the state." Statutes requiring school attendance appear in R.C. Chapter 3321. In particular, R.C. 3321.03 provides, with certain exceptions:

[T]he parent of a child of compulsory school age shall cause such child to *attend a school in the school district in which the child is entitled to attend school* under division (B) or (F) of section 3313.64 or section 3313.65 of the Revised Code, to participate in a special education program under Chapter 3323. of the Revised Code, or to otherwise cause him to be instructed in accordance with law. (Emphasis added.)

See also R.C. 3321.04.¹ Similarly, R.C. 3313.48 requires the board of education of each city, exempted village, local, and joint vocational school district to "provide for the free education of the youth of school age within the district under its jurisdiction."

¹ For purposes of R.C. Chapter 3321, "parent" may include a person or government agency with legal or permanent custody of a child. R.C. 3321.01(A) states, in part:

As used in this chapter, "parent," "guardian," or "other person having charge or care of a child" means either parent unless the parents are separated or divorced or their marriage has been dissolved or annulled, in which case "parent" means the parent who is the residential parent and legal custodian of the child. *If the child is in the legal or permanent custody of a person or government agency, "parent" means that person or government agency.* When a child is a resident of a home, as defined in section 3313.64 of the Revised Code, and his parent is not a resident of this state, "parent," "guardian," or "other person having charge or care of a child" means the head of the home. (Emphasis added.)

Provision of Free Public Education to Children Who Are in the Temporary Care and Custody of a County Children Services Board and Reside in a Residential Care Facility that Is Operated by the Board and Is Not Located in the School District in Which the Children's Parents Reside

R.C. 3313.64 specifies the school district in which a child is entitled to attend school. It states, in part:

[A] 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 his parent resides.

(2) A child who does not reside in the district where his parent resides shall be admitted to the schools of the district in which he resides if any of the following applies:

(a) He is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent.

(b) He resides in a home.

(c) He 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 he resides and who is residing with a resident of this state with whom he 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.

R.C. 3313.64(B).

On the facts presented, the children are in the temporary custody of a county children services board, which is a government agency. *See* R.C. 5153.02-.07. Since temporary custody is a form of legal custody, *see* R.C. 2151.011(B)(9), (12); R.C. 3313.64(A)(2),² the children are in the

² Pursuant to R.C. 3313.64(A)(2), the term "[l]egal custody," as used in R.C. 3313.64, has the meaning given in R.C. 2151.011. R.C. 2151.011(B) states, in part:

(9) "Legal custody" means a legal status which vests in the custodian the right to have physical care and control of the child and to determine where and with whom he shall live, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.

....

(12) "Temporary custody" means legal custody of a child who is removed from his home, which custody may be terminated at any time at the discretion of the court or,

legal custody of a government agency. Because each child is in the legal custody of someone other than a parent and does not reside in the district where the child's parent resides, the child is, pursuant to R.C. 3313.64(B)(2)(a), entitled to attend the schools of the district where the child resides -- that is, the district in which the residential care facility is located. It appears that the child is entitled to attend those schools also under R.C. 3313.64(B)(2)(b), since the residential care facility comes within the definition of "home" appearing in R.C. 3313.64.³ In addition, those children who require

if the legal custody is granted in an agreement for temporary custody, by the person who executed the agreement.

See also 1994 Op. Att'y Gen. No. 94-033.

³ R.C. 3313.64(A)(4) contains the following definition:

Except as used in division (C)(2) of this section, "home" means a home, institution, family foster home, group home, or other residential facility in this state that receives and cares for children, to which any of the following applies:

- (a) The home is licensed, certified, or approved for such purpose by the state or is maintained by the department of youth services.
- (b) The home is operated by a person who is licensed, certified, or approved by the state to operate the home for such purpose.
- (c) The home accepted the child through a placement by a person licensed, certified, or approved to place a child in such a home by the state.
- (d) The home is a children's home created under section 5153.21 or 5153.36 of the Revised Code.

special education are also entitled to attend schools of the district in which the residential care facility is located pursuant to R.C. 3313.64(B)(2)(c), because it is the district in which they reside.

The provisions of R.C. 3313.64 thus clearly direct that a child who is in the temporary custody of a county children services board, and who resides in a residential care facility operated by the board and located outside the district in which the child's parent resides, is entitled to attend the schools of the district in which the residential care facility is located. Your question is whether the child might *also* be entitled to attend the schools of the district in which the child's parent resides. It has been suggested on the facts you have presented that there may be some option as to which school district may be chosen for the child to attend.

Construction of R.C. 3313.64(B)

R.C. 3313.64(B)(1) states that a child "shall be admitted to the schools of the school district in which his parent resides." That division does not specify that the child must reside with his parent or that the child must be in the custody of his parent. It might, accordingly, be argued that a child continues to be entitled to attend the schools of the school district in which his parent⁴ resides even if the child resides in another district and is entitled pursuant to R.C. 3313.64(B)(2) to attend the schools of the district in which the child resides. It appears, however, that the logical reading of R.C. 3313.64(B) is to construe R.C. 3313.64(B)(2) as an exception to R.C. 3313.64(B)(1), so that a child who would otherwise be entitled to admission to the schools of the school district in which his parent resides becomes ineligible for such admission when he resides in a different district and: (a) is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent; (b) resides in a home; or (c) requires special education. *See* 1987 Op. Att'y Gen. No. 87-026.⁵

⁴ For purposes of determining the school district of admission under R.C. 3313.64-.65, a child's parent remains his parent even if the child is in the legal custody of someone else. R.C. 3313.64(A)(1) contains the following definition:

"Parent" means either parent, unless the parents are separated or divorced or their marriage has been dissolved or annulled, in which case "parent" means the parent who is the residential parent and legal custodian of the child. When a child is in the legal custody of a government agency or a person other than his natural or adoptive parent, "parent" means the parent with residual parental rights, privileges, and responsibilities. When a child is in the permanent custody of a government agency or a person other than his natural or adoptive parent, "parent" means the parent who was divested of parental rights and responsibilities for the care of the child and the right to have the child live with him and be the legal custodian of the child and all residual parental rights, privileges, and responsibilities.

⁵ 1987 Op. Att'y Gen. No. 87-026 contains the following discussion of school attendance:

R.C. 3313.64 provides guidelines for determining which school district a child may attend; division (B) establishes which school district the child is entitled to attend.

The conclusion that R.C. 3313.64(B) specifies a single school district⁶ in which a child is entitled to attendance is consistent with the language of related statutes and with the interpretation accorded R.C. 3313.64(B) by the courts. R.C. 3321.03, quoted in part above, states plainly that a child must attend a school "in the school district in which the child is entitled to attend school," thereby indicating that there is only one such district. Further, in *Board of Education of Austintown Local School District v. Mahoning County Board of Mental Retardation and Developmental Disabilities*, 66 Ohio St. 3d 355, 613 N.E.2d 167 (1993), the Ohio Supreme Court considered which school district was responsible for the placement of certain children who resided in a home and required special education. The court quoted and applied only divisions (2)(b) and (2)(c) of R.C. 3313.64(B), evidently concluding that if a child is, pursuant to R.C. 3313.64(B)(2), entitled to be admitted to the schools of the district in which he resides, the provisions of R.C. 3313.64(B)(1) are not relevant to the child's school placement. *Id.* at 360-62, 613 N.E.2d at 172-73. R.C. 3323.04 supports this conclusion in the case of children requiring special education, stating that the State Board of Education "shall require the board of education of each school district to place each

Subsection (B)(1) establishes which district's schools a child may attend tuition-free, and provides: "[a] child shall be admitted to the schools of the school district in which his parent resides." The general rule operates to prevent students from "shopping" for school districts by requiring most students to attend school in the school district in which their parents reside. See R.C. 3313.64(B)(1), State ex rel. Henry v. Board of Education, 20 Ohio App. 3d 185, 485 N.E. 2d 732 (Madison County 1984). R.C. 3313.64(B)(2) does, however, create exceptions to this general rule, providing that a child who does not reside in the district where his parent resides shall attend school in the district in which he resides if any of the following apply:

- (a) He is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent;
- (b) He resides in a home;
- (c) He requires special education.

Op. No. 87-026 at 2-182 (footnote omitted). This analysis is consistent with the conclusions reached in this opinion and is hereby approved and followed.

⁶ There may be instances in which unusual domestic arrangements result in a situation in which a child is entitled pursuant to R.C. 3313.64(B)(1) to attend school in more than one school district. For example, *Baucher v. Board of Education*, 31 Ohio Misc. 49, 277 N.E.2d 92 (C.P. Mercer County 1971), concerned a family whose members used two houses in two different school districts as their dwelling place. The children were found eligible to attend schools in either district without the payment of tuition. *Id.*; *see also Board of Education, Kenton City Schools v. Day*, 30 Ohio Misc. 2d 25, 506 N.E.2d 239 (C.P. Hardin County 1986). This type of arrangement does not affect the conclusion that the school district of attendance may change when the parents no longer have custody of the child.

handicapped child of compulsory school age residing within the district in an appropriate education program." *Accord* R.C. 3323.03.

Other School Admission Provisions

Other provisions governing the admission of children to public schools appear in R.C. 3313.64(F) and R.C. 3313.65. R.C. 3313.64(F) contains a list of circumstances in which an individual may be entitled to attend the schools of a district other than the one determined pursuant to R.C. 3313.64(B). Such circumstances involve individuals who are emancipated or married, parents who are serving outside Ohio in the armed forces of the United States, parents who are buying a house or having a house built, children whose parents die during a school year or move during the child's senior year, children who live with a parent in a domestic violence shelter, and persons in other specified situations. R.C. 3313.64(F). In some circumstances approval of the school board is required. *Id.* It is clear that in some instances covered by R.C. 3313.64(F) a parent has a choice of which school district a child may attend. For example, R.C. 3313.64(F)(3) provides that a child is entitled to attend school in the district in which either of his parents is employed, if the child has a medical condition that may require emergency medical attention. A parent whose child has such a condition may choose whether to submit the appropriate information to bring this provision into effect. Similarly, a parent who is purchasing a house or having a house built may decide whether to take steps under R.C. 3313.64(F)(6) or (7) to make his child eligible to attend school in the district of the new house prior to the move.⁷ There is, however, no indication that any choice is involved in determining which is the appropriate school district of admission under R.C. 3313.64(B).

R.C. 3313.65 governs the school admission and payment of tuition for children whose parents are institutionalized or incarcerated. R.C. 3313.65(C) states:

A child who does not reside in the school district in which his parent resides and for whom a tuition obligation previously has not been established under [R.C. 3313.64(C)(2)] shall be admitted to the schools of the district in which the child resides if at least one of the child's parents is in a residential or correctional facility or a juvenile residential placement and the other parent, if living and not in such a facility or placement, is not known to reside in this state.

⁷ It is assumed for purposes of this opinion that the attendance options provided by R.C. 3313.64(F) are not available to the children in question. This opinion does not address the question whether the various options listed in R.C. 3313.64(F) may be exercised if the parent does not have custody of the child. Each such option is governed by the language of its specific provision.

When R.C. 3313.65(C) is applicable, its provisions prevail over those of R.C. 3313.64. *See* R.C. 3313.65(B). Other portions of R.C. 3313.65 govern the payment of tuition in such circumstances. R.C. 3313.65(D)-(E). Under R.C. 3313.65(C), school attendance depends upon the residence of the child. There is no option to select a different school district.

Option to Attend the Schools of a Different School District

Your questions concern the school district in which a child is entitled to attend school if the child has been placed in the temporary care and custody of a children services board and resides in a residential care facility that is operated by that board and located in a different school district from the one in which the child's parent resides. For the reasons discussed above, the child is entitled to attend the schools of the district in which the child resides -- that is, the school district in which the residential care facility is located. A child who is in the legal custody of a government agency and does not reside in the school district in which his parent resides is, pursuant to R.C. 3313.64(B)(2), entitled to attend only the schools of the school district in which the child resides.⁸

⁸ 1983 Op. Att'y Gen. No. 83-041 (syllabus, paragraph 5) states:

Pursuant to R.C. 3313.64(B), the school district in which an individual who has legal custody of a child resides must admit the child if:

- a.the school district is also the district in which the child's parent resides; or
- b.the child resides in the school district.

Op. No. 83-041 at 2-151. To the extent that Op. No. 83-041 could be read to conclude that a child who is in the legal custody of a person other than his parent is entitled to attend school in the school district in which the parent resides even though the child does not himself reside in that district, it is inconsistent with this opinion and is hereby overruled.

Your second question asks, if there is a choice of school districts, whether the county children services board may select the school district in which the child will attend school. You have described a situation in which there may be a desire for a child who has been placed in the legal custody of a county children services board to continue in the schools of the district in which the child's parent resides. On the facts presented, the relevant statutes do not authorize the county children services board to elect to send a child to the schools of the school district in which the parent resides, rather than to the schools of the school district in which the child resides. While, pursuant to R.C. 2151.011(B)(9), the person with legal custody of a child has the right and duty to provide the child with education, subject to any residual parental rights, privileges, and responsibilities, R.C. 3321.03 provides that, if a child attends public schools, the child shall attend a school in the school district in which the child is entitled to attend school under R.C. 3313.64(B) or (F) or R.C. 3313.65. As discussed above, R.C. 3313.64(B) and R.C. 3313.65 provide for a single school district in which a child is entitled to attend school, and R.C. 3313.64(F) provides a list of specified instances in which options are available. *See note 7, supra.*

The board of education of a school district may place a handicapped child who resides in the district in a special education program outside the district or its schools in compliance with R.C. Chapter 3323. *See Op. No. 87-026.* A decision to make such a placement for purposes of special education is, however, made by the board of education of the school district in which the child is entitled to attend school pursuant to R.C. 3313.64(B), since that board of education is responsible for the school placement of the child. *See R.C. 3323.04; Board of Education of Austintown Local School District v. Mahoning County Board of Mental Retardation and Developmental Disabilities; 1991 Op. Att'y Gen. No. 91-024.* Such placement must be in accordance with the handicapped child's individualized education program ("IEP"). *See R.C. 3323.01(E).* While the child's parents or guardian may not make the determination regarding school placement, the parents or guardian are entitled to participate in the preparation of the IEP and have certain rights of appeal. *See R.C. 3323.05, .08; see also 20 U.S.C.A. §1401(a)(20) (West Supp. 1994); 34 C.F.R. §§300.343-.345 (1993); Op. No. 91-024.*

Children who do not require special education may in certain circumstances be placed in public schools outside the school district in which they reside. R.C. 3327.04 permits a board of education to contract with the board of education of another school district, on terms agreed by the boards, for the admission of pupils into the schools of the other district. R.C. 3327.06 provides for the payment of tuition in such circumstances. R.C. 3313.90 permits a school district to provide vocational education to its students by contracting for such education with another school district or a joint vocational school district. R.C. 3313.98 authorizes the admission of students to schools in an adjacent school district but requires that such admission be pursuant to a policy established by resolution of the board of education. Placement pursuant to these or similar provisions is within the discretion of the school district in which the child is entitled to attend school. The person with legal custody of a child is not authorized by Ohio law to claim entitlement for the child to attend schools of a district other than the district designated by statute.⁹

⁹ This opinion does not address the admission of a child through the private payment of tuition to a school district the child is not by law entitled to attend. *See R.C. 3317.08, 3321.03-.04.*

R.C. 3319.01 gives the superintendent of a school district, or the county superintendent, the responsibility of assigning the pupils of the schools under his supervision to the proper schools and grades, with the requirement that assignment of a pupil to a school outside his district of residence be approved by the board of the district of residence of the pupil.¹⁰ The statutory scheme does not provide that a county children services board with custody of a child must approve the child's school assignment or may have discretion to choose that assignment.

Your third question asks, if a children services board is authorized to determine the school district to which a child is sent, whether the school district in which the child resides must be part of any contractual agreement for attendance to another school district. The answers provided to your first two questions render unnecessary a discussion of your third question.

¹⁰ The term "district of residence" is not defined for purposes of R.C. Chapter 3319. The term "school district of residence" is given a statutory definition for purposes of certain provisions dealing with the education of handicapped children. R.C. 3323.01(I); *see* 1987 Op. Att'y Gen. No. 87-026.

Conclusion

For the reasons discussed above, it is my opinion and you are advised, as follows:

- 1.R.C. 3313.64(B)(2) operates as an exception to R.C. 3313.64(B)(1), so that a child who is entitled pursuant to R.C. 3313.64(B)(2) to attend the schools of the school district in which the child resides is not entitled pursuant to R.C. 3313.64(B)(1) to attend the schools of the district in which the child's parent resides. (1987 Op. Att'y Gen. No. 87-026 approved and followed in part; 1983 Op. Att'y Gen. No. 83-041 overruled in part.)

- 2.If a child is placed in the temporary care and custody of a county children services board, and the child resides in a residential care facility that is operated by the board and that is not located in the school district in which the child's parent resides, the child is entitled pursuant to R.C. 3313.64(B)(2) to attend the schools of the school district in which the residential care facility is located and in which the child resides; because the child is entitled pursuant to R.C. 3313.64(B)(2) to attend the schools of the district in which the child resides, the child is not entitled pursuant to R.C. 3313.64(B)(1) to attend the schools of the district in which the child's parent resides.

- 3.When a county children services board has temporary care and custody of a child who resides in a residential care facility operated by the board, that board has legal custody of the child and, pursuant to R.C. 2151.011(B)(9), has the right and duty to provide the child with education, subject to any residual parental rights, privileges, and responsibilities; the board cannot, however, select for the child a school district other than the district in which the residential care facility is located.

Respectfully,

LEE FISHER
Attorney General

October 13, 1994

The Honorable David E. Bowers
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SYLLABUS:

94-070

- 1.R.C. 3313.64(B)(2) operates as an exception to R.C. 3313.64(B)(1), so that a child who is entitled pursuant to R.C. 3313.64(B)(2) to attend the schools of the school district in which the child resides is not entitled pursuant to R.C. 3313.64(B)(1) to attend the schools of the district in which the child's parent resides. (1987 Op. Att'y Gen. No. 87-026 approved and followed in part; 1983 Op. Att'y Gen. No. 83-041 overruled in part.)
- 2.If a child is placed in the temporary care and custody of a county children services board, and the child resides in a residential care facility that is operated by the board and that is not located in the school district in which the child's parent resides, the child is entitled pursuant to R.C. 3313.64(B)(2) to attend the schools of the school district in which the residential care facility is located and in which the child resides; because the child is entitled pursuant to R.C. 3313.64(B)(2) to attend the schools of the district in which the child resides, the child is not entitled pursuant to R.C. 3313.64(B)(1) to attend the schools of the district in which the child's parent resides.
- 3.When a county children services board has temporary care and custody of a child who resides in a residential care facility operated by the board, that board has legal custody of the child and, pursuant to R.C. 2151.011(B)(9), has the right and duty to provide the child with education, subject to any residual parental rights, privileges, and responsibilities; the board cannot, however, select for the child a school district other than the district in which the residential care facility is located.