May 23, 2001

OPINION NO. 2001-019

The Honorable W. Duncan Whitney
Delaware County Prosecuting Attorney
15 West Winter Street
Delaware, Ohio 43015

Dear Prosecutor Whitney:

You have asked whether a board of county commissioners has a mandatory duty under R.C. 5705.222 to place a tax levy on the ballot for mental retardation and developmental disabilities programs and services if it receives a petition from the county board of mental retardation and developmental disabilities (MR/DD board) seeking the levy for additional funding, or whether the board of county commissioners may reject the request of the MR/DD board and choose not to certify the question of a tax levy for placement on the ballot. A response to your question requires us to examine the provisions of both R.C. Chapter 5705, the tax levy law, and R.C. Chapter 5126, governing county boards of mental retardation and developmental disabilities.

R.C. 5705.03(A) authorizes the taxing authority of a subdivision to levy within the ten-mill limitation[1] property taxes for the purpose of paying the current operating expenses of the subdivision. *See* R.C. 5705.01(A) (defining "subdivision" to include any county); R.C. 5705.01(C) (defining "taxing authority" in the case of a county to mean the board of county commissioners). R.C. 5705.05(E) authorizes a board of county commissioners to include in the general levy for current expenses amounts necessary for "the support of mental health, mental retardation, or developmental disabilities services."

If, however, the amount of taxes which may be raised within the ten-mill limitation will be insufficient, the board of county commissioners may, pursuant to R.C. 5705.19(L), place before the voters the question of whether a tax in excess of the ten-mill limitation for the provision of mental retardation and developmental disabilities programs and services pursuant to R.C. Chapter 5126 should be levied. The procedure for such levies is governed by R.C.

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[1] Ohio Const. art. XII, § 2 prohibits the taxation of property "in excess of one per cent of its true value," unless approved by a majority of the electors of the taxing district voting on the question. This is known as the "ten-mill limitation." *See* R.C. 5705.02; R.C. 5705.03; R.C. 5705.07.

5705.222. *Id.* *See also* R.C. 5705.03(B); *Jackson County Bd. of Mental Retardation and Developmental Disabilities v. Board of County Comm'rs*, 49 Ohio St. 3d 63, 551 N.E.2d 133 (1990) (a board of county commissioners is not required to appropriate moneys from the general fund to support the county MR/DD board, but may meet its obligations through a special tax levy); 1988 Op. Att'y Gen. No. 88-096 (syllabus, paragraph 2) ("[t]he board of county commissioners may fund the programs of the county board of mental retardation and developmental disabilities by special levy pursuant to R.C. 5705.19(L) and/or by treating the costs of such programs as current expenses of the county payable from the general fund pursuant to R.C. 5705.05(E)"); 1969 Op. Att'y Gen. No. 69-015.

An examination of the language of R.C. 5705.19 and R.C. 5705.222 reveals that the duty of a board of county commissioners to submit to the voters the question of a special tax to support the MR/DD board is discretionary, not mandatory, in nature. Pursuant to R.C. 5705.19(L), the board of county commissioners, "may declare by resolution and certify the resolution to the board of elections … that the amount of taxes that may be raised within the ten-mill limitation will be insufficient to provide for the necessary requirements of the [county] and that it is necessary to levy a tax in excess of that limitation" for mental retardation and developmental disabilities programs and services. R.C. 5705.222 similarly provides:

> (A) At any time the board of county commissioners of any county by a majority vote of the full membership *may* declare by resolution and certify to the board of elections of the county that the amount of taxes which may be raised within the ten-mill limitation by levies on the current tax duplicate will be insufficient to provide the necessary requirements of the county board of mental retardation and developmental disabilities established pursuant to Chapter 5126. of the Revised Code, and that it is necessary to levy a tax in excess of such limitation for the operation of programs and services by county boards of mental retardation and developmental disabilities and for the acquisition, construction, renovation, financing, maintenance, and operation of mental retardation and developmental disabilities facilities. (Emphasis added.)

The statutory use of the term "may" generally connotes a permissive duty. *See Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971). Thus, the use of the word "may" in both R.C. 5705.19 and R.C. 5705.222 to describe the board of county commissioners' duty to put before the voters the question of a tax levy in excess of the ten-mill limitation indicates such duty is permissive or discretionary in nature. In other words, if the board of county commissioners receives a request from the county MR/DD board to seek an additional tax levy under R.C. 5705.222, the board of county commissioners is not required to seek such levy, but may choose not to certify the question to the board of elections for placement on the ballot.

This conclusion is consistent with the general nature of the relationship between a board of county commissioners and the county MR/DD board. As summarized in 1992 Op. Att'y Gen. No. 92-061 at 2-253 to 2-254:

> Notwithstanding the extensive nature of its powers, a county MR/DD board is an agency of the county, rather than an independent entity…. A county MR/DD board has no independent taxing authority…. Rather, the board of county commissioners is required to levy taxes and make appropriations sufficient to enable the county MR/DD board to perform its functions and duties…. A levy for the purposes of the county MR/DD board is submitted to the voters by the county commissioners, and the county commissioners must approve the expenditure of the proceeds by annual appropriations to the county MR/DD board…. It is thus, clear that a county MR/DD board cannot function completely independently, but exists as a unit within the county government. (Citations omitted.)

Similarly, 1991 Op. Att'y Gen. No. 91-042 noted at 2-228 that a county MR/DD board is "granted no authority to impose taxes, and it does not receive payments directly at the time of tax settlement….[i]nstead, a county MR/DD board receives funding from the board of county commissioners." Specifically with regard to the submission of a special tax levy, the opinion stated that, "[t]he board of county commissioners is the body with authority to make the decision to present to the voters a tax levy to fund mental retardation and developmental disabilities programs, services, and facilities under R.C. 5705.19(L) and R.C. 5705.222." *Id*. *Cf.* 2001 Op. Att'y Gen. No. 2001-013 (the duty of a board of county commissioners under R.C. 3709.29 to submit to the voters the question of a special tax levy on behalf of a general health district is mandatory in nature); 1988 Op. Att'y Gen. No. 88-013 and 1982 Op. Att'y Gen. No. 82-056 (a taxing authority has a mandatory duty under R.C. 5705.23 to submit to the voters a tax levy on behalf of a board of library trustees); 1975 Op. Att'y Gen. No. 75-089 (the board of a joint-county mental health district is a taxing authority and may place a tax levy before the voters without the approval of the board of county commissioners).

Our conclusion that the board of county commissioners does not have a mandatory duty under R.C. 5705.19 and R.C. 5705.222 to certify the question of a special tax levy for placement on the ballot does not, however, fully address the extent of the commissioners' duty to fund the MR/DD board. Division (G) of R.C. 5126.05 specifically imposes a duty upon the board of county commissioners to adequately fund the MR/DD board, stating: "The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation and developmental disabilities to perform its functions and duties, and may

utilize any available local, state, and federal funds for such purpose."[2] *See State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 470, 423 N.E.2d 105, 113 (1981) ("[t]he board of county commissioners was required by [R.C. 5126.05] to levy such taxes and make such appropriations as are sufficient to enable the county board of mental retardation to perform its functions and duties"); *Cuyahoga County Bd. of Mental Retardation v. Cuyahoga County Bd. of Comm'rs*, 41 Ohio St. 2d 103, 322 N.E.2d 885 (1975) (a board of mental retardation has the power to bring an action in mandamus to compel the board of county commissioners to perform its statutory duty under what is now R.C. 5126.05(G)); 1988 Op. Att'y Gen. No. 88-096 (syllabus, paragraph 1) (under R.C. 5126.05, "the board of county commissioners has a mandatory duty to levy taxes and make appropriations sufficient to enable the county board of mental retardation and developmental disabilities to perform its functions and duties") and at 2-473 ("[r]ejection of … a special levy [under R.C. 5705.19(L)] by the voters does not end either the duty or the ability of the board of county commissioners to fund the county MR/DD board").[3] *See also State ex rel. Fairfield County Bd. of Mental Retardation and Developmental Disabilities v. Fairfield County Budget Comm'n*, 10 Ohio St. 3d 123, 461 N.E.2d 1297 (1984) (a board of mental retardation and development disabilities may compel by writ of mandamus the county budget commission to approve the total millage passed by the voters). In *Jackson County Bd. of Mental Retardation*

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[2] The level of funding that is sufficient to enable a county MR/DD board "to perform its functions and duties," under R.C. 5126.05 is a question of fact that is not capable of resolution by means of an Attorney General opinion. *See* 1988 Op. Att'y Gen. No. 88-096 at 2-473 n. 10.

[3] 1988 Op. Att'y Gen. No. 88-096 further emphasized:

> In the absence of special levy funds or other available local, state, or federal funds which the board of county commissioners may appropriate to the county board of mental retardation and developmental disabilities, R.C. 5126.05 requires that the board of county commissioners provide sufficient funds to the county board of mental retardation and developmental disabilities from the county general fund.
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> The board of county commissioners is required by R.C. 5126.05 to give the funding needs of the county board of mental retardation and developmental disabilities priority over all appropriations not otherwise mandated by statute.
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> The board of county commissioners is required by R.C. 5126.05 to exercise, to the fullest extent necessary and authorized by law, its statutory authority to levy taxes for and to make or amend appropriations from the county general fund in order to provide sufficient funds to the county board of mental retardation and developmental disabilities.

Id. (syllabus, paragraphs 3, 4, and 5). We approve and follow 1988 Op. Att'y Gen. No. 88-096.

and Developmental Disabilities v. Board of County Comm'rs, the court noted that R.C. 5126.05 "clearly mandates the commissioners to provide funds to Jackson MRDD," and in accordance with *Cuyahoga County Bd. of Mental Retardation v. Cuyahoga County Bd. of Comm'rs*, "a county MRDD may bring an action in mandamus to compel county commissioners to meet their financial obligations." 49 Ohio St. 3d at 63, 551 N.E.2d at 134.[4]

R.C. 5126.05(G) permits a county to utilize state moneys in order to help meet its mandate to sufficiently fund the county MR/DD board. *See, e.g.*, R.C. 5123.36 (state funds for construction projects); R.C. 5126.12 (state payments based on number of persons enrolled or participating in various services); R.C 5126.15(D) (state subsidy for case management services); R.C. 5126.18 (state payments to county MR/DD boards "whose hypothetical local revenue per enrollee is less than the hypothetical statewide average revenue per enrollee"); R.C. 5126.19 (temporary funding from the State's community mental retardation and developmental disabilities trust fund).[5] *See also* R.C. 5123.35 (distribution of federal assistance). We note, however, that a lack of local support for MR/DD services and programs may jeopardize a county's receipt of state funds. R.C. 5126.053(B) requires the state Department of Mental Retardation and Developmental Disabilities (Department) to make reductions in state payments distributed to a county MR/DD board pursuant to R.C. 5126.12 and R.C. 5126.15 "in each year

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[4] In *Jackson County Bd. of Mental Retardation and Developmental Disabilities v. Board of County Comm'rs*, 49 Ohio St. 3d 63, 551 N.E.2d 133 (1990), the court went on to conclude that, "[a] board of county commissioners that appropriates funds for the county MRDD but is simply unable to supply that agency with sufficient funds does not violate R.C. 5126.05," since the State has a duty to "share in the responsibility for such funding when sufficient funds are unavailable from the county … [and] can and should augment county appropriations … and thereby assist a county suffering financial straits." 49 Ohio St. 3d at 65, 551 N.E.2d at 135. *Accord State ex rel. Cottrill v. Meigs County Bd. of Mental Retardation and Developmental Disabilities*, 86 Ohio App.3d 596, 602, 621 N.E.2d 728, 732 (Meigs County 1993). In so concluding, the court relied on language in R.C. 5123.351 requiring the director of the state Department of Mental Retardation and Developmental Disabilities to provide state funds for MR/DD programs when local funds were not available or when he considered it necessary. In 1993, however, the statutory language upon which the court relied was repealed. *See* 1993-1994 Ohio Laws, Part I, 241, 281-82 (Am. Sub. S.B. 21, eff. Oct. 29, 1993). While a county MR/DD board may, as discussed below, receive state funding for a variety of purposes, there is nothing in current law, similar to the former R.C. 5123.351, that imposes a broad-based duty upon the State to "augment" a shortfall in county funding.

[5] County MR/DD boards may also receive funding from the State's school foundation program, *see* R.C. 3317.024(E), (M), and (N); R.C. 3317.20, and pursuant to R.C. Chapter 3323 (education of handicapped children), *see* R.C. 3323.09; R.C. 3323.142. *See generally* 1988 Op. Att'y Gen. No. 88-096 (describing financial support available to schools operated by county MR/DD boards).

that the board, on the first day of January of that year, has an effective tax rate of less than one and one-half mills for general operations for programs under which the board provides" the specified services. Division (D) of R.C. 5126.053 permits a county board to appeal for an exemption from the reduction by "present[ing] evidence of its attempts to obtain passage of levies and any other extenuating circumstances the board considers relevant." The Department "shall grant an exemption if it determines that the board has made good faith efforts to obtain an effective tax rate of at least one and one-half mills for general operations for programs," under which the specified services are provided, or there are extenuating circumstances. *Id.* *See also* R.C. 5123.351(D) (withholding of state reimbursement from counties for failure to comply with applicable laws); R.C. 5126.18(B) (providing a higher rate of state funding for county MR/DD boards whose effective tax rate is equal to or more than one mill than to boards whose effective tax rate is less than one mill) and R.C. 5126.18(E) (requiring any county receiving supplemental funding under that section to certify to the State "that it will make a good faith effort to obtain revenues … for services to individuals included in its infant and adult enrollment").

Although we have focused on the responsibility of the board of county commissioners to properly fund the county MR/DD board, the board itself has a duty to "plan and set priorities *based on available resources* for the provision of facilities, programs, and other services"(emphasis added)). R.C. 5126.04(A). *See also* R.C. 5126.051(A), (B), and (C) (authorizing a county MR/DD board to provide various services, "[t]o the extent that resources are available"). Thus, a county MR/DD board must, for its part, consider the availability of county funds, as well as support from other sources, in setting its priorities and implementing its programs, knowing these funds are not unlimited. *But cf.* 1988 Op. Att'y Gen. No. 88-096 at 2-471 n. 7 (the language of what is now R.C. 5126.04(A) "neither defines nor modifies the nature of the county's obligation to make funds available" under what is now R.C. 5126.05(G)).

It is, therefore, my opinion, and you are hereby advised, that if the board of county commissioners receives a request from the county board of mental retardation and developmental disabilities to seek an additional tax levy under R.C. 5705.19(L) and R.C. 5705.222, the board of county commissioners is not required to seek such levy, but may choose not to certify the question for placement on the ballot. Nonetheless, the board of county commissioners has a mandatory duty under R.C. 5126.05(G) to "levy taxes and make appropriations sufficient to enable the county board of mental retardation and developmental disabilities to perform its functions and duties." (1988 Op. Att'y Gen. No. 88-096, approved and followed.)

Respectfully,

BETTY D. MONTGOMERY
Attorney General

May 23, 2001

The Honorable W. Duncan Whitney
Delaware County Prosecuting Attorney
15 West Winter Street
Delaware, Ohio 43015

SYLLABUS: 2001-019

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