

OPINION NO. 79-081

Syllabus:

A county board of mental retardation has, pursuant to R.C. 5126.03, a legally mandated responsibility to provide education and habilitation for mentally retarded adults as required by the Chief of the Division of Mental Retardation and Developmental Disabilities through 7 Ohio Admin. Code 5119:3-1-03 and other relevant rules.

To: Timothy B. Moritz, M.D., Director, Department of Mental Health and Mental Retardation, Columbus, Ohio
By: William J. Brown, Attorney General, November 9, 1979

I have before me your request for my opinion regarding the following question:

Does a County Board of Mental Retardation have a legally mandated responsibility to provide comprehensive education and habilitation for mentally retarded adults as provided by section 5126.06 and 5126.03 of the Revised Code, and Rule MHR-1-03 [now 7 Ohio Admin. Code 5119:3-1-03] ?

The relevant portions of R.C. 5126.03 are as follows:

The county board of mental retardation, subject to the rules and standards of the chief of the division of mental retardation and developmental disabilities shall:

(A) Administer and supervise facilities, programs and services established under section 5126.06 of the Revised Code and exercise such powers and duties as prescribed by the chief;

(B) Submit an annual report of its work and expenditures, pursuant to section 5126.06 of the Revised Code, to the chief and to the board of county commissioners at the close of the fiscal year and at such other times as may be requested;

(C) Employ such personnel and provide such services, facilities, transportation, and equipment as are necessary;

(D) Provide such funds as are necessary for the operation of facilities, programs, and services established under section 5126.06 of the Revised Code.

Any county board of mental retardation may enter into a contract with another such board or with a public or nonprofit agency or an organization of the same or another county, to provide the facilities, programs, and services authorized in section 5126.06 of the Revised Code, upon such terms as may be agreeable.

. . . .

The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation to perform its functions and duties as provided by this section. (Emphasis added.)

R.C. 5126.06, referred to in R.C. 5126.03, reads as follows:

The chief of the division of mental retardation and developmental disabilities, with the approval of the director of mental health and mental retardation, shall establish in any county or mental health and mental retardation district a training center or workshop, residential center, and other programs and services for the special training of mentally retarded persons, who are determined by the division of mental retardation and developmental disabilities to be capable of profiting by specialized training. Special attention shall be given to the establishment of a training program for the mentally retarded for the purpose of enabling them to become accepted by society and to find employment in the structure of society to the extent that they may be fitted therefor. The chief is the final authority in determining the nature and degree of mental retardation. He shall decide all questions relative or incident to the establishment and operation of each training center or workshop, residential center, and other program or service; determine what

constitutes special training; promulgate subject to section 119.01 to 119.13 of the Revised Code, all rules governing the approval of mentally retarded persons for such training; determine or approve all forms used in the operation of programs undertaken under this section; and approve the current operating costs of such programs.

Special education for handicapped children shall be provided in accordance with Chapter 3323. of the Revised Code.

As used in this section and section 5126.07 of the Revised Code, a "mentally retarded person" means a person who has been determined by the proper authorities to be in need of a special training program under this section. The nature and degree of mental retardation shall be determined in the manner prescribed by the chief. (Emphasis added.)

7 Ohio Admin. Code 5119:3-1-03, the administrative section of the rules of the Division of Mental Retardation and Developmental Disabilities, implements the requirements outlined in the above statutes and states:

(A) Responsibility of the County Board of Mental Retardation:

- (1) The County Board of Mental Retardation shall be responsible for providing comprehensive education and habilitation programs for mentally retarded and developmentally disabled children and adults residing within the county, as established under Chapters 5126 and 5127¹ of the Ohio Revised Code.

. . . .

(D) Comprehensive Program

- (1) Each County Board of Mental Retardation independently, or in cooperation with other County Boards or contracted direct service agencies, shall provide comprehensive education and habilitation programs for all eligible mentally retarded or developmentally disabled persons who reside in the county.
- (2) Each County Board of Mental Retardation, or in cooperation with another County Board of Mental Retardation, or with a contracted direct service agency, shall provide materials and equipment necessary to implement all programs that meet the standards of the Division of Mental Retardation and Developmental Disabilities.
- (3) A comprehensive program shall be developed and implemented by the Superintendent with the advice and approval of the Board, in accordance with the Division of Mental Retardation and Developmental Disabilities rules. A comprehensive program shall include, but not be limited to:
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(d) Adult programs.

Specific requirements regarding adult programs are set forth in 7 Ohio Admin. Code 5119:3-1-07.

¹R.C. Chapter 5127 was effectively abolished by H.B. 455 (1976), which transferred certain sections of that chapter to R.C. Chapter 5126 and repealed the remainder of the sections.

R.C. 5126.03 specifically subjects the county boards of mental retardation to the terms of R.C. 5126.06, and further requires the county boards to administer, supervise, and fund all programs established pursuant to the rules of the Chief of the Division of Mental Retardation and Developmental Disabilities and the terms of R.C. 5126.03 and 5126.06. The language of R.C. 5126.06 clearly states that in each county a training center or other programs and services shall be established for the special training of mentally retarded persons.

The Chief of the Division of Mental Retardation and Developmental Disabilities is given the power to decide who is capable of profiting from specialized training programs and to establish rules regarding such programs. The statute clearly contemplates the inclusion of adults in the county programs as state funding for adults is mentioned in R.C. 5126.07. Nowhere in Chapter 5126 are adults excluded from coverage; the only distinction between adults and children is a reference in R.C. 5126.06 which requires any programs for children to comply with Chapter 3323 of the Revised Code. No compliance section for adults is mentioned; thus, the programs in each county must meet the general requirements of R.C. 5126.06 and the rules of the Chief of the Division of Mental Retardation and Developmental Disabilities.

You indicate in your letter that you assume that rules validly promulgated according to Chapter 119 have the force and effect of law. The Supreme Court of Ohio has made such an assertion in many instances. See State ex rel. Kildow v. Industrial Commission, 128 Ohio St. 573 (1934); The Kroger Grocery & Baking Co. v. Glander, 149 Ohio St. 120 (1948), and cases cited therein. Assuming that the rules of the Division of Mental Retardation and Developmental Disabilities regarding the programs and the approval of mentally retarded persons for training were validly adopted in accordance with applicable law—including, as required by R.C. 5126.06, R.C. 119.01 through 119.13—the county board must provide to developmentally disabled adults the services outlined in those rules.

R.C. 5125.03 states that the county board, ". . . subject to the rules and standards of the chief of the division of mental retardation and developmental disabilities shall . . ." establish the required programs. (Emphasis added.) The Supreme Court of Ohio held, in Dorrian v. Scioto Conserv. Dist., 27 Ohio St. 2d 102 (1971), in the first paragraph of the syllabus:

In 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.

See also State ex rel. Ewing v. Without a Stitch, 37 Ohio St. 2d 95 (1974); 1977 Op. Att'y Gen. No. 77-004; 1977 Op. Att'y Gen. No. 77-003; 1974 Op. Att'y Gen. No. 74-013; 1974 Op. Att'y Gen. No. 74-010; 1973 Op. Att'y Gen. No. 73-083. It is clear, therefore, that the county boards of mental retardation must follow the requirements in R.C. 5126.03 and 5126.06 since the Legislature has used in R.C. 5126.03 the presumptively mandatory term, "shall," and there is no language in the statute indicating any contrary intent. See 1973 Op. Att'y Gen. No. 73-014 (county board of mental retardation must, pursuant to R.C. 5126.03, provide transportation to and from special programs) and 1969 Op. Att'y Gen. No. 69-146 (county board of mental retardation, and not community mental health and retardation board, has power and responsibility of establishing special training programs).

Accordingly, it is my opinion, and you are advised, that a county board of mental retardation has, pursuant to R.C. 5126.03, a legally mandated responsibility to provide education and habilitation for mentally retarded adults as required by the Chief of the Division of Mental Retardation and Developmental Disabilities through 7 Ohio Admin. Code 5119:3-1-03 and other relevant rules.