

July 19, 2022

The Honorable Brodi J. Conover  
Union Township Law Director  
Bricker & Eckler LLP  
2 East Mulberry Street  
Lebanon, Ohio 45036

SYLLABUS:

2022-011

1. An entity that provides a newborn-safety incubator pursuant to R.C. 2151.3516 is required, if possible, to make available the materials specified in R.C. 2151.3518(A)(3) and (4) to a parent who delivers a child to the incubator.
2. An entity that provides a newborn-safety incubator pursuant to R.C. 2151.3516 may exercise its official discretion to decide how the materials specified in R.C. 2151.3518(A)(3) and (4) will be made available to a parent who delivers a child to the incubator.



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OPINION NO. 2022-011

The Honorable Brodi J. Conover  
Union Township Law Director  
Bricker & Eckler LLP  
2 East Mulberry Street  
Lebanon, Ohio 45036

Dear Law Director Conover:

You have requested an opinion on behalf of Union Township, a limited home-rule township in Clermont County.

I have framed your questions as follows:

1. Is an entity that provides a newborn-safety incubator pursuant to R.C. 2151.3516 required to make available the materials specified in R.C. 2151.3518(A)(3) and (4) to a parent who brings a child to the incubator?
2. If the entity is required to make available these materials, *how* must the organization make the materials available?

I conclude, that “yes,” the entity must make the materials available if possible. The entity may exercise its discretion when determining how to make the materials available.

## I

Ohio law allows a parent of a child not more than 30 days old to deliver the child, without intent to return for the child, to law-enforcement agencies, hospitals, and emergency-medical-service organizations. R.C. 2151.3516-3518. The entity that takes possession of the child shall, “if possible, make available to the parent” medical history forms and written informational materials. R.C. 2151.3518(A)(3) and (4). The forms and materials are developed by the Ohio Department of Job and Family Services. R.C. 2151.3534. The parent is not required to take the materials or fill out the forms. R.C. 2151.3528 and 2151.3529.

The law also allows these entities to provide newborn-safety incubators to facilitate the delivery of the child, and allows a parent to deliver a child by using an incubator. R.C. 2151.3516 and 2151.3532. A newborn-safety incubator is essentially a compartment that is designed to keep an infant healthy for a brief period of time, until officials can retrieve the child. *See* R.C. 2151.3532; *see also* Ohio Adm.Code 3701-86-01 et seq. Use of an incubator allows a parent to deliver their child without directly interacting with a medical or law enforcement worker. *See* R.C. 2151.3526 (parent who delivers child has absolute right to anonymity).

Union Township’s emergency-medical-service organization operates an incubator. An emergency-medical-service organization is an entity authorized to provide an incubator. R.C. 2151.3516 and 2151.3517(C). You ask whether the requirement to make available the materials in R.C. 2151.3518(A)(3) and (4) applies if a

parent delivers their child to authorities using an incubator (rather than by handing off the child directly). I conclude it does apply.

First, the plain language of R.C. 2151.3516, R.C. 2151.3517, and R.C. 2151.3518 applies the duty to make available the materials to parents who deliver a child using an incubator. Surrender via an incubator is a method of delivery authorized by R.C. 2151.3516. The entities set forth in R.C. 2151.3517 are required to take possession of a child delivered in accordance with R.C. 2151.3516. And R.C. 2151.3518 imposes on those entities the duty to make available the materials. It makes no exception for entities that choose to accept delivery through an incubator.

In addition, the duty to make available the materials is imposed on the entities covered by R.C. 2151.3517—hospitals and emergency-medical-service organizations, for example—not individual employees. R.C. 2151.3516 states that a “parent may voluntarily deliver his or her child who is not older than thirty days, without intent to return for the child, to... a newborn safety incubator provided by an *entity* described in [section 2151.3517]” (emphasis added). In turn, it is the “law enforcement *agency*, *hospital*, or emergency medical service *organization*” that shall make available the materials in R.C. 2151.3518(A)(3) and (4) (emphasis added). This language makes clear that, even if a specific person at the entity does not immediately take the child upon delivery, the forms must still be made available to the parent.

Finally, R.C. 2151.3518(A)(3) and (4) state that the entity shall “make available” the materials to the parent. The statutes do not state that the materials shall be “handed to” or “personally given” to the parent. This passive language envisions providing these materials even if no individual employee of the entity interacts with the parent.

Therefore, a township emergency-medical-service organization that operates a newborn-safety incubator is required, if possible, to make available the materials specified in R.C. 2151.3518(A)(3) and (4) to parents who deliver a child by using the incubator.

## II

Because I conclude that an entity that provides an incubator must make available the materials required in 2151.3518(A)(3) and (4) when a parent delivers a child using the incubator, I now turn to the question of how the entity is to provide the forms.

Neither 2151.3518(A)(3) and (4), nor any other statute, contains requirements regarding *how* the materials are to be made available. Because the statute does not provide the method that the materials are to be made available, the statute leaves that matter to the receiving entity’s official discretion. 2022 Op. Att’y Gen. No. 2022-010, Slip Op. at 6-7; *see also State ex rel. Hunt v. Hildebrant*, 93 Ohio St.1, 11-12, 112 N.E. 138 (1915); 1997 Op. Att’y Gen. No. 97-051, at 2-319; 1982 Op. Att’y Gen. No. 82-018, at 2-59.

This discretion is even more clear in these particular statutes, which require only that the materials be made available “if possible.” R.C. 2151.3518(A)(3) and (4). The use of “if possible” indicates that the legislature recognizes that the circumstances of each child delivery will vary, and the way in which the materials are made available may need to vary as well.

It is outside of my opinion-rendering function to advise another government entity regarding how the entity should exercise its discretion. *See* 1990 Op. Att’y Gen. No. 90-32, at 2-126; 1986 Op. Att’y Gen. No. 86-076, at 2-422.

Conclusion

Accordingly, it is my opinion, and you are hereby advised that:

1. An entity that provides a newborn-safety incubator pursuant to R.C. 2151.3516 is required, if possible, to make available the materials specified in R.C. 2151.3518(A)(3) and (4) to a parent who delivers a child to a newborn-safety incubator.
2. An entity that provides a newborn-safety incubator pursuant to R.C. 2151.3516 shall exercise its official discretion to decide how the materials specified in R.C. 2151.3518(A)(3) and (4) will be made available to a parent who delivers a child to the incubator.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive style with a large, looping "D" and "Y".

DAVE YOST  
Ohio Attorney General