

OPINION NO. 86-016

Syllabus:

One person may not serve simultaneously as superintendent of a county board of mental retardation and developmental disabilities and member of a board of education of a city school district.

To: John R. Allen, Perry County Prosecuting Attorney, New Lexington, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 21, 1986

I have before me your request for my opinion in which you ask whether one person may serve simultaneously in the positions of superintendent of a county board of mental retardation and developmental disabilities (BMRDD) created under R.C. Chapter 5126 and member of a board of education of a city school district. It is my understanding that a contractual relationship exists between the county BMRDD and board of education of the city school district in question.

In 1979 Op. Att'y Gen. No. 79-111, my predecessor established seven questions, which must be addressed to determine whether two public positions are incompatible. Two positions are considered incompatible if, *inter alia*, the empowering statutes of either position limit the outside employment permissible or if an individual serving in both positions would be subject to a conflict of interest.

R.C. 5126.02 establishes in each county a BMRDD. R.C. 5126.05 delineates the general powers and duties of a county BMRDD, and provides in pertinent part that, subject to the rules established by the Director of the Department of Mental Retardation and Developmental Disabilities, the county BMRDD shall:

(1) Employ a qualified superintendent as defined by the rules of the director who shall serve under contract with the board for a term of employment not less than one and not more than five years.... The superintendent shall have no voting privileges on the board. The board shall prescribe the duties of the superintendent, review his performance, and fix his compensation. In addition to such compensation, the

superintendent shall be reimbursed for actual and necessary expenses.

Thus, pursuant to R.C. 5126.05(I), each county BMRDD, subject to rules established by the Director of the Department of Mental Retardation and Developmental Disabilities, must employ a qualified superintendent who shall serve under contract with the board for a term of employment not less than one and not more than five years. Under R.C. 5126.05(I), the superintendent shall have no voting privileges on the county BMRDD and such board must prescribe the duties, review the performance and fix the compensation of the superintendent. A superintendent of a county BMRDD is in the unclassified service, R.C. 124.11(A)(19). R.C. 5126.06 sets forth the general powers and duties of a superintendent of a county BMRDD.

R.C. 5126.03(A)-(D) generally proscribe specified individuals from serving on a county BMRDD. R.C. 5126.03(E) provides as follows: "A county board of mental retardation and developmental disabilities shall not contract with an agency whose board includes...an employee of the same county board." Thus, R.C. 5126.03(E) expressly prohibits a county BMRDD from contracting¹ with a board of education of a city school district which includes among its membership the superintendent or other employee of the same county BMRDD. It plainly follows from R.C. 5126.03(E) that where a contract exists between a county BMRDD and a city school district, one person may not serve simultaneously in the positions of superintendent of such county BMRDD and member of the city board of education.

It is well-established that:

Any public officer owes an undivided duty to the public. It is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public. (Citation omitted.)

1970 Op. Att'y Gen. No. 70-168 at 2-336 (overruled on other grounds by 1981 Op. Att'y Gen. No. 81-100). I believe that in enacting R.C. 5126.03(E), see 1979-1980 Ohio Laws, Part I, 499, 574 (Am. Sub. S.B. 160, eff. Oct. 31, 1980), the General Assembly recognized that where a county BMRDD contracts with an agency, a person who simultaneously serves as an employee of the county BMRDD and as a member of the board of the contract agency would be subject to divided duties and conflicting loyalties. Indeed, I believe that the language of R.C. 5126.03(E) manifests the clear intention of the General Assembly that the same person may not serve simultaneously in the two positions in question where a contract exists between the county BMRDD and the board of education.

In the instant situation, it is my understanding that two contracts exist between the county BMRDD and the city board of education in question, one of which is for the county BMRDD's

¹ R.C. 5126.05 authorizes a county BMRDD to enter into contracts with public agencies of the same or another county "to provide the facilities, programs, and services authorized or required, upon such terms as may be agreeable, and in accordance with Chapters 3323. and 5126. of the Revised Code and rules adopted thereunder."

provision of special education services for school district children and the other of which is for the school district's maintenance of buses owned by the county BMRDD.² Since a contractual relationship exists between the county BMRDD and the board of education, under R.C. 5126.03(E) and the principles outlined above, the positions of superintendent of the county BMRDD and member of the board of education are incompatible. Thus, I conclude that where a contract exists between a county BMRDD and a board of education of a city school district, one person may not serve simultaneously as superintendent of such county BMRDD and member of such board of education.

Even if no contractual relationship exists between a county BMRDD and a board of education of a city school district, it is apparent that one person may not serve simultaneously as superintendent of a county BMRDD and as member of a city school board. Under R.C. 3323.07, a board of education is required to establish and maintain programs for the education of handicapped children in accordance with the standards set by the State Board of Education. Under R.C. 3323.09, as authorized by the State Board of Education, the Director of Mental Retardation and Developmental Disabilities "shall establish special education programs for handicapped children to be operated and maintained by county boards of mental retardation and developmental disabilities in accordance with a plan submitted to and approved by the director." See R.C. 5126.05(H) (a county BMRDD must "[p]rovide special education programs according to Chapter 3323. of the Revised Code"). Thus, pursuant to R.C. 3323.07 and R.C. 3323.09, special education for handicapped children is provided by both boards of education and county BMRDD's.

Under R.C. 3323.04, the board of education of each school district is required to place each handicapped child of compulsory school age residing within the district in an appropriate education program which may include instruction in regular classes, a special education program, or any combination thereof. Prior to the placement of a child in a program operated under R.C. 3323.09, the board of education must consult with the county BMRDD. As noted above, a special education program, see R.C. 3323.01(B), may be operated by the board of education, see R.C. 3323.07, or by the county BMRDD, see R.C. 3323.09. School district special education classes and support units that are approved by the State Board of

² Where a contractual relationship exists between a county BMRDD and a board of education of a city school district, an individual who simultaneously serves as superintendent of the county BMRDD and member of the city school board could arguably be deemed to have an unlawful interest in a public contract in violation of R.C. 2921.42 or R.C. 3313.33. See Ohio Ethics Commission, Advisory Opinion No. 78-006 (a member of a board of education who has management responsibility in a corporation which seeks to contract with the board of education may have an unlawful interest in the contract). See also Ohio Ethics Commission, Advisory Opinion No. 81-008 (an interest prohibited under R.C. 2921.42 may be fiduciary in nature, as well as pecuniary). The Ohio Ethics Commission, which has authority to render advisory opinions interpreting R.C. 2921.42, see R.C. 102.08, should be contacted for further guidance in this matter.

Education for funding under R.C. 3317.05 receive special education unit payments pursuant to R.C. 3317.024. County BMRDD special education classes and support units that are approved by the State Board of Education for funding under R.C. 3317.05 also receive the same funding as units operated by school districts. R.C. 3317.024. Approved classroom units are determined primarily on the basis of the average daily membership of handicapped children, see R.C. 3317.03, in classes that are eligible for approval by the State Board of Education under R.C. 3317.05. Thus, a major factor in calculating the amount of state funding of special education programs for school districts and county BMRDD's is the number of pupils in classes operated by the board of education and BMRDD. R.C. 3317.023; R.C. 3317.024; R.C. 3317.03; R.C. 3317.05.

From the foregoing, it is apparent that one person serving as a board of education member and superintendent of a county BMRDD would be subject to conflicting loyalties, since the person, as a member of the board of education, must influence decisions as to the placement of pupils, selection of personnel and the establishment of board special education policies. The decision to place a pupil in one program would have a detrimental effect on the funding of another program. Thus, one person serving in both capacities would be in a position to favor one program over another.

In conclusion, it is my opinion, and you are so advised that one person may not serve simultaneously as superintendent of a county board of mental retardation and developmental disabilities and member of a board of education of a city school district.