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CHILD ENTITLED TO FREE EDUCATION IN SCHOOL DISTRICT IN WHICH A STATE INSTITUTION FOR THE FEEBLE-MINDED IS LOCATED—A CHILD TRANSFERRED TO A FOSTER HOME FROM INSTITUTION IS ENTITLED TO FREE EDUCATION—§§5123.03, 3313.64, 5123.12, R.C.

SYLLABUS:

1. When a child is committed to a state institution for the feeble-minded the superintendent of such institution becomes, pursuant to Section 5123.03, Revised Code, the guardian of such child and the child as a ward of such guardian is entitled, pursuant to Section 3313.64, Revised Code, to a free education in the school district in which the state institution is located.

2. The Department of Mental Hygiene and Correction has the authority, pursuant to Section 5123.12, Revised Code, to transfer a child committed to a state institution to a foster home and as the foster parents would have the care, custody and control of such child the child would be a ward of the foster parents and entitled pursuant to Section 3313.64, Revised Code, to a free education in the school district in which the foster home is located.

Columbus, Ohio, July 28, 1960

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which request reads as follows:

“Section 3313.64 of the Revised Code provides for the payment of tuition by non-residents of a school district; payment to

be made at the expense of the school district in which the pupil was a school resident at the time of placement.

“A question has been raised by the Cleveland City School District as to its liability to pay tuition to the Columbus City School District for a child who was committed by the Probate Court of Cuyahoga County to the Columbus State School, a state institution for feeble minded located in Columbus, Ohio, which State School in turn placed such child in a foster home located in the City of Columbus, Ohio. The Cleveland City Board of Education questions its liability to pay this tuition which is being charged it by the Columbus City School District.

“Section 5119.18 of the Revised Code provides that all minors who, in the judgment of the *Juvenile Court* (emphasis mine), require state institutional care and guardianship, shall be wards of the State and shall be committed to the care and custody of the department of mental hygiene and correction, which department thereupon becomes vested with the exclusive *guardianship of such minors*. (Emphasis mine)

“Section 5121.04 of the Revised Code requires the department of mental hygiene and correction to investigate the financial condition of the inmates of benevolent institutions under its control *and of the relatives liable for the support of such inmates*, in order to determine the liability of any inmate or such relatives to make payment in whole or in part for the support of the inmate, etc. (Emphasis mine)

“Section 5119.17 of the Revised Code provides for the classification of all persons committed to any institution and, ‘If the report of such examination, observation, and classification of such person recommends that he be assigned to an institution or place maintained by the state *within another division* of the department than one within the division maintaining the facility or bureau making such examination, observation, and classification, then the director of mental hygiene and correction may assign such person to such institution *or place*, there to be confined, cared for, treated, trained, and rehabilitated until released under the order of the court making the sentence or commitment of such person.’ (Emphasis mine)

In view of this situation, we respectfully request an opinion as to :

“1. Does the Department of Mental Hygiene and Correction, upon commitment, assume the guardianship of a mentally deficient person committed to its care, so that the residence of the child so committed becomes the institution in which such child is placed?

“2. Is a mentally retarded child, under the guardianship of the superintendent of a mental institution, a resident of a school district other than that of the situs of the mental institution?

"3. Do the provisions of Section 5121.05 of the Revised Code requiring the parent to support such child include the institution costs when such child is assigned to a foster home, which is located in a school district other than the school district which was the residence at the time the child was committed?"

"4. Does the superintendent of a mental institution have the authority to transfer an inmate to a foster home, which in turn sends the child to a school; such school being located in the school district in which the foster home is located?"

"5. Has school residence at the time of commitment been abrogated when commitment is effected and the superintendent of the institution to which the child is committed assumes the guardianship of such a child?"

While it is not explicit in your request, I assume for the purposes of this opinion that the action of the probate court of Cuyahoga County in committing the child to the Columbus State School was taken pursuant to the authority contained in Section 5125.25, Revised Code. This section reads, in part, as follows:

"The authority to apprehend, detain, arrest, hear, commit, and receive for treatment, a person alleged to be or determined to be feeble-minded, and any and all proceedings thereunder, including apprehension, detention, arrest, filing of affidavit, issuing and service of warrant to detain, arrest, convey, and reconvey, commitment, transfer, hearing, and rehearing, witnesses and appearances therefor, discharge, release on trial visit, and return therefrom, authority, powers, and duties of the superintendent, right and control of custody of person and property, authority and duties of the department of mental hygiene and correction and the director of mental hygiene and correction, the division of mental hygiene, commissioner of mental hygiene and any other employee thereof in respect to the director and the institutions for the feeble-minded and patients therein, traveling expenses, legal status, powers and duties of probate judge, financial report, fees, court costs, and expenses, residence qualifications and provisions therefor, shall be the same as is provided for the mentally ill and insane insofar as may be applicable to the feeble-minded and institutions for the feeble-minded.

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To determine the extent of the authority of the court and the obligations of the Department of Mental Hygiene and Correction, it is necessary then to turn to the statutes providing for the commitment of the mentally ill. Sections 5123.19 through 5123.25, Revised Code, provide for the commitment to a state institution of a person who is adjudged to be mentally

ill, and by reference to Section 5125.25, Revised Code, also for the commitment by the court to a state institution of a person adjudged to be feeble-minded. As you have stated in your letter that the Columbus State School is a state institution for the feeble-minded, it will be presumed that this was the type of commitment made in this particular case. The question remaining for answer then is what is the relationship between a child so committed and a school district's obligation to provide a free public education for its residents.

Section 3313.64, Revised Code, provides, in part, as follows :

“The schools of each city, exempted village, or local school district shall be free to all school residents between six and twenty-one years of age, but the time in the school year at which beginners may enter upon the first year's work of the elementary school shall be subject to the rules and regulations of the board of education. School residents shall be all youth who are children or wards of actual residents of the school district. District of school residence shall be the school district in which a school resident is entitled to attend school free. * * *”

It should be noted that the definition of school residents for whom this section prescribes free schooling is controlled by the residence of the parents or guardians of the youths and not by the residence of the youths themselves.

To arrive at an answer to your question we must examine the relationship between the Department of Mental Hygiene and Correction and a child committed to a state institution for the feeble-minded. Section 5125.23, Revised Code, provides as follows :

“The state shall have the care, custody, control, and treatment of persons adjudged to be feeble-minded and admitted to any institution for the feeble-minded under the control of the division of mental hygiene and department of mental hygiene and correction.”

Section 5123.03, Revised Code, also governs this relationship and provides, in part, as follows :

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“The superintendent or person in charge of any hospital operated by the state shall be the guardian of the person of the patients committed to such hospital for the purpose of retaining them therein. The superintendent shall have exclusive custody and con-

trol of the person of the patient during the period of time he is detained for observation or treatment, or both, whether a guardian of the person of said patient has been appointed or is appointed by any probate court. Such superintendent shall also be guardian of the person of the patient for the purpose of release on trial visit and shall retain the right of custody during the period of such trial visit. Such superintendent may determine the place of abode of such patient while on trial visit irrespective of the existence of a guardian of the person appointed by the probate court.

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These sections provide that the superintendent of a state institution shall be the guardian of all persons committed to such institution. While there are some limitations on this guardianship, it does expressly include the care, custody, control and treatment of such committed persons. The question then arises, is this the type of guardianship as would enable the ward of such guardian to take advantage of the free education offered by Section 3313.64, Revised Code, for wards of actual residents of the school district.

Several opinions of the Attorney General have construed the type of guardianship necessary to provide a ward with free education. In Opinion No. 1140, Opinions of the Attorney General for 1918, page 545, which held that a child living with her uncle in a school district apart from her parents was entitled to a free education in the school district of her uncle, it was stated that a “liberal construction should be given to the term ‘ward’ as the same is used in relation to the education of the youth of school age in this state.” This opinion was followed with approval in Opinion No. 106, Opinions of the Attorney General for 1927, page 160, which held at page 163:

“It would seem that if the court can award the care and control of a child to a person other than its parents and thus establish a wardship for school purposes, that the parents themselves, who have the undisputed natural care, custody and control of such child, may grant the care, custody and control of such child to someone else, so as to make that child a ward of the other person for school purposes.

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“I am of the opinion that a liberal construction should be given to the term ‘ward’ as used in this statute; and that if a child be given in good faith by its parents to some other person, and that if the other person obtains the full control and custody of the child and provides such child with food, clothing and shelter, and

that it be intended by all parties concerned that the child is leaving the home of its parents to reside with the other person, then such child stands in the relation of a ward to the person to whom the parents have granted the child's custody and would be entitled to attend school in the district of which this person is an actual resident. * * *

In Opinion No. 4864, Opinions of the Attorney General for 1932, at page 1475, the previous opinions noted above were followed and that opinion stated, in part, as follows :

“As these children appear to be residing permanently in the home of an actual resident of the school district in question, the whole question is whether or not that resident stands in loco parentis, or in the place of the parent, to the children. If so, the children are entitled to attend the public schools of that district without the payment of tuition, if not, and the estate of the children can bear the expense of tuition, it should be paid.

“The mere fact that these children have a legally appointed guardian and that the people with whom they are living are being paid something for their care is not, in my opinion, completely decisive of the matter. Even natural parents may commit the care, control and training of their children to other persons in such a manner and to such an extent that those other persons stand in loco parentis to their children and if that can be done by natural parents, I see no reason why a guardian may not do the same thing.”

In Opinion No. 2045, Opinions of the Attorney General for 1933, page 1960, the same doctrine was followed with the specific statement that a child placed by a parent or guardian in a foster home would have the right to a free education in the school district in which the foster home was located.

In light of these previous opinions of the Attorney General, I conclude that the term “ward” as used in Section 3313.64, should be given a liberal construction to effectuate the public policy of this state in providing a free education for all its children. It appears, therefore, that a child who has been committed to a state institution for the feeble minded is the ward as that term is used in Section 3313.64, Revised Code, of the superintendent of the state institution or of his foster parents if the child has been placed in the custody of a foster home by the Department of Mental Hygiene and Correction. This entitles such child to a free education in the school district in which the state institution or the foster home is located.

As to the second question you pose concerning the power of the Department of Mental Hygiene and Correction to place a committed child in a foster home, I believe a sufficient answer is provided by Section 5123.12, Revised Code, which, by virtue of Section 5125.25, Revised Code, is made applicable to the feeble-minded. Section 5123.12, Revised Code, reads as follows:

“The department of mental hygiene and correction may provide for the custody, supervision, control, treatment, and training of feeble-minded, epileptic, mentally ill, and mentally deficient persons committed to its custody and care elsewhere than within the enclosure of an institution, if the department and the division of mental hygiene shall so determine with respect to any individual or group of individuals. In all such cases the department shall insure adequate and proper overseeing and supervision for the due protection of such persons and of the public.”

In light of my conclusion that education in a public school is free to a child committed to a state institution for the feeble-minded, there would be no cost of tuition to pay for the education of the child in the school district in which his guardian resides and, therefore, there would be no costs for parents to pay under Section 5121.05, Revised Code.

It is, therefore, my opinion and you are accordingly advised:

1. When a child is committed to a state institution for the feeble-minded the superintendent of such institution becomes, pursuant to Section 5123.03, Revised Code, the guardian of such child and the child as a ward of such guardian is entitled, pursuant to Section 3313.64, Revised Code, to a free education in the school district in which the state institution is located.

2. The Department of Mental Hygiene and Correction has the authority, pursuant to Section 5123.12, Revised Code, to transfer a child committed to a state institution to a foster home and as the foster parents would have the care, custody and control of such child the child would be a ward of the foster parents and entitled pursuant to Section 3313.64, Revised Code, to a free education in the school district in which the foster home is located.

Respectfully,

MARK McELROY

Attorney General