

**OPINION NO. 81-002****Syllabus:**

A board of education may not contract with, and pay, a private nonprofit association for the instruction of secondary school age pupils who have dropped out of the public schools and who desire to complete instruction in a curriculum designed to lead toward a high school diploma.

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**To: Franklin B. Walter, Superintendent, Department of Education, Columbus, Ohio**  
**By: William J. Brown, Attorney General, January 27, 1981**

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

1. May a school district contract with and pay a private non-profit organization for the instruction of secondary school age pupils who have dropped out of the public schools and who desire to complete instruction in a general curriculum designed to lead toward a high school diploma?
2. If the answer to the first question is in the affirmative, may a school district count such pupils in its average daily membership for the purposes of calculating the school foundation payments pursuant to Revised Code Chapter 3317?

Pursuant to conversations pertaining to your inquiry, you have informed my

staff that your request for advice was precipitated by the Youngstown City School District Board of Education (hereinafter Youngstown Board) in reference to a certain program operated by a private nonprofit organization called The Learning Supplement Center (hereinafter LSC). You have stated that LSC conducts an educational program which is described as an "adult high school continuation program." This program is designed to provide instruction for high school "dropouts" who desire to complete instruction in a program designed to lead toward a high school diploma. You also state that LSC has approached the Youngstown Board with a proposal to enter into a contract whereby LSC would provide these educational services and the Youngstown Board would pay it an amount equal to the "state foundation funds" which would be generated by the Youngstown Board pursuant to R.C. Chapter 3317 by inclusion of these LSC students in the Youngstown Board's average daily attendance enrollment figures. Finally, you state that LSC would retain its current autonomy in its functions.

The nature of your request in conjunction with the underlying factual situation requires an overall review of at least four different chapters of the Ohio Revised Code, *i.e.*, Chapters 3313, 3315, 3317 and 3319, and presents a basic question regarding the parameters of authority of a city school district board of education.

This question involves the principle, frequently announced by the courts and now firmly established, that creatures of statute, such as boards of education, are limited in their powers to those granted by the General Assembly. The proposition that a board of education is a mere agency of the state created by statute for the sole purpose of carrying out the constitutional mandate to the General Assembly contained in the Ohio Const. art. VI, §§2 and 3, namely, to make such provisions as are necessary to secure a thorough and efficient system of common schools throughout the state, is well settled. See, e.g., Board of Education v. Walter, 52 Ohio St. 2d 368, 390 N.E.2d 813 (1979).

The principle of law relating to these powers and duties has been variously stated by the courts. A succinct description of a board's contractual capacity, or power, is described in paragraph one of the syllabus of Schwing v. McClure, 120 Ohio St. 335, 335, 166 N.E. 230, 230 (1929), as follows:

Members of a board of education of a school district are public officers, whose duties are prescribed by law. Their contractual powers are defined by the statutory limitations existing thereon, and they have no power except such as is expressly given, or such as is necessarily implied from the powers that are expressly given.

See also Teachers' Association v. Board, 41 Ohio St.2d 127, 323 N.E.2d 714 (1975); State ex rel. Clarke v. Cook, 103 Ohio St. 465, 134 N.E. 655 (1921).

It is equally well settled that the authority of creatures of statute, such as boards of education, to act in financial transactions must be clearly and distinctly granted and if such authority is doubtful, the doubt is to be resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the political subdivision for which the board acts. See generally State ex rel. Clarke v. Cook, supra. See also 1943 Op. Att'y Gen. No. 5846, p. 108 (wherein one of my predecessors concluded that a board of education of a city school district is without authority to employ, at public expense, the services of a private nongovernmental agency to conduct examinations to determine the relative fitness of applicants for teaching positions).

In attempting to answer your first question, one must review all relevant sections of the Revised Code to determine whether there is any authority, either express or implied, for a school board to contract with and pay a private nonprofit organization for the instruction of secondary school age pupils who have dropped out of the public schools and who desire to complete instruction in a general curriculum designed to lead toward a high school diploma. Upon review of R.C. Chapters 3313, 3315, 3317 and 3319, I find no specific provision for such authority. The question then becomes whether such authority is necessarily implied from the

powers which are expressly granted. In order to respond to this question, an analysis of R.C. 3313.531, R.C. 3313.641, R.C. 3313.91 and R.C. 3315.09, which authorize boards of education to operate educational programs and to contract for educational instruction, is necessary.

R.C. 3313.531 and R.C. 3313.641 expressly authorize boards of education to operate adult high school continuation programs and other programs for out-of-school youth. R.C. 3313.641 provides, in this regard, as follows:

Notwithstanding the provisions of sections 3313.48 and 3313.64 of the Revised Code, the board of education of a city, exempted village, or local school district may organize and operate a summer school, an evening or day school for adults and out-of-school youth, or technical school or institute for instruction beyond the high school, offer driver education courses as a part of the regular curriculum of the school district in conformity with section 4508.07 of the Revised Code, or offer postgraduate work in any course of instruction to pupils who have completed the twelfth grade, which may be open to any pupil irrespective of his age upon such terms and upon payment of such tuition as the board prescribes. Courses of instruction in basic literacy may be offered with or without tuition, as the board determines. (Emphasis added.)

R.C. 3313.531 provides, in pertinent part, as follows:

As used in this section, "adult high school continuation programs" means an organized instructional program for persons sixteen years of age and older who are not otherwise enrolled in a high school for which the state board of education sets standards pursuant to section 3301.07 of the Revised Code. Such programs are limited to courses for which credit may be granted toward the issuance of a high school diploma.

The board of education of any school district may establish and operate an adult high school continuation program. Two or more boards of education may jointly establish and operate such a program. The resolution establishing an adult high school continuation program may specify the contribution and expenditure of funds, the use of buildings, equipment, and other school facilities, and such other matters as the board wishes to include. In the case of a jointly operated program, the resolutions establishing such program shall also designate one of the participating boards to be responsible for receiving and disbursing funds, and administering the program for the benefit of all participating boards of education. (Emphasis added.)

R.C. 3313.641 expressly authorizes a board of education, itself, to organize and to operate a program providing instruction in courses other than those required for the issuance of a high school diploma. R.C. 3313.531, on the other hand, expressly authorizes a board of education, itself, to establish and to operate a program providing instruction in courses which are required for the issuance of a high school diploma. Clearly, neither R.C. 3313.641 nor R.C. 3313.531 expressly authorizes a board of education to enter into a contract with a private organization to provide such educational instruction to adults and out-of-school youth.

Moreover, there is nothing in the plain language of either R.C. 3313.641 or R.C. 3313.531 from which the authority to enter into such contracts with private organizations may be implied. Rather, the plain language of R.C. 3313.641 and R.C. 3313.531, which authorizes boards of education, themselves, to operate such programs, belies that such was the legislative intent. Since the intent of the legislature in enacting a statute must be determined primarily from the language of the statute itself,<sup>1</sup> I am of the opinion that neither R.C. 3313.641 nor R.C. 3313.531

<sup>1</sup>See Stewart v. Trumbull County Board of Education, 34 Ohio St. 2d 129, 296 N.E.2d 676 (1973).

authorizes a board of education to contract with a private organization for provision of educational instruction designed to lead toward a high school diploma.

The fact that the General Assembly has seen fit to enact statutes which expressly authorize boards of education, in certain circumstances, to enter into contracts with private organizations for the provision of educational instruction further supports the conclusion that neither R.C. 3313.641 nor R.C. 3313.531 was intended to authorize a board of education to enter into a contract such as the one herein proposed. See R.C. 3313.91; R.C. 3315.09.

R.C. 3313.91 and R.C. 3315.09, however, do expressly authorize boards of education to contract with private organizations for the purpose of obtaining, in the district, vocational or special instruction. R.C. 3313.91, which authorizes a board of education to contract for vocational services, provides, in pertinent part, as follows:

Any public board of education may contract with any public agency, board, or bureau, or with any private individual or firm for the purchase of any vocational education or vocational rehabilitation service for any resident of the district under the age of twenty-one years and may pay for such services with public funds. Any such vocational education or vocational rehabilitation service shall meet the same requirements, including those for teachers, facilities, and equipment, as those required of the public schools and be approved by the state department of education. (Emphasis added.)

It appears, from the plain language of R.C. 3313.91, that the legislative intent in enacting R.C. 3313.91 was to enable school districts to provide, through contract, vocational services for district residents which the school district itself might not be able to otherwise provide.

It is my understanding that the contract to be entered into by the Youngstown Board and LSC is for the provision of instruction to high school dropouts in a program designed to lead toward a high school diploma. Such a program of instruction clearly does not constitute vocational education or rehabilitation as contemplated by R.C. 3313.91. In light of the fact that R.C. 3313.91 clearly authorizes a board of education to contract only for the purchase of vocational services, it is my opinion that R.C. 3313.91 was not intended to authorize a board of education to contract with a private organization for the operation of a program designed to lead toward a high school diploma.

Similarly, I am of the opinion that the provisions of R.C. 3315.09 were not intended to empower a board of education to enter into a contract such as the one proposed herein. R.C. 3315.09 provides, in pertinent part, as follows:

The boards of education of any city, exempted village, local, county, or joint vocational school districts may enter into a contract for a term not exceeding one year, upon such terms as each board deems expedient, with each other, or with the trustees or other authorized officials of any college or university, legally organized, for the purpose of obtaining in such school district instruction in the special, technical, professional, or other advanced studies which may be pursued in such college or university beyond the scope of the public high school. In like manner such boards may contract for a term, not exceeding one year, with each other or with a private corporation or association not for profit, maintaining and furnishing a museum of art, science, or history, or providing musical instruction, for the purpose of obtaining in such school district such instruction or other educational services as can be rendered to the schools by such private corporation or association. (Emphasis added.)

A reasonable construction of the phrase "for the purpose of obtaining in such school district such instruction or other educational services as can be rendered to

the schools by such private corporation or association" leads to the conclusion that the legislative intent was to authorize boards of education to contract only with the associations enumerated in R.C. 3315.09, that is, with associations maintaining a museum or providing musical instruction.

LSC is not, to my knowledge, a nonprofit organization or association maintaining a museum or providing musical instruction. As previously discussed, any doubt as to the authority of a board of education to act in cases where a financial obligation is to be imposed upon the school district must be resolved against the board of education's exercise of such authority. Consequently, since R.C. 3315.09 authorizes a board of education to contract only with an association maintaining a museum or providing musical instruction, I am of the opinion that R.C. 3315.09 may not be interpreted as authorizing a board of education to enter into a contract with a private association for provision of instruction designed to lead toward a high school diploma.

I am not aware of any other statutes which may be construed as authorizing a board of education to enter into a contract such as the one proposed in this case. Application of the rule expressio unius est exclusio alterius, therefore, gives rise to the presumption that the General Assembly did not intend for boards of education to have the authority to enter into contracts with private associations for the provision of a "continuing adult education program." See Schofield v. Cleveland Trust Co., 38 Ohio Op. 392, 84 N.E.2d 83 (C.P. Cuyahoga County 1948) (where express authority is given by statute and there is an absence in legislation of more extensive authority, the implication is that it was not intended for more extensive authority to exist). Had the General Assembly intended for boards of education to have the authority to enter into such contracts, the General Assembly could have so provided by statute. Consequently, it must be concluded that a board of education has no authority to contract with, and pay, a private nonprofit association for the instruction of secondary school age pupils who have dropped out of the public schools and who desire to complete instruction in a curriculum designed to lead toward a high school diploma.

Since a board of education has no authority to enter into the proposed contract, it is unnecessary to respond to your second question, in which you have inquired whether individuals enrolled in the proposed program may be included in calculating the school districts' average daily membership.

In conclusion, then, it is my opinion, and you are advised, that a board of education may not contract with, and pay, a private nonprofit association for the instruction of secondary school age pupils who have dropped out of the public schools and who desire to complete instruction in a curriculum designed to lead toward a high school diploma.