

OPINION NO. 89-043

Syllabus:

1. The Ohio Department of Youth Services is a public agency having administrative control and direction of schools that it operates in its institutions.
2. Elementary and secondary schools that are operated by the Ohio Department of Youth Services in its institutions and are chartered by the State Board of Education as being in compliance with minimum standards established under R.C. 3301.07(D) are public elementary and secondary schools under the law of Ohio.
3. For purposes of 40 C.F.R. Part 763, dealing with asbestos-containing materials in schools, the Ohio Department of Youth Services is a local education agency and is subject to provisions that are applicable to the public elementary and secondary schools that it operates in its institutions.

To: Geno Natalucci-Persichetti, Director, Department of Youth Services, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, July 20, 1989

I have before me your request for my opinion as to whether the United States Environmental Protection Agency's rules concerning asbestos-containing materials in schools apply to the schools operated by the Department of Youth Services in its institutions. You cite as examples the schools in Buckeye Youth Center, Scioto Village, and Riverview School for Boys.

Your opinion request refers specifically to 40 C.F.R. Part 763, which was promulgated by the United States Environmental Protection Agency pursuant to 15 U.S.C.A. §§2605 and 2607(c) (Toxic Substances Control Act) and 15 U.S.C.A. §§2641, 2643, 2646, and 2647 (Asbestos Hazard Emergency Response Act of 1986). See also 15 U.S.C.A. §§2642, 2644-2645, 2648-2655; 20 U.S.C.A. §§3601-3611 (Asbestos School Hazard Detection and Control Act of 1980); 20 U.S.C.A. §§4011-4021 (Asbestos School Hazard Abatement Act of 1984); 20 U.S.C.A. §4022.

The purpose of the Asbestos Hazard Emergency Response Act of 1986 is as follows:

The purpose of this subchapter [15 U.S.C.A. §§2641-2655] is—

- (1) to provide for the establishment of Federal regulations which require inspection for asbestos-containing material and implementation of appropriate response actions with respect to asbestos-containing material in the Nation's schools in a safe and complete manner;
- (2) to mandate safe and complete periodic reinspection of school buildings following response actions, where appropriate; and
- (3) to require the Administrator to conduct a study to find out the extent of the danger to human health posed by asbestos in public and commercial buildings and the means to respond to any such danger.

15 U.S.C.A. §2641(b). 15 U.S.C.A. §2643 provides for the promulgation of regulations to carry out that purpose. 15 U.S.C.A. §2647 prescribes civil penalties for local educational agencies that commit certain violations.

40 C.F.R. Part 763 contains federal provisions relating to asbestos and includes provisions governing asbestos-containing materials in schools. Subpart E of 40 C.F.R. Part 763 (40 C.F.R. §§763.80-.99) was enacted in 1987 to implement the Asbestos Hazard Emergency Response Act of 1986. 52 Fed. Reg. 41,846 (1987); see also 52 Fed. Reg. 41,826 (1987). 40 C.F.R. §763.80 requires local education agencies to identify friable and nonfriable asbestos-containing material in public and private elementary and secondary schools; to submit, implement, and complete implementation of management plans; to comply with recordkeeping requirements;

and to provide for the transportation and disposal of asbestos in accordance with federal guidelines. *See also* 40 C.F.R. §763.85 (local education agencies shall inspect each school building to identify locations of asbestos-containing building material); 40 C.F.R. §763.93 (local education agencies shall develop an asbestos management plan for each school). 40 C.F.R. §763.83 includes the following definitions:

"Friable" when referring to material in a school building means that the material, when dry, may be crumbled, pulverized, or reduced to powder by hand pressure, and includes previously nonfriable material after such previously nonfriable material becomes damaged to the extent that when dry it may be crumbled, pulverized, or reduced to powder by hand pressure.

....
 "Nonfriable" means material in a school building which when dry may not be crumbled, pulverized, or reduced to powder by hand pressure.

Subpart F of 40 C.F.R. Part 763 (40 C.F.R. §§763.100-.119) was initially enacted in 1982 pursuant to the Toxic Substances Control Act. 47 Fed. Reg. 23,369 (1982); *see also* 47 Fed. Reg. 23,360 (1982). 40 C.F.R. §763.100 requires local education agencies to identify friable asbestos-containing material in schools, have samples analyzed, post a notice of the results of inspections and analyses, provide warnings on the health effects of asbestos and instructions on methods to avoid or reduce exposure, notify parent-teacher associations of the results of inspections, and comply with recordkeeping requirements. 40 C.F.R. §763.103 defines "[f]riable material" to mean "any material applied onto ceilings, walls, structural members, piping, ductwork, or any other part of the building structure which, when dry, may be crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. §763.103(d); *see also* 40 C.F.R. §§763.105, .107, .109, .111.

The provisions of 15 U.S.C.A. §§2641-2655 apply generally to local educational agencies. 15 U.S.C.A. §2642(7) defines the term "local educational agency" to include:

- (A) any local educational agency as defined in section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), [and]
- (B) the owner of any private, nonprofit elementary or secondary school building....

20 U.S.C. §3381 adopts by reference the definitions set forth in 20 U.S.C. §2891. 20 U.S.C. §2891(12) states:

The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State....Such term includes *any other public institution or agency having administrative control and direction of a public elementary or secondary school.* (Emphasis added.)

Applicable provisions of 40 C.F.R. Part 763 adopt the same definition. *See* 40 C.F.R. §763.83; 40 C.F.R. §763.103(e) (defining "[l]ocal education agency" to include "[a]ny local education agency as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2854)"; that definition currently appears in 20 U.S.C. §2891).

The federal statute and regulations set forth requirements that local educational agencies must meet with respect to their schools. 40 C.F.R. §763.83 defines "[s]chool" to mean "any elementary or secondary school as defined in section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2854)." *Accord* 15 U.S.C.A. §2642(12). Those definitions now appear in 20 U.S.C. §2891, as follows:

(8) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

....
 (21) The term 'secondary school' means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

40 C.F.R. §763.103(g) contains a similar definition: "'School' means any public or private day or residential school that provides elementary or secondary education for grade 12 or under as determined under State law, or any school of any Agency of the United States."

15 U.S.C. §2642(13) defines the term "school building" as follows:

The term "school building" means—

(A) any structure suitable for use as a classroom, including a school facility such as a laboratory, library, school eating facility, or facility used for the preparation of food,

(B) any gymnasium or other facility which is specially designed for athletic or recreational activities for an academic course in physical education,

(C) any other facility used for the instruction of students or for the administration of educational or research programs, and

(D) any maintenance, storage, or utility facility, including any hallway, essential to the operation of any facility described in subparagraphs (A), (B), or (C).

40 C.F.R. §763.103(h) includes also "[d]ormitories or other living areas of residential schools." 40 C.F.R. §763.83 includes facilities used for the housing of students and also "[a]ny portico or covered exterior hallway or walkway" and "[a]ny exterior portico of a mechanical system used to condition interior space."

The regulations contained in 40 C.F.R. Part 763 thus apply to schools operated by the Department of Youth Services if that Department is a "local education agency" under federal law and if the facilities in question are "schools" under the appropriate definitions. Pursuant to 20 U.S.C.A. §2891(12), the Department of Youth Services is a "local educational agency" if it is a public agency having administrative control and direction of a public elementary or secondary school. An examination of state education provisions and of statutes governing the Department of Youth Services leads to the conclusion that the Department of Youth Services is such a public agency and that schools that it operates in its institutions are such public schools.¹

The Department of Youth Services is created by statute. R.C. 5139.01(B). It is administered by the Director of Youth Services, who is appointed by the Governor, with the advice and consent of the Senate. R.C. 121.02(P); R.C. 5139.01(B). The general powers and duties of the Department of Youth Services include the power to receive a child committed to the Department by a court under R.C. Chapter 2151. *See* R.C. 5139.04(B); R.C. 5139.05. The Department of Youth Services is responsible for the control and management of "all state institutions or facilities established or created for the training or rehabilitation of delinquent children committed to the department, except where the control and management of an institution or facility is vested by law in another agency." R.C. 5139.03; *accord*

¹ I note that I am without authority to provide definitive interpretations of federal statutory law and administrative regulations. *See, e.g.*, 1988 Op. Att'y Gen. No. 88-007; 1985 Op. Att'y Gen. No. 85-007. In the instant case, however, the federal definitions are dependent upon findings made under state law. I have no hesitation in making determinations concerning the status of the Department of Youth Services and its schools under the law of the State of Ohio.

R.C. 5139.13. It is, thus, clear that the Department of Youth Services is a public agency. See generally 1988 Op. Att'y Gen. No. 88-042.

Your question pertains to schools that the Department of Youth Services operates in its institutions. Under R.C. 5139.01, an "[i]nstitution" is "a state facility created by the general assembly that is under the management and control of the division of correctional services of the department of youth services and that maintains sufficient control over juveniles committed to its custody in order to prevent them from committing further acts of delinquency and accomplish their rehabilitation." R.C. 5139.01(A)(4).

The Department of Youth Services is given responsibility for assuring that persons who are committed to its custody receive an appropriate education. R.C. 5139.01 includes the following definitions:

(A) As used in Chapter 5139. of the Revised Code:

(1) "Commitment" means the transfer of the physical custody of a child or youth from the court to the department of youth services.

(2) "Permanent commitment" means a commitment which vests legal custody of a child in the department of youth services.

(3) "Legal custody," insofar as it pertains to the status which is created when a child is permanently committed to the department of youth services, means a legal status wherein the department has the following rights and responsibilities: the right to have physical possession of the child; the right and duty to train, protect, and control him; the responsibility to provide him with food, clothing, shelter, education, and medical care; and the right to determine where and with whom he shall live, subject to the minimum periods of institutional care prescribed in section 2151.355 of the Revised Code; provided, that these rights and responsibilities are exercised subject to the powers, rights, duties, and responsibilities of the guardian of the person of the child, and subject to any residual parental rights and responsibilities. (Emphasis added.)

See also R.C. 2151.011(A)(10) (defining "[l]egal custody," as used in the Revised Code, as "a legal status which vests in the custodian...the right and duty...to provide [the child] with...education"). See generally 1988 Op. Att'y Gen. No. 88-023 at 2-92 ("R.C. 2151.011 and R.C. 5139.01 require that the Department of Youth Services provide an education to juveniles who are committed to its custody"). The Department of Youth Services receives a copy of the school transcript of each child who is committed to its custody, and upon release of the child from institutional care the Department provides the court and the school with an updated copy of the child's school transcript. R.C. 2151.355.

Pursuant to its responsibility to provide an education for the individuals who are in its custody, the Department of Youth Services has established schools in its institutions. Members of your staff have stated that the schools in question are elementary and secondary schools operated by the Department of Youth Services and chartered by the State Board of Education as special schools that are in compliance with the minimum standards established pursuant to R.C. 3301.07(D). See R.C. 3301.16 ("p]ursuant to standards prescribed by the state board of education as provided in division (D) of section 3301.07 of the Revised Code, such board shall classify and charter school districts and individual schools within each district. Such board shall revoke the charter of any school district or school which fails to meet the standards for elementary and high schools as prescribed by the board"); Op. No. 88-023. See generally *Board of Education v. State Board of Education*, 116 Ohio App. 515, 189 N.E.2d 81 (Brown County 1962), appeal dismissed, 174 Ohio St. 321, 189 N.E.2d 86 (1963).

3 Ohio Admin. Code 3301-35-05(E) provides for the chartering of special schools, as follows:

A school provided by a state institution may be chartered in accordance with minimum standards specified in rules 3301-35-01 to 3301-35-03 of the Administrative Code subject to such exceptions as may be approved by the state board of education on the basis of recommendations by the superintendent of public instruction.

See generally Ferris v. Paulding Exempted Village School District Board of Education, 7 Ohio App. 3d 163, 165, 454 N.E.2d 957, 959 (Paulding County 1982) ("[i]n essence all a charter consists of is a certification by the State Board of Education that the school district and/or individual schools within the district fulfill the standards prescribed by that board of education as provided in R.C. 3301.07(D)"); 1977 Op. Att'y Gen. No. 77-074.

Schools operated by the Department of Youth Services at its institutions are clearly public schools. They are financed with public moneys. *See, e.g., Quigley v. State*, 5 Ohio C.C. 638, 657 (Lucas County 1891), *aff'd*, 27 Weekly L. Bull. 332 (1892) (defining a public school as "a school supported by taxation, and by money raised by the state"); R.C. 3317.024(M), (N), (O) and 3323.091 (providing state funds for state institutions that provide vocational or special education programs); Op. No. 88-023 (concluding that the Department of Youth Services is eligible to receive payments of tuition in accordance with R.C. 2151.357, R.C. 3313.64, and R. Juv. Proc. 34(C) for juveniles who are committed to the custody of the Department and are educated at schools that are operated by the Department at its institutions, where such schools are chartered as special schools pursuant to R.C. Chapter 3301); 1980 Op. Att'y Gen. No. 80-095. They are administered by a public body and serve as part of the statewide scheme for provision of public education to all children. *See* R.C. 3313.55 ("[t]he board [of education] of any school district in which is located...any public institution, except state institutions for the care and treatment of delinquent, unstable, or socially maladjusted children, shall make provision for the education of all educable children therein..."); R.C. 3321.03 ("[e]very child of compulsory school age shall attend a school or participate in a special education program that conforms to the minimum standards prescribed by the state board of education..."); R.C. 3321.04. *See generally* Ohio Const. art. VI, §§2, 3; *City of Akron v. Lane*, 65 Ohio App. 2d 90, 416 N.E.2d 642 (Summit County 1979); R.C. 2151.357, 3307.01, 3313.64; R. Juv. Proc. 34(C); Op. No. 88-023; Op. No. 80-095; 1976 Op. Att'y Gen. No. 76-055; 1933 Op. Att'y Gen. No. 1409, vol. II, p. 1290 (syllabus, paragraph 2) ("'[c]ommon schools' or 'public schools', as the terms are used in the Constitution of Ohio and the present statutory law of the state, are those schools or that system of schools established by laws enacted by the legislature in pursuance of the constitutional mandate to establish a thorough and efficient system of common schools throughout the state administered by public agencies created by law and maintained from public funds raised by taxation or from school funds otherwise obtained"). The Department of Youth Services clearly has administrative control and direction of schools that it operates at its institutions. *See, e.g.,* 3 Ohio Admin. Code 3301-35-05(E); Op. No. 88-023. It follows that the Department of Youth Services is a local educational agency as that term is used in 20 U.S.C. §2891(12) and is required to comply with the provisions of 40 C.F.R. Part 763 as they apply to the schools that the Department operates in its institutions.

Members of your staff have indicated that the Department of Youth Services has a variety of institutions at which persons who are committed to the Department reside and receive their education. This opinion does not attempt to determine whether the entirety of each such institution constitutes a facility that is subject to 40 C.F.R. Part 763, or whether some portions of certain of the institutions do not come within the relevant definitions of "school" and "school building." Determinations of such issues must be based upon findings of fact that are beyond the scope of this opinion. It should, however, be noted that the federal definitions are broad, including eating facilities, dormitories, administration and maintenance facilities, and hallways, as well as classrooms and libraries. *See* 15 U.S.C.A. §2642(13); 40 C.F.R. §763.83; 40 C.F.R. §763.103(h).

In conclusion, it is my opinion, and you are hereby advised, as follows:

1. The Ohio Department of Youth Services is a public agency having administrative control and direction of schools that it operates in its institutions.
2. Elementary and secondary schools that are operated by the Ohio Department of Youth Services in its institutions and are chartered by the State Board of Education as being in compliance with minimum standards established under R.C. 3301.07(D) are public elementary and secondary schools under the law of Ohio.

3. For purposes of 40 C.F.R. Part 763, dealing with asbestos-containing materials in schools, the Ohio Department of Youth Services is a local education agency and is subject to provisions that are applicable to the public elementary and secondary schools that it operates in its institutions.