

OPINION NO. 79-078**Syllabus:**

Pursuant to R.C. Chapters 5119 and 5126, and rules promulgated thereunder, a county board of mental retardation has a legally mandated responsibility to provide programs for the developmentally disabled whose handicaps are other than mental retardation.

To: Stephan M. Gabalac, Summit County Pros. Atty., Akron, Ohio
By: William J. Brown, Attorney General, November 9, 1979

I have before me your request for my opinion regarding the following question:

Must the Summit County Board of Mental Retardation provide facilities and services for the developmentally disabled whose handicaps are other than mental retardation?

The relevant portions of R.C. 5119.061 broadly define the powers and duties of the Division of Mental Retardation and Developmental Disabilities, as follows:

The division of mental retardation and developmental disabilities shall:

- (A) Promote comprehensive state-wide programs and services for the mentally retarded and their families wherever they reside in the state. These programs shall include public education, prevention, diagnosis, treatment, training, and care;
- (B) Provide administrative leadership for state-wide services which include residential facilities, evaluation centers, and community classes which are wholly or in part financed by the department of mental health and mental retardation as provided by section 5119.33 of the Revised Code;
- (C) Develop and maintain, to the extent feasible, data on all services and programs for the mentally retarded provided by governmental and private agencies;
- (D) Make periodic determinations of the number of retarded persons requiring services in the state;
- (E) Provide leadership to local authorities in planning and developing community-wide services for the mentally retarded and their families;
- (F) Promote programs of professional training and research in cooperation with other state departments, agencies, and institutions of higher learning;
- (G) Perform such other duties as determined by the director of the department.

The powers and duties of county boards of mental retardation are set forth in R.C. 5126.03. The relevant portions of R.C. 5126.03 are as follows:

The county board of mental retardation, subject to the rules and standards of the chief of the division of mental retardation and developmental disabilities shall:

- (A) Administer and supervise facilities, programs, and services established under section 5126.06 of the Revised Code and exercise

such powers and duties as prescribed by the chief;

(B) Submit an annual report of its work and expenditures, pursuant to section 5126.06 of the Revised Code, to the chief and to the board of county commissioners at the close of the fiscal year and at such other times as may be requested;

(C) Employ such personnel and provide such services, facilities, transportation, and equipment as are necessary;

(D) Provide such funds as are necessary for the operation of facilities, programs, and services established under section 5126.06 of the Revised Code.

Any county board of mental retardation may enter into a contract with another such board or with a public or nonprofit agency or an organization of the same or another county, to provide the facilities, programs, and services authorized in section 5126.06 of the Revised Code, upon such terms as may be agreeable.

. . . .

The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation to perform its functions and duties as provided by this section. (Emphasis added.)

R.C. 5126.06, referred to in R.C. 5126.03, reads as follows:

The chief of the division of mental retardation and developmental disabilities, with the approval of the director of mental health and mental retardation, shall establish in any county or mental health and mental retardation district a training center or workshop, residential center, and other programs and services for the special training of mentally retarded persons, who are determined by the division of mental retardation and developmental disabilities to be capable of profiting by specialized training. Special attention shall be given to the establishment of a training program for the mentally retarded for the purpose of enabling them to become accepted by society and to find employment in the structure of society to the extent that they may be fitted therefor. The chief is the final authority in determining the nature and degree of mental retardation. He shall decide all questions relative or incident to the establishment and operation of each training center or workshop, residential center, and other program or service; determine what constitutes special training; promulgate subject to sections 119.01 to 119.13 of the Revised Code, all rules governing the approval of mentally retarded persons for such training; determine or approve all forms used in the operation of programs undertaken under this section; and approve the current operating costs of such programs.

Special education for handicapped children shall be provided in accordance with Chapter 3323 of the Revised Code.

As used in this section and section 5126.07 of the Revised Code, a "mentally retarded person" means a person who has been determined by the proper authorities to be in need of a special training program under this section. The nature and degree of mental retardation shall be determined in the manner prescribed by the chief. (Emphasis added.)

R.C. 5126.03(A) clearly directs the county boards to "exercise such powers and duties as prescribed by the chief [of the division of mental retardation and developmental disabilities]."

Under rules promulgated by the Division of Mental Retardation and Developmental Disabilities, the county boards must develop programs for the developmentally disabled. 7 Ohio Admin. Code 5119:3-1-03 sets forth the responsibilities of the county boards of mental retardation, including the following:

(A) Responsibility of the County Board of Mental Retardation:

- (1) The County Board of Mental Retardation shall be responsible for providing comprehensive education and habilitation programs for mentally retarded and developmentally disabled children and adults residing within the county, as established under Chapters 5126 and 5127¹ of the Ohio Revised Code. (Emphasis added.)

R.C. 5126.03 specifically subjects the county boards of mental retardation to the terms of R.C. 5126.06, and further requires the county boards to establish and fund all programs established pursuant to the rules of the Chief of Mental Retardation and Developmental Disabilities and the terms of R.C. 5126.03 and 5126.06.

7 Ohio Admin. Code 5119:3-1-03 clearly requires the county board to establish "comprehensive programs" for the developmentally disabled. 7 Ohio Admin. Code 5119:3-1-03 states in relevant part:

Each County Board of Mental Retardation independently, or in cooperation with other County Boards or contracted direct service agencies, shall provide comprehensive education and habilitation programs for all eligible mentally retarded or developmentally persons who reside in the county. (Emphasis added.)

7 Ohio Admin. Code 5119:3-1-04, which sets forth standards of eligibility for programs of a county board of mental retardation, by its terms includes the developmentally disabled among those eligible for such programs. The Early Childhood Program (7 Ohio Admin. Code 5119:3-1-04) and Adult Program (7 Ohio Admin. Code 5119:3-1-07) are expressly made available to the developmentally disabled who are not mentally retarded.

As is noted in your correspondence, the term "developmentally disabled" is used in R.C. Chapter 5126 only in the designation of the "Division of Mental Retardation and Developmental Disabilities"; however, the Chief of the Division of Mental Retardation and Developmental Disabilities is given broad powers under R.C. 5126.06 to establish rules and to determine who is capable of profiting from services provided by county boards of mental retardation. R.C. 5119.06(C), which establishes the Division of Mental Retardation and Developmental Disabilities within the Department of Mental Health and Mental Retardation, clearly contemplates that the developmentally disabled will be included in programs established by the Division. There is no indication that the developmentally disabled are to be excluded from the coverage of R.C. 5126.

Rules validly promulgated, pursuant to statutory authority, have the force and effect of law. The Supreme Court of Ohio has made such an assertion in many instances. See *State ex rel. Kildow v. Industrial Commission*, 128 Ohio St. 573 (1934); *Kroger Grocery & Baking Co. v. Glander*, 149 Ohio St. 120 (1948), and cases cited therein. Assuming that the rules of the Division of Mental Retardation and Developmental Disabilities regarding the programs established for the developmentally disabled were validly adopted in accordance with applicable law—including, as required by R.C. 5126.06, R.C. 119.01 through 119.13—the county board of mental retardation must provide the services outlined in these rules by virtue of R.C. 5126.03.

R.C. 5126.03 states that the county board, "subject to the rules and standards

¹R.C. Chapter 5127 was effectively abolished by H.B. 455 (1976), which transferred certain sections of that chapter to R.C. Chapter 5126 and repealed the remainder of the sections.

of the chief of the division of mental retardation and developmental disabilities shall" establish the required programs. It is well established that, in statutory construction, the word "shall" shall be construed as mandatory unless there appears a legislative intent to the contrary. Dorrian v. Scioto Conserv. Dist., 27 Ohio St. 2d 102 (1971). No such contrary intent is evident with respect to R.C. 5126.03. Hence, a county board of mental retardation is required to establish programs for the developmentally disabled whose handicaps are other than mental retardation, in accordance with rules adopted by the Chief of the Division of Mental Retardation and Developmental Disabilities.

Accordingly, it is my opinion, and you are advised, that, pursuant to R.C. Chapters 5119 and 5126, and rules promulgated thereunder, a county board of mental retardation has a legally mandated responsibility to provide programs for the developmentally disabled whose handicaps are other than mental retardation.