OPINION NO. 72-022

Syllabus:

1. The community program for the trainable mentally retarded, administered through the Department of Mental Hygiene and Correction, is considered a state-operated program.

2. The community program for the trainable mentally retarded is considered free public education under Ohio statutes.

To: Martin W. Essex, Supt. of Public Instruction, Dept. of Education, Columbus, Ohio

By: William J. Brown, Attorney General, March 29, 1972

I have before me your request for my opinion regarding Ohio's eligibility for federal funding under provisions of Public Law No. 89-313 for community programs for the trainable mentally retarded. With reference to this, you ask:

> "1. Is the community program for the trainable mentally retarded, administered through the Department of Mental Hygiene and Correction, considered a state operated program?
>
> "2. Is the community program for the trainable

> mentally retarded considered free public education under Ohio statutes?"

It is apparent that your questions have to do with the community educational programs for the mentally retarded provided by County Boards of Mental Retardation under Chapters 5126 and 5127, Revised Code. Your questions are not concerned with the health services provided by community mental health and retardation boards under Chapter 340, Revised Code. See Opinions No. 71-067 and No. 71-070, Opinions of the Attorney General for 1971.

Obviously these questions must be answered in light of the applicable provisions of Public Law No. 89-313 and all pertinent federal guidelines relating thereto. Section 6 (a) is the relevant section of Public Law No. 89-313. It is an amendment to Part A of Title I of the Elementary & Secondary Education Act of 1965 (Public Law No. 89-10) and constitutes a basic federal grant under that title. It was amended in 1970 by Public Law No. 91-230, Section 105 (a), which permitted the counting of children in schools under contract with the state (as well as in directly operated state schools) in computing the amount of a grant. As amended, it can be found at 20 U.S.C.A. Section 241c (a) (5) and reads as follows:

> "In the case of a State agency which is directly responsible for providing free public education for handicapped children (including mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require special education), the maximum grant which that agency shall be eligible to recieve under this part for any fiscal year shall be an amount equal to the Federal percentage of the average per pupil expenditure in the State or, if greater, in the United States, multiplied by the number of such children in average daily attendance, as determined by the Commissioner, at schools for handicapped children operated or supported by the State agency, including schools providing special education for handicapped children under contract or other arrangement with such State agency, in the most recent fiscal year for which satisfactory data are available. Such State agency shall use payments under this part only for programs and projects (including the acquisition of equipment and where necessary, the construction of school facilities) which are designed to meet the special educational needs of such children."

It should be pointed out that grants made available under the above provision are Title I grants under the Elementary & Secondary Education Act and are unrelated statutorily to grants made available under Title VI of that Act. Title VI is known specifically as the Education of the Handicapped Act and constitutes Chapter 33, Title 20, United States Code; it can be found at 20 U.S.C.A. Sections 1401 et seq. Title VI was enacted into law as title VI of Public Law No. 91-230 (Elementary & Secondary Education Amendments of 1969), while the above quoted provision was enacted into law as part of title I of that Law. As evidenced by the Senate Report on Public Law No. 91-230, it was clearly Congress' intention that Public Law No. 89-313, as amended, remain a Title I grant independent of the Education of the Handicapped Act. S. Rep. No. 91-634, 91st Cong., 2d Sess., United States Code Congressional and Administrative News, at page 2910 (1970). Not only that, but the very critical nature of the questions you have asked me

regarding Public Law No. 89-313 is also established in Title VI by a section which provides basically that no Title VI monies shall be made available for handicapped children in programs receiving or eligible to receive funds under Public Law No. 89-313. 20 U.S.C.A. Section 1413 (a) (9).

The essential difference between Public Law No. 89-313 and Title VI programs rests in that the first is concerned with the funding of state agencies providing education for the handicapped, while the second is concerned with the funding of local educational agencies involved with the education of the handicapped. 20 U.S.C.A. Section 241c (a) (5) and Section 1413 (a) (1) (A), respectively; also, Bureau of Education for the Handicapped, Office of Education, United States Department of Health, Education and Welfare, Administrative Manual Public Law No. 89-313, Amendment to Title I, Elementary & Secondary Education Act, and Part B, Education of the Handicapped Act (Title VI-B, Public Law No. 91-230), at pages I-A-1 - I-A-2, I-B-1, and I-B-5 (1971) [hereinafter cited as Administrative Manual]. * However, while the fundings are different, the purposes of the two programs are not different or exclusive - taken together they evince an overall plan attempting to directly benefit all handicapped children. The Administrative Manual, at pages I-A-1 and I-A-2, reads as follows:

> "Public Law 89-313 and Part B, Education of the Handicapped Act, are project-oriented, child-centered Federal programs designed to initiate, expand, and improve special educational and related services to handicapped children. They are not general support programs, or construction, media, or training acts * * *.
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> "* * * * * * * * *

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*Note: Part B of the education of the Handicapped Act constitutes that part of Title VI under which the basic federal grants of monies are made (codified as Subchapter II of Chapter 33, Title 20, United States Code).

> "It is clearly the intent of Congress, that all handicapped children receive appropriate instruction and services wherever they may be enrolled--in State, local, or private facilities. Since PL 89-313 and Part B are designed to benefit children and not schools, every handicapped child within a State is eligible to receive benefits under one or the other of these legislative provision." (Emphasis added.)

The goal of both programs and the reason for their mutual existence is to benefit all handicapped children. They clearly do not exist just to find a particular state or local educational agency--that is manifestly not their purpose. Thus, it is totally immaterial from the federal viewpoint as to which particular agency meets the criteria of the program under which it is applying. And, in light of this, it would seem a certainty that under both Public Law No. 89-313 and Part B, different state agencies and different local educational agencies will qualify for grants since both acts take the term "handicapped children" to include "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally distrubed, crippled, or other health impaired children who by reason thereof require

special education." 20 U.S.C.A. Sections 241c (a) (5), 1401 (1); 45 C.F.R. Section 116.1(o), 121.1(h) (1971).

In consequence, it would also seem to be totally immaterial from the state's viewpoint as to which of its state or local educational agencies qualify for grants just so long as the particular state or local educational agency meets the criteria of the program under which it is applying. In the case at hand, there is no question that, assuming all other criteria can be met, the Ohio Department of Mental Hygiene and Correction is eligible to receive funding for the trainable mentally retarded program which it administers through its Division of Mental Retardation. The Administrative Manual, at pages I-A-1 and II-A-1, reads as follows:

> "Funds are made available under the PL 89-313 amendment to title I, ESEA, to State agencies that are responsible for, and do provide educational services to handicapped children in State-operated and State supported schools. State agencies, such as departments of education, health, mental health, mental hygiene welfare are eligible to participate in this program. * * *.
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> "* * * * * * * * *
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> "State agencies which are directly responsible for providing free public education for one or more types of handicapped children, as defined in the provisions of the act, in schools for handicapped children operated or supported by the State agency, including schools providing special education for handicapped children under contract or other arrangement with such State agency, are eligible to receive allocations and to participate under PL 89-313. The direct educational responsibility of such a State agency must be established by or pursuant to State law. Such agencies may include departments of education, health, mental health, mental hygiene, welfare, institutions, State boards of control, etc." (Emphasis added.)

However, regardless of the fact that the Department of Mental Hygiene and Correction is eligible, the above quotation emphasizes and Public Law No. 89-313 itself states, that the agency must be "directly responsible for providing free public education * * * at schools for handicapped children operated or supported by the State agency." This requirement in essence established two criteria and brings out the importance of your questions. The criteria are: (1) Is the state agency directly responsible for the program under state law (in other words, is the program considered state-operated)? and (2) Does the program provide free putlic education for the particular handicapped children it serves?

With respect to the first question, whether the state agency has direct educational responsibility under state law for the program, means whether there are state-operated schools. That there are, in fact, schools, is not in question. The Annual Financial & Statistical Report for 1970-1971 of the Ohio Department of Mental Hygiene and Correction, at pages 38 and 39, shows that every county in Ohio is served by community classes for school-age retarded children and that only two counties, Noble and Shelby, conduct their community class programs in conjunction with other counties. In addition, as of the date of the Report, there were 33 additional school-age developmental class programs and 36 preschool class programs for retarded children, bringing the

total number of trainable or severely retarded children educationally served in Ohio to just around 10,000. See, also, two other publications of the Department of Mental Hygiene and Correction and its Division of Mental Retardation, Eight Years of Progress in Mental Retardation (1970) and Good for a Lifetime--Ohio's Programs for the Mentally Retarded (1971). But whether these schools or this program is considered to be state-operated remains to be answered.

In determining whether the schools or program is state-operated, the Administrative Manual is definitive. It states, at pages II-A-1 - II-A-2, as follows:

> "State-operated schools, as defined for the purpose of determining State agency eligibility to receive PL 89-313 grants, are those schools serving eligible handicapped children, which meet the following criteria:
>
> "1. The State agency directly operates the school. The school is either administered by the State agency board directly, or administered by an individual, individuals, or a special board, having accountability directly to the State Agency. * * *
>
> "2. The employees of the school are on the State payroll, with the hiring, supervision, and dismissal of such staff being done by the State agency.
>
> "3. The principal portion of the costs of operating the educational program for handicapped children enrolled in the school is borne by the State."

With the foregoing as a guideline to the meaning of state-operated, the relevant state statutes applicable to the community program for the trainable mentally retarded should be examined. Chapter 5119, Revised Code, establishes and generally provides for the Department of Mental Hygiene and Correction. Secton 5119.06, Revised Code, establishes the divisions within the Department, including the Division of Mental Retardation. Section 5119.061, Revised Code, outlines the powers and duties of the Division of Mental Retardation and reads as follows:

> "The division of mental retardation 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 hygiene and correction 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 department of mental hygiene and correction."

At the local level there are County Boards of Mental Retardation which are provided for by Chapter 5126, supra. Section 5126.01, Revised Code, states that "[t]here is hereby created in each county a county board of mental retardation * * *." Section 5126.03, Revised Code, outlines the powers and duties of such Boards and reads in pertinent part as follows:

> "The county board of mental retardation, subject to the rules, regulations, and standards of the commissioner of mental retardation shall:
>
> "(A) Administer and supervise facilities, programs, and services established under section 5127.01 of the Revised Code and exercise such powers and duties as prescribed by the commissioner;
>
> "(B) Submit an annual report of its work and expenditures, pursuant to section 5127.01 of the Revised Code, to the commissioner 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 5127.01 of the Revised Code."

In conjunction with this, Section 5127.01, Revised Code, reads in pertinent part as follows:

> The commissioner of mental regardation, with the approval of the director of mental hygiene and correction, shall establish in any county or district a training center or workshop, residential center, and other programs and services for the special training of mentally retarded persons, including those who have been adjudged by the proper authorities to be ineligible for enrollment in public schools under Chapter 3317. and sections 3321.01 and 3323.01 of the Revised Code, and who are determined by the division of mental

> retardation 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 commissioner is the final authority in determining the nature and degree of mental retardation, 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 all rules and regulations, subject to sections 119.01 to 119.13, inclusive, of the Revised Code, 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."

The foregoing Sections clearly establish that the program, and therefore schools, are state-operated--that special boards having direct accountability and responsibility to the state agency administer the local programs in all respects, including the employment of personnel.

Chapter 5127, supra, on the whole, deals with the training or education of the severely retarded. Section 5127.03, Revised Code, specifically provides for state funding for the operation of the programs, including those for school-age trainable or severely retarded children. That Section reads as follows:

> "On the thirtieth day of June of each year, the county board of mental retardation shall certify to the commissioner of mental retardation:
>
> "(A) The names and residences of the persons enrolled in the training center and workshop pursuant to section 5127.01 of the Revised Code or other programs in the county for the mentally retarded which have been approved for reimbursement by the division of mental retardation, or both. Each program for the mentally retarded in operation in the county shall be listed separately with the names of the persons enrolled in each program.
>
> "(B) The period of time each mentally retarded person was enrolled in each program;
>
> "(C) An itemized report of expenditures which have been approved for reimbursement by the commissioner of mental retardation;
>
> "(D) The total annual cost per enrollee to the county for operation of training programs for the mentally retarded. The report shall include a grand total of all programs operated and shall include the cost of the individual programs.
>
> "(E) That the report is in accordance with rules and regulations established by the division of mental retardation for the operation and reimbursement of

> training programs and other approved programs for the mentally retarded.
>
> "The division of mental retardation, upon receipt and approval of the report provided in this section, shall present a voucher to the auditor of state in favor of the agency providing the specialized training in an amount not to exceed the amount of four hundred fifty dollars per year for each mentally retarded person under twenty-one years of age who is enrolled in a training program and not to exceed six hundred dollars per year for each mentally retarded adult in a workshop program or other such program approved by the commissioner of mental retardation. Upon presentation of such voucher the auditor of state, if satisfied as to the correctness of the voucher, shall draw a warrant on the treasurer of state in the amount of the voucher."

Further, additional funding is provided for the operation of school-age retarded children programs by Section 5127.04, Revised Code, which provides as follows:

> "The county board of mental retardation which during the school year has administered and supervised, pursuant to the provisions of section 5127.01 of the Revised Code, a training center for the mentally retarded shall prepare a statement for each person under twenty-one years of age who has received such training, such statement to show the name of the person, the name of the school district in which the person is a school resident, the name of the board providing the training, and the number of months the person received training. Not later than the thirtieth day of June the board shall forward a certified copy of such statement to the clerk of the board of education of the school district in which the person is a school resident and shall forward a certified copy of such statement to the commissioner of mental retardation. Within thirty days after the receipt of such statement the board of education shall pay to the county board of mental retardation submitting the statement an amount equal to the computed amount of tuition that would be due the school district receiving the statement if a nonresident pupil attended the schools of such district for the same period of time that the mentally retarded person attended the training center, such amount to be computed in the manner prescribed in section 3317.08 of the Revised Code."

Sections 5127.03 and 5127.04, supra, provide funding for the actual operation of educational programs for the trainable mentally retarded child in Ohio. Section 5127.04, supra, may or may not constitute a state funding source. This need not be answered, however, since current figures (approximates and projected) obtained from the Division of Mental Retardation indicate that Section 5127.04 revenue is, at present, roughly 75 percent less than Section 5127.03 revenue. And, since there is no question that Section 5127.03 funds are state monies, there is no question that "[t]he principal portion of the costs of operating the educational progrem * * * is borne by the state."

In short, the community program for the trainable mentally re-

tarded administered through the Department of Mental Hygiene and Correction, is a state-operated program.

Remaining is the question of whether the community program is considered free public education for the purposes of federal funding. Again, federal rules and regulations must be relied upon to furnish definitive guidelines. Part 116 of the Code of Federal Regulations is an official promulgation of rules and regulations relating to Title I grants, including Public Law No. 89-313. With regard to the meaning of "free public education," 45 C.F.R. Section 116.1(n) (1971), provides as follows:

> "'Free public education' means education which is provided at public expense, under public supervision and direction, and without tuition charge, and which is provided as elementary or secondary education not above grade 12 in a State. Elementary education may, if so determined under State law, include education below grade 1 meeting the above criteria."

The Administrative Manual also defines "free public education" and again emphasizes why such a determination must be made. At page II-A-2 it is provided as follows:

> "State agencies are required to provide free public education in order to be eligible to participate in PL 89-313. 'Free public education' means an organized program of instruction constituting elementary or secondary education and recognized as such under State law, which is provided without charge to the student, his parents or guardians. It may include organized programs or services at the kindergarten and prekindergarten levels, provided these are recognized as appropriate for the types of handicapped children served, and are considered to be 'education' under State law of regulation.
>
> "Parents may not be charged fees for the educational services their children receive, although charges for board, room, medical care, and other noneducational expenses are permissible."

The key then is that the educational program be supplied retarded children without tuition or fee charges to the children or their families or guardians.

In discussing Sections 5127.03 and 5127.04, supra, one of my predecessors in Opinion No. 2787, Opinions of the Attorney General for 1962, pointed out, as I have, that these Sections provide the sole funding for the operation of Ohio's trainable mentally retarded programs. My predecessor then pointed out the basic fact that, in the absence of a specific statutory grant of power for funding other than these Sections, tuition or fees may not be charged. He then held in particular that the body administering the mentally retarded program under Chapter 5127, supra, was completely without authority to require tuition of persons over twenty-one years of age enrolled in a program.

To recapitulate, Ohio's trainable mentally retarded programs and services (Chapters 5126 and 5127, supra) are totally available without cost to the enrollees or their families, and there is no possibility under existing Ohio law that the enrollees or their families can ever be charged tuition or fees for the programs and services. All costs of operation come from public funds which leaves no question that the com-

munity program for the trainable mentally retarded in Ohio is free public education.

In specific answer to your questions it is, therefore, my opinion, and you are so advised, that:

1. The community program for the trainable mentally retarded, administered through the Department of Mental Hygiene and Correction, is considered a state-operated program.

2. The community program for the trainable mentally retarded is considered free public education under Ohio statutes.