OPINION NO. 94-028

Syllabus:

1. R.C. 3313.205 requires the board of education of each school district to adopt a written policy with respect to the notification of a student's parents or other responsible person within a reasonable time after the determination that the student is absent from school. There is no express requirement of immediate or same-day notification, but it is clear that the quickest possible notification is desirable to implement Ohio's Missing Child Law. A notification procedure under which the responsible person might not receive notice until some time after the day on which the absence is determined may be included in a written policy under R.C. 3313.205 only if, in light of all the circumstances, the procedure provides for notification within a reasonable time after determination of the student's absence.

2. A board of education that is using postcards as a method of notification under R.C. 3313.205 may discontinue sending the postcards if it changes the written policy requiring that postcards be sent and replaces it with a written policy that contains different provisions with respect to notification within a reasonable time in accordance with R.C. 3313.205.

3. Questions of liability under R.C. 3313.205 are dependent upon the facts of a particular situation and cannot be decided by opinion of the Attorney General.

To: Anthony G. Pizza, Lucas County Prosecuting Attorney, Toledo, Ohio
By: Lee Fisher, Attorney General, May 20, 1994

You have requested an opinion concerning the duty of a board of education to provide notification when a student is absent from school. The relevant provision, R.C. 3313.205, was initially enacted as part of Ohio's Missing Child Law, 1983-1984 Ohio Laws, Part 1, 1192, 1220 (Am. Sub. S.B. 321, eff. Apr. 9, 1985). It has been amended, most recently by Am. S.B. 63, 120th Gen. A. (1993) (eff. Oct. 1, 1993), and now reads, as follows:

> The *board of education* of each school district *shall adopt a written policy with respect to the notification of a student's parents*, parent who is the residential parent and legal custodian, guardian, or legal custodian or any other person responsible for the student *within a reasonable time after the determination that the student is absent from school. The student's parents*, parent who is the residential parent and legal custodian, guardian, or legal custodian or any other person responsible for the student *shall provide the school that the student attends*

> *a current address and a telephone number at which the student's parents*, parent who is the residential parent and legal custodian, guardian, or legal custodian or any other person that is responsible for the student *can receive notice that the student is absent from school.* (Emphasis added.)

Your questions are:

1. Does the Missing Child's Act require an immediate or same-day notification of a missing child by boards of education or is it permissible to have a delayed notice procedure of some kind without imposing liability on boards of education?

2. May boards of education discontinue the use of postcards as a method of notifying parents or guardians of a child's absence from school without being in violation of the "Missing Child Law"?

As your letter indicates, R.C. 3313.205 does not clearly prescribe the type of notification procedure that a board of education must adopt. Your letter contains information concerning the actual practices of various boards of education. Some boards of education have installed automatic dialing equipment to make daily phone calls; that equipment is expensive and has high maintenance and replacement requirements. Other boards of education send out postcards, a method of notification that is expensive and has inherent delays. Notification is sometimes difficult because of students who are in transient situations or have no telephones. It is thus clear that there are some practical problems concerning the provision of notification pursuant to R.C. 3313.205.

Requirements of R.C. 3313.205

You have asked whether R.C. 3313.205 requires an immediate or same-day notification of a missing child, or whether some kind of delayed notice procedure may be implemented without imposing liability on the board of education. R.C. 3313.205 does not directly address the question of whether liability may ensue if something less than immediate or same-day notice is provided. Instead, it requires that a board of education "adopt a written policy with respect to the notification" of the responsible person "within a reasonable time after the determination that the student is absent from school." R.C. 3313.205. A board of education's responsibility under R.C. 3313.205 is, accordingly, to consider the issue of notification and to adopt a written policy that the board, in the reasonable exercise of its discretion, considers appropriate for its school district.

While the General Assembly has not specified how a board of education should exercise its discretion under R.C. 3313.205, various statutes provide indications of factors to be considered in determining what type of notification policy would be reasonable. It is appropriate, first, to consider that R.C. 3313.205 was enacted as part of the Missing Child Law. That law was comprehensive legislation designed to implement programs of information and training to reduce the number of missing children and to increase the efficiency with which missing child cases are resolved. *See* 1983-1984 Ohio Laws, Part 1, 1192 (Am. Sub. S.B. 321, eff. Apr. 9, 1985). For purposes of the missing child provisions, the term "missing child" has the following definition:

> "Missing children" or "missing child" means either of the following:
> (a) A minor who has run away from or who otherwise is missing from the home of, or the care, custody, and control of, his parents, parent who is the

> residential parent and legal custodian, guardian, legal custodian, or other person having responsibility for the care of the minor;
>
> (b) A minor who is missing and about whom there is reason to believe he could be the victim of a violation of section 2905.01 [kidnapping], 2905.02 [abduction], 2905.03 [unlawful restraint], 2905.04 [child stealing], or 2919.23 [interference with custody] of the Revised Code.

R.C. 2901.30(A)(3). *See, e.g.*, R.C. 109.64, .71; R.C. 3313.672, .96.

Missing child provisions relate to training and coordination of law enforcement personnel, *see, e.g.*, R.C. 109.55, .73, .741, .77, .79; R.C. 2901.30, civil actions for interference with parental or guardianship interest in a minor, *see* R.C. 2307.50, various criminal offenses, *see, e.g.*, R.C. 2905.04, fingerprinting programs, *see, e.g.*, R.C. 109.58; R.C. 3313.96, and improved notice and information systems and techniques, *see, e.g.*, R.C. 109.64, .65; R.C. 2901.30, .31; R.C. 3319.322; R.C. 5101.31. R.C. 3313.205 is directed only incidentally to matters of truancy and school attendance. Those matters are addressed directly by provisions governing compulsory school attendance. *See* R.C. Chapter 3321; R.C. 4113.14. The focus of R.C. 3313.205 is not upon keeping records of attendance or assuring that children do not miss school, but upon identifying instances in which a child may have run away from home, may have been detained or prevented from attending school, or may for some other reason be a "missing child" under R.C. 2901.30(A)(3).

As part of the Missing Child Law, R.C. 3313.205 provides for notification policies for the apparent purpose of reducing the number of missing children and increasing the speed with which missing child cases are resolved. It is thus evident that the quickest possible notice under R.C. 3313.205 will serve the goals of the Missing Child Law.

Further, R.C. 3313.205, through language added by Am. S.B. 63 and effective as of October 1, 1993, expressly requires that the person with responsibility for a child "shall provide the school that the student attends a current address and a telephone number" at which the responsible person "can receive notice that the student is absent from school." The express reference to a telephone number at which the responsible person can receive notice of a student's absence indicates that the General Assembly contemplated that notice might ordinarily be given by telephone. The reference to a current address suggests that it might also be appropriate, in some circumstances, to contact the home by personal visit or by mail.

The fact that the responsible person is given the duty of providing an address and a telephone number indicates that part of the burden of making notification possible has been placed on the responsible person. A written policy under R.C. 3313.205 might take this fact into consideration by stating that notification will be made by telephone to the number provided by the responsible person. A policy might further provide for steps to be taken in advance of any student absence to assure that an appropriate telephone number is provided for every child -- for example, mailing a request for a telephone number to a residence for which no telephone number has been provided. As part of its preparation of a notification policy under R.C. 3313.205, a school district might, accordingly, address the manner in which it obtains and updates the addresses and telephone numbers required under R.C. 3313.205.

Delayed Notice Procedure

Your first question asks specifically whether immediate or same-day notification is required, or whether it is permissible to have a delayed notice procedure of some kind without

imposing liability on boards of education. For purposes of this opinion, the term "delayed notice procedure" refers to any procedure under which the responsible person probably would not receive notice until some time after the day on which the student's absence is discovered. As discussed above, the requirement of R.C. 3313.205 is that a board of education adopt a written policy "with respect to the notification" of the responsible person "within a reasonable time after the determination that the student is absent from school." A delayed notice procedure is permissible under R.C. 3313.205 if it is part of a written policy with respect to the notification of the responsible person within a reasonable time after the determination that the student is absent from school. It appears, in general, that if notice is not received until some time after the day on which the student's absence is discovered, there might not be notification within a reasonable time in accordance with R.C. 3313.205. It cannot, however, be stated as a matter of law that a written policy adopted under R.C. 3313.205 can never contain a delayed notice procedure. A policy can include a delayed notice procedure if, in light of all the circumstances, the procedure provides for notification "within a reasonable time after the determination that the student is absent from school." R.C. 3313.205. If, for example, timely efforts to contact the responsible person by telephone have not been successful, a board of education might find it appropriate to include in its policy a provision for then sending notice by mail.

In specific response to your first question, it must be concluded that R.C. 3313.205 does not expressly require immediate or same-day notification of a missing child. Rather, the statute requires that the board of education adopt a written policy with regard to the notification of the appropriate person within a reasonable time after the determination that the student is absent from school. It is clear that the quickest possible notice is desirable to implement Ohio's Missing Child Law. R.C. 3313.205 does, however, give a board of education discretion to tailor its policy to the needs of its district. The determination as to what is a "reasonable time" is left to the discretion of the board of education and may be affected by facts surrounding a particular situation.

Discontinuing Postcard Notification

Your second question is whether a board of education may discontinue the use of postcards as a method of notification under R.C. 3313.205 without being in violation of the Missing Child Law. R.C. 3313.205, which requires each board of education to adopt a notification policy, also by clear implication permits the board to modify its policy from time to time to meet changing circumstances or requirements. Accordingly, a board of education that has adopted a policy providing for notification by postcard is free to change its policy to eliminate the postcard notification. The board is still required, however, to have in effect a written policy with respect to notification of the responsible person within a reasonable time after an absence is determined. Thus, a board of education that is using postcards as a method of notification under R.C. 3313.205 may discontinue sending the postcards if it changes the written policy requiring that postcards be sent and replaces it with a written policy that contains different provisions with respect to notification within a reasonable time in accordance with R.C. 3313.205. The board of education must then comply with its modified policy.

A board of education that maintains a postcard notification system should be aware of the history of R.C. 3313.205. Prior to the amendments enacted by Am. S.B. 63, R.C. 3313.205 stated simply:

> The board of education of each school district shall adopt a written policy with respect to the notification of a student's parents, parent who is the residential

parent and legal custodian, guardian, legal custodian, or other person responsible for him when the student is absent from school.

See Am. S.B. 63, 120th Gen. A. (1993) (eff. Oct. 1, 1993). This version contained neither the "reasonable time" language nor the requirement that an address and a telephone number be provided. It would be appropriate for a board of education that adopted a postcard notification policy under the earlier version of R.C. 3313.205 to reconsider its policy under the amended statutory language. Since responsible persons are now required to provide telephone numbers, and since the concept of notification within a "reasonable time" has been expressly added to the statute, a board of education might find postcard notification less satisfactory and telephone notification more desirable than under prior law. Again, however, it cannot be stated as a matter of law that a policy including notification by postcard can never satisfy the provisions of R.C. 3313.205.

Potential Liability Under R.C. 3313.205

You are concerned about the potential liability of a board of education under R.C. 3313.205. Questions of liability are dependent upon the facts of a particular situation and cannot be decided by opinion of the Attorney General. This discussion is, therefore, limited to general principles relating to the possible liability of a board of education.[1]

Prior to 1983, boards of education in Ohio were, under the common law doctrine of sovereign immunity, afforded absolute immunity in tort. *See, e.g., Board of Education v. Volk*, 72 Ohio St. 469, 74 N.E. 646 (1905). The Ohio Supreme Court abolished that immunity in *Carbone v. Overfield*, 6 Ohio St. 3d 212, 451 N.E.2d 1229 (1983), finding that boards of education were liable for tortious acts in the same manner as private individuals. *See also Zagorski v. South Euclid-Lyndhurst City School District Board of Education*, 15 Ohio St. 3d 10, 471 N.E.2d 1378 (1984) (abolishment of sovereign immunity was declared retroactive).

In response to the *Carbone* case and related decisions of the Ohio Supreme Court, the General Assembly enacted R.C. Chapter 2744, which governs actions for personal injuries or property damage brought against political subdivisions of the state. R.C. Chapter 2744 does not address actions based on contract, actions by employees arising out of the employment relationship or dealing with wages, hours, conditions, or other terms of employment, actions by sureties or actions about the rights of sureties under fidelity or surety bonds, or actions involving claimed violations of federal civil rights, R.C. 2744.09, nor does it govern actions in mandamus or actions for injunctions.

A school district is a political subdivision for purposes of R.C. Chapter 2744 and its potential liability in tort is governed by that chapter. *See* R.C. 2744.01(F). R.C. 2744.02 states, in general, that a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property caused by any act or omission of the subdivision or an employee in connection with a governmental or proprietary function. R.C. 2744.02(A)(1). There are, however, exceptions which provide for liability in connection with a governmental or proprietary function: (1) for the negligent operation of a motor vehicle, subject to certain defenses; (2) for negligent performance of acts with respect to proprietary functions; (3) for

[1] You have not inquired about possible liability of particular individuals. Accordingly, this opinion does not address that issue.

failure to keep public roads, sidewalks, and grounds open, in repair, and free from nuisance; (4) for negligence in or around public buildings used for governmental functions; and (5) in circumstances where liability is expressly imposed by law. R.C. 2744.02(B). The provision of a system of public education is defined as a "governmental function." R.C. 2744.01(C)(2)(c). The exceptions of R.C. 2744.02(B) that provide for liability of political subdivisions are themselves subject to R.C. 2744.03, which provides for certain defenses and immunities, and R.C. 2744.05, which provides for limitations on damages. R.C. 2744.02(B).

Even after the abolishment of sovereign immunity and the enactment of R.C. Chapter 2744, certain court-created immunities for governmental bodies continue to apply to boards of education. These immunities were not abolished by *Carbone* and related cases, and preserve to a board of education immunity relating to legislative functions, judicial functions, and executive or planning functions. *See Enghauser Mfg. Co. v. Eriksson Engineering Ltd.*, 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983) (syllabus, paragraph 2) (even though the sovereign immunity of local governmental units is abolished, no tort action will lie against a local governmental unit "for those acts or omissions involving the exercise of a legislative or judicial function or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. However, once the decision has been made to engage in a certain activity or function, municipalities [or other local governmental units] will be held liable, the same as private corporations and persons, for the negligence of their employees and agents in the performance of the activities").

In accordance with the *Enghauser* case, R.C. 2744.03 preserves the immunity of a political subdivision and its employees for various discretionary or policy-making functions. In a civil action for damages, a political subdivision is immune: (1) for judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative functions; (2) for nonnegligent conduct that is authorized or required by law or necessary to the operation of the political subdivision; (3) for actions that are within the discretion of an employee with respect to policy-making, planning, or enforcement powers; and (4) for the exercise of judgment or discretion in determining whether to acquire or how to use equipment, supplies, materials, personnel, and other resources, unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C. 2744.03(A). The immunities and defenses set forth in R.C. 2744.03 prevail over the potential liability allowed under R.C. 2744.02(B). R.C. 2744.02(B).

It is impossible to predict with certainty how any question of liability will be determined in a particular case. It might be argued that, in accordance with R.C. 2744.03 and the *Enghauser* case, the board of education of a school district is immune in an action for damages resulting from the adoption of a policy under R.C. 3313.205, since that action requires the exercise of a high degree of official judgment. It might, further, be argued that the board of education of a school district is immune in an action for damages resulting from the operation of the policy: (1) under R.C. 2744.03(A)(2), because the action is required by law or necessary to the school district's operation, provided that the actor is not negligent; (2) under R.C. 2744.03(A)(3), because the action relates to policy-making, planning, or enforcement powers and is within the actor's discretion; or (3) because the action involves the exercise of judgment or discretion in determining how to use resources, provided that there is no malicious purpose, bad faith, wantonness or recklessness. In addition, it might be argued that the board of education of a school district cannot be liable for damages in an action brought for acts or omissions under R.C. 3313.205 because the provision of schools is a governmental function and the acts or omissions do not come under the exceptions of R.C. 2744.02(B). Other authorities have, however, taken the position that there is a potential for liability if a board of education

adopts something less than an immediate or same-day notification procedure. *See* **1** R. Baker & K. Carey, *Ohio School Law* §9.55.3 (1993-94 Revision). Research has disclosed no court cases addressing the application of R.C. 3313.205.

It is clear that there are existing issues concerning the interpretation and implementation of R.C. 3313.205 and possible liability relating to that provision. It is impossible to resolve issues of liability by means of an opinion of the Attorney General, since those issues are dependent upon the facts existing in a particular situation. R.C. 3313.205 gives a board of education discretion in adopting a policy of notification that suits its needs. A determination of what period of time is reasonable or what degree of effort must be taken to provide notification must be made in light of all relevant circumstances.

Missing Child Educational Program

The General Assembly has created within the Office of the Attorney General an entity called the Missing Children Clearinghouse, which is a "central repository of information to coordinate and improve the availability of information regarding missing children." R.C. 109.65(B). Within the Missing Children Clearinghouse is a Missing Child Educational Program, established by the Attorney General in cooperation with the Department of Human Services. R.C. 109.65(E)(1). The Missing Child Educational Program is authorized, upon request, to provide to a board of education of a school district "sample policies on missing and exploited children issues to assist the board in complying" with R.C. 3313.205. R.C. 109.65(E)(2)(a). Thus, if a board of education is in need of assistance in preparing a written policy on notification under R.C. 3313.205, it may request the assistance of the Missing Child Educational Program.

Conclusion

It is, therefore, my opinion and you are advised, as follows:

1. R.C. 3313.205 requires the board of education of each school district to adopt a written policy with respect to the notification of a student's parents or other responsible person within a reasonable time after the determination that the student is absent from school. There is no express requirement of immediate or same-day notification, but it is clear that the quickest possible notification is desirable to implement Ohio's Missing Child Law. A notification procedure under which the responsible person might not receive notice until some time after the day on which the absence is determined may be included in a written policy under R.C. 3313.205 only if, in light of all the circumstances, the procedure provides for notification within a reasonable time after determination of the student's absence.

2. A board of education that is using postcards as a method of notification under R.C. 3313.205 may discontinue sending the postcards if it changes the written policy requiring that postcards be sent and replaces it with a written policy that contains different provisions with respect to notification within a reasonable time in accordance with R.C. 3313.205.

3. Questions of liability under R.C. 3313.205 are dependent upon the facts of a particular situation and cannot be decided by opinion of the Attorney General.