

Note from the Attorney General's Office:

1983 Op. Att'y Gen. No. 83-041 was overruled in part by
1994 Op. Att'y Gen. No. 94-070.

OPINION NO. 83-041**Syllabus:**

1. Pursuant to R.C. 3313.64(B)(1), a child shall be admitted to the schools of the school district in which his parent resides.
2. Pursuant to R.C. 3313.64(B)(2), a child who does not reside in the district in which his parent resides shall be admitted to the schools of the district in which he resides if any of the following applies:
 - a. he is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent;
 - b. he resides in a home; or
 - c. he requires special education.

A handicapped child may be placed in a special education program outside of the district in compliance with R.C. Chapter 3323.
3. An individual appointed by the probate court as guardian of the person of a minor, pursuant to R.C. Chapter 2111, has "legal custody" of the child, as that term is used in R.C. 3313.64.

Pursuant to R.C. 3313.64, a child who is in the legal custody of a guardian shall be admitted to the schools of the district in which the child resides.

4. An individual granted custody of a child by the domestic relations division of the court of common pleas has "legal custody" of the child, as that term is used in R.C. 3313.64. Pursuant to R.C. 3313.64, a child who is in the legal custody of such an individual shall be admitted to the schools of the district in which the child resides.
5. Pursuant to R.C. 3313.64(B), the school district in which an individual who has legal custody of a child resides must admit the child if:
 - a. the school district is also the district in which the child's parent resides; or
 - b. the child resides in the school district.
6. Whenever a child is, pursuant to R.C. 3313.64(B)(2), admitted to the schools of a district other than the district in which his parent resides, tuition for such child must be paid as required by R.C. 3313.64(C), even though the child may be the subject of an order of guardianship issued prior to June 30, 1981.

To: Betty D. Montgomery, Wood County Prosecuting Attorney, Bowling Green, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 26, 1983

You have indicated that you have been presented with several questions involving the admission of children to particular school districts when the children have been made the subjects of guardianships or custody awards, and with related questions pertaining to the payment of tuition for such children. You have clarified the questions set forth in your letter to read as follows:

1. In the event that guardianship of a child is granted through the probate court to a person other than the child's parent, is the district in which the guardian resides required to admit the child? If so, who is to bear the tuition obligation in such instance?
2. In the event that custody of a child is granted through the domestic relations court to a resident of a given school district (other than the child's parent), is the district required to admit the child? If so, who is to bear the tuition obligation in such instance?
3. If a grant of guardianship through the probate court, as outlined in question 1, took place prior to June 30, 1981 (the effective date of Am. S.E. 140), may the school district continue a past practice of admitting the child without charging tuition? If tuition is required, who is to bear such obligation?

The answers to your questions turn on the provisions of R.C. 3313.64, as amended by Am. S.B. 140, 114th Gen. A. (1981) (eff. July 1, 1981). R.C. 3313.64 sets forth a comprehensive scheme for determining where a pupil is entitled to free schooling and when tuition must be paid.

Your first question concerns a situation in which guardianship of a child is granted through the probate court to a resident of a given school district other than the child's parent. You want to know whether the district is required to admit the child and, if so, who is to bear the tuition obligation.

Instances in which a school district is required to admit a child are set forth in R.C. 3313.64(B), as follows:

- (1) A child shall be admitted to the schools of the school district in which his parent resides.
- (2) A child who does not reside in the district where his parent resides shall be admitted to the schools of the district in which he resides if any of the following apply:
 - (a) He is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent;
 - (b) He resides in a home;
 - (c) He requires special education.

Pursuant to these provisions, a child who is in the guardianship of an individual other than his parent must be admitted to the schools of the school district in which the guardian resides if the guardian resides in the same school district as the child's parent,¹ if the guardian has legal or permanent custody² of the child and the

¹ "Parent" is defined in R.C. 3313.64(A)(1), as used in R.C. 3313.64, as follows:

"Parent" means either parent, unless the parents are separated or divorced or their marriage has been dissolved or annulled, in which case "parent" means the custodial parent. When a child is in the legal custody of a government agency or a person other than his natural or adoptive parent, "parent" means the parent with residual parental rights, privileges, and responsibilities. When a child is in the permanent custody of a government agency or a person other than his natural or adoptive parent, "parent" means the parent who was divested of custody and residual parental rights, privileges, and responsibilities.

Further, R.C. 3313.64(J) states: "In the event of a disagreement, the superintendent of public instruction shall determine the school district in which the parent resides."

² R.C. 3313.64(A)(2) sets forth the following definitions for purposes of R.C. 3313.64:

"Legal custody," "permanent custody," and "residual parental rights, privileges, and responsibilities" have the meanings given in section 2151.011 of the Revised Code.

R.C. 2151.011 states, in relevant part:

- (B) As used in this chapter:

. . . .

(10) "Legal custody" means a legal status created by court order which vests in the custodian the right to have physical care and control of the child and to determine where and with whom he shall live, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.

(11) "Residual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the person, including but not

child resides in the same school district as the guardian, if the child resides in a home³ in the school district in which the guardian resides, or if the child resides in the same school district as the guardian and requires special education. R.C. 3313.64 expressly provides that a handicapped child may be placed in a special education program outside of the district in compliance with R.C. Chapter 3323.

Your difficulty in applying R.C. 3313.64 appears to stem from some confusion involving the terms "custody" and "guardianship." The provisions of R.C. 3313.64 governing school admissions and tuition payments are written in terms of "legal or permanent custody."⁴ A guardianship arrangement, as such, is relevant to the provisions of R.C. 3313.64 only to the extent that it changes the legal or permanent custody of a child. The extent to which that result is effected by a particular order of guardianship will depend upon the nature of the guardianship.

R.C. 2111.01(A) contains the following definition, applicable to provisions governing the probate courts:

As used in Chapters 2101. to 2131. of the Revised Code:

(A) "Guardian," other than a guardian under sections 5905.01 to 5905.19 of the Revised Code [veterans' guardianship law], means any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor, or the department of mental retardation and developmental disabilities, an agency under contract with the department for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code, or the legal rights service created by section 5123.60 of the Revised Code when appointed by the probate court to have the care and management of the person of an incompetent.

necessarily limited to the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.

(12) "Permanent custody" means a legal status created by the court which vests in the county department of welfare which has assumed the administration of child welfare, county children services board, or certified organization, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights and obligations.

³ "Home" is defined in R.C. 3313.64(A)(4), for purposes of R.C. 3313.64, as follows:

Except as used in division (C)(2) of this section, "home" means a home, institution, foster home, group home, or other residential facility in this state that receives and cares for children, to which any of the following apply:

(a) The home is licensed, certified, or approved for such purpose by the state;

(b) The home is operated by a person who is licensed, certified, or approved by the state to operate the home for such purpose;

(c) The home accepted the child through a placement by a person licensed, certified, or approved to place a child in such a home by the state;

(d) The home is a children's home created under section 5153.21 or 5153.36 of the Revised Code.

⁴ You have indicated that your question has arisen because R.C. 3313.64, as it existed prior to its amendment by Am. S.B. 140, 114th Gen. A. (1981) (eff. July 1, 1981), clearly included a guardian as a parent and granted a child a right to free schooling in the school district in which his parent or guardian

R.C. 2111.06 states, in part:

If the powers of the person appointed as guardian of a minor or incompetent are not limited by the order of appointment, such person shall be guardian both of the person and estate of the ward. . . .

. . . A guardian of the person shall have the custody and provide for the maintenance of the ward, and if the ward is a minor, such guardian shall also provide for the education of such ward.

R.C. 2111.07 provides further:

Each person appointed guardian of the person and estate of a minor shall have the custody and tuition of his ward and the management of such ward's estate during minority, unless such guardian is removed or discharged from such trust or the guardianship terminates from any of the causes specified in Chapters 2101. to 2131., inclusive, of the Revised Code.

R.C. 2111.13 specifies the duties of a guardian of the person of a minor, as follows:

When a guardian is appointed to have the custody and maintenance of a ward and to have charge of the education of such ward, if such ward is a minor, his duties are:

(A) To protect and control the person of his ward;

(B) To provide suitable maintenance for his ward when necessary, which must be paid out of the estate of such ward upon the order of the guardian of the person of such ward;

(C) To provide such maintenance and education for such ward as the amount of his estate justifies when the ward is a minor and has no father or mother, or has a father or mother who fails to maintain or educate him, which shall be paid out of such ward's estate upon the order of the guardian of the person of such ward;

(D) To obey all the orders and judgments of the probate court touching the guardianship.

No part of the ward's estate shall be used for the support, maintenance, or education of such ward unless ordered and approved by the court.

It is clear from the foregoing that a person who is appointed guardian of the person of a minor has "[l]egal custody" of that minor, as that term is defined in R.C. 2151.011 and used in R.C. 3313.64. See note 2, *supra*; R.C. 2111.15 ("[w]hen a person is appointed to have custody of the person and to take charge of the estate of a ward, such person shall have all the duties required of a guardian of the estate and of a guardian of the person"). See generally R.C. 2101.24(D) (probate court has jurisdiction to appoint and remove guardians, direct and control their conduct, and settle their accounts); R.C. 2111.01(B) ("[w]ard means any person for whom a guardian as defined in this section is acting"); R.C. 2151.23(A)(2) (juvenile court has jurisdiction to "determine the custody of any child not a ward of another court of

resided. I note, however, that the earlier version of R.C. 3313.64 did not use the word "guardian." Rather, it stated:

If neither parent has legal custody of the child, "parent" means the person or government agency with legal custody or permanent custody as those terms are defined in divisions (B)(10) and (12) of section 2151.011 of the Revised Code.

See Am. Sub. H.B. 965, 113th Gen. A. (1980) (eff. April 9, 1981). The rule for determining which school district a child may attend without the payment of tuition has changed, but the definitions in R.C. 2151.011(B)(10) and (12) of a person with legal or permanent custody have not changed.

this state"). A guardian is generally considered to be a type of custodian. See, e.g., Juv. R. 2(5) (" 'Custodian' means a person who has been granted custody of a child by a court"); Juv. R. 2(9) (" 'Guardian' means a court appointed guardian of the person of a child"); Juv. R. 6 (permitting a child to be taken into custody "when there are reasonable grounds to believe that the child has run away from his parents, guardian, or other custodian"); Juv. R. 7 (permitting a child to be placed in detention or shelter care prior to final disposition if "he has no parent, guardian, or custodian or other person able to provide supervision and care for him and return him to the court when required").

Provisions for the payment of tuition are set forth in R.C. 3313.64(C), as follows:

If the district admits a child under division (B)(2) of this section, tuition shall be paid to the district that admits the child as follows:

(1) If the child receives special education in accordance with Chapter 3323. of the Revised Code, tuition shall be paid in accordance with section 3323.13, 3323.14, or 3323.141 of the Revised Code regardless of who has custody of the child or whether he resides in a home.

(2) If the child is in the permanent or legal custody of a government agency or person other than the child's parent, tuition shall be paid by:

(a) The district in which the child's parent resided at the time the court removed the child from his home or at the time the court vested legal or permanent custody of the child in the person or government agency, whichever occurred first; or

(b) If the parent's residence at the time the court removed the child from his home or placed him in the legal or permanent custody of the person or government agency is unknown, tuition shall be paid by the district in which the child resided at the time he was removed from his home or placed in legal or permanent custody, whichever occurred first; or

(c) If a school district cannot be established under division (C)(2)(a) or (b) of this section, tuition shall be paid by the district determined as required by section 2151.357 of the Revised Code by the court at the time it vests custody of the child in the person or governmental agency.

(3) If the child is not in the permanent or legal custody of a government agency or person other than his parent and he resides in a home, tuition shall be paid by:

(a) The school district in which the child's parent resides; or

(b) If the child's parent is not a resident of this state, the home in which the child resides.

In the various instances in which a child is required to be admitted to schools outside the school district in which his parent resides, tuition for such child shall be paid pursuant to these provisions. See generally 1982 Op. Att'y Gen. No. 82-106. I note that, in most instances, tuition will be paid by a school district.

Your second question concerns a situation in which the custody of a child is granted through the domestic relations division of a court of common pleas to a resident of a given school district other than the child's parent. The provisions governing the school district to which a child must be admitted and the placement of the tuition obligation are as outlined above in connection with your first question.

Whenever a court of competent jurisdiction grants legal custody of a child to an individual other than the child's parent, that child shall, under R.C. 3313.64(B)(2)(a), be admitted to the schools of the district in which the child resides, and tuition shall be paid pursuant to R.C. 3313.64(C). See generally R.C. 3105.01 ("[t]he court of common pleas including divisions of courts of domestic relations, has full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters"); R.C. 3109.06 (where court of

common pleas has jurisdiction in any case respecting the care, custody, or support of a child and finds the parents unsuitable to have custody of the child, the court may certify the case to the juvenile court for further proceedings without the consent of the juvenile court).

R.C. 3109.04 provides that, "[i]f the court finds, with respect to any child under eighteen years of age, that custody to neither parent is in the best interest of the child, it may commit the child to a relative of the child or certify a copy of its findings. . .to the juvenile court for further proceedings, and, upon the certification, the juvenile court has exclusive jurisdiction." It appears that such a commitment constitutes a granting of legal custody, as that term is used in R.C. 3313.64. See note 2, *supra*; R.C. 2151.01(A)(13) (" '[t]emporary custody' means legal custody as defined in division (B)(10) of this section which may be terminated at any time in the discretion of the court"); R.C. 2151.01(A)(14) (" '[c]ommit' means to vest custody as ordered by the court"). See generally R.C. 2151.23(A)(2); *Boyer v. Boyer*, 46 Ohio St. 2d 83, 346 N.E.2d 286 (1976) (commitment to a relative pursuant to R.C. 3109.04 constitutes a determination of who shall have the care, custody, and control of a child); *Baxter v. Baxter*, 27 Ohio St. 2d 168, 271 N.E.2d 873 (1971) (under prior version of statute, where no finding was made that father was not a suitable person to have custody, the court had no authority to commit child to grandmother, and lack of authority could not be obviated by describing commitment as "physical" rather than "legal" custody); *Thrasher v. Thrasher*, 3 Ohio App. 2d 210, 444 N.E.2d 431 (Summit County 1981) (same substantive law test should apply to custody disputes between parent and non-parent under R.C. 2151.23 and 3109.04); *Ludy v. Ludy*, 84 Ohio App. 195, 82 N.E.2d 775 (Franklin County 1948) (where matter is not certified to juvenile court, the common pleas court, division of domestic relations, retains continuing jurisdiction over the custody of a child); see also *Rowe v. Rowe*, 44 Ohio Op. 224, 97 N.E.2d 223 (Franklin County 1950) (court of common pleas may, in divorce proceeding, act upon an agreement of parents granting the custody, care, and control of their minor children to the children's maternal grandmother).

Your third question concerns the same factual situation as your first question. You have asked whether, if a grant of guardianship took place prior to June 30, 1981, the school district may continue a past practice of admitting the child without charging tuition. I understand that your inquiry relates to a situation in which the grant of guardianship did not specifically address the payment of tuition and in which, except for the past practice, the payment of tuition would be required. I assume that the situation is one involving guardianship of the person of the child.

R.C. 3313.64 states plainly that, if a school district admits a child under R.C. 3313.64(B)(2), "tuition shall be paid to the district that admits the child," as provided in that section. Use of the word "shall" in a statute is ordinarily construed as imposing a mandatory duty. See *Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1976). The only instances in which R.C. 3313.64 provides for discretion in determining whether tuition should be charged appear in R.C. 3313.64(E), (G), and (H), as follows:

(E) A board of education may enroll a child free of any tuition obligation for a period not to exceed sixty days, on the sworn statement of an adult resident of the district that he has initiated legal proceedings for custody of the child.

(G) A board of education may, after approving admission, waive tuition for students who are residents or domiciliaries of a

⁵ I am not, in this opinion, considering a situation in which there may be orders of more than one court addressing the custody of a particular child. I note, however, that it has been held that a juvenile court has authority to hear and determine the case of a neglected child although the child is at the time within the continuing jurisdiction of the common pleas court by virtue of a divorce decree. *In re L.*, 12 Ohio Misc. 251, 231 N.E.2d 253 (Juv. Ct. Cuyahoga County 1967).

foreign nation, who request admission as foreign exchange students, and who will temporarily reside in the district.

(H) Pursuant to sections 3311.211 [joint vocational school district], 3313.90, 3319.01 [assignment of pupil to school outside his district of residence], 3323.04 [handicapped children], 3327.04 [contract between school districts], and 3327.06 of the Revised Code, a child may attend school or participate in a special education program in a school district other than in the district where he is entitled to attend school under division (B) of this section.

It is clear from the foregoing that, with specified exceptions, the statutory scheme contemplates that, whenever a child is required to be admitted to the schools of a school district other than that in which his parent resides, tuition shall be paid for such child.⁶ See 1981 Op. Att'y Gen. No. 81-052 (board of education may not absolutely waive tuition due by law). I am aware of no exception to this scheme which may be based on the date on which the guardianship of a child was granted to a person other than his parent.⁷ That date may, however, affect a determination as to which district must pay tuition under R.C. 3313.64(C).

In response to your third question, I conclude, therefore, that tuition must be paid pursuant to R.C. 3313.64(C) for any child who is, pursuant to R.C. 3313.64(B)(2), admitted to the schools of a school district other than the one in which his parent resides, even though the child may be the subject of an order of guardianship issued prior to June 30, 1981.

Based on the foregoing, it is my opinion, and you are hereby advised, as follows:

1. Pursuant to R.C. 3313.64(B)(1), a child shall be admitted to the schools of the school district in which his parent resides.
2. Pursuant to R.C. 3313.64(B)(2), a child who does not reside in the district in which his parent resides shall be admitted to the schools of the district in which he resides if any of the following applies:

⁶ Further, R.C. 3317.08 provides, in part: "A board of education may admit to its schools a child it is not required by section 3313.64 of the Revised Code to admit, if tuition is paid for the child." See generally R.C. 3327.06 (providing for collection of tuition for a child who is not entitled to be admitted to a particular district's schools pursuant to R.C. 3313.64(B), and providing that if tuition is not collected the attendance of such child is unauthorized attendance).

⁷ I am aware that, under R.C. 3313.64 as it existed prior to the enactment of Am. S.B. 140, 114th Gen. A. (1981) (eff. July 1, 1981), a child who was in the legal or permanent custody of a guardian (other than the child's parent) could attend school in the school district in which the guardian resided, without the payment of tuition by another school district or institution. See Am. Sub. H.B. 965, 113th Gen. A. (1980) (eff. April 9, 1981). I cannot, however, find that this prior statutory scheme in any way entitled the child, the guardian, or the school district to have the scheme continue. See generally Buckley v. City of Cincinnati, 63 Ohio St. 2d 42, 44, 406 N.E.2d 1106, 1108 (1980) ("where no constitutional right exists, there can be no retrospective impairment of that right"). The existing scheme continues to provide for free public education for children, changing, at most, the particular district which the child may attend or the school district or institution which will bear the ultimate cost of the child's free schooling. See generally Ohio Const. art. VI, §§2, 3; R.C. 3313.64, 3321.03. I assume, for purposes of this opinion, that the modifications made to the scheme by the General Assembly are constitutional. See generally 1981 Op. Att'y Gen. No. 81-067; 1980 Op. Att'y Gen. No. 80-002.

- a. he is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent;
- b. he resides in a home; or
- c. he requires special education.

A handicapped child may be placed in a special education program outside of the district in compliance with R.C. Chapter 3323.

3. An individual appointed by the probate court as guardian of the person of a minor, pursuant to R.C. Chapter 2111, has "legal custody" of the child, as that term is used in R.C. 3313.64. Pursuant to R.C. 3313.64, a child who is in the legal custody of a guardian shall be admitted to the schools of the district in which the child resides.
4. An individual granted custody of a child by the domestic relations division of the court of common pleas has "legal custody" of the child, as that term is used in R.C. 3313.64. Pursuant to R.C. 3313.64, a child who is in the legal custody of such an individual shall be admitted to the schools of the district in which the child resides.
5. Pursuant to R.C. 3313.64(B), the school district in which an individual who has legal custody of a child resides must admit the child if:
 - a. the school district is also the district in which the child's parent resides; or
 - b. the child resides in the school district.
6. Whenever a child is, pursuant to R.C. 3313.64(B)(2), admitted to the schools of a district other than the district in which his parent resides, tuition for such child must be paid as required by R.C. 3313.64(C), even though the child may be the subject of an order of guardianship issued prior to June 30, 1981.