

OPINION NO. 91-025**Syllabus:**

1. Pursuant to R.C. 3323.142, when a school district places a child with a county board of mental retardation and developmental disabilities for special education, but another district is responsible for tuition under R.C. 3313.64 or R.C. 3313.65 and the child is not a resident of the territory served by the board, the board may charge the school district that is responsible for tuition with educational costs in excess of the per pupil amount received by the board under R.C. Chapter 3317. Charges may also be made pursuant to contracts entered into under R.C. 3323.142. No charge for excess costs may be made under R.C. 3323.142 in circumstances that do not come within its provisions.

2. If no statutory provision is made for the reimbursement of excess costs, such costs must be borne by the entity that accrues them or paid pursuant to some other arrangement.
3. Pursuant to R.C. 3323.01(D) and R.C. 3323.02, all handicapped children of compulsory school age in Ohio shall be provided with an appropriate education at public expense.
4. The Ohio Department of Mental Retardation and Developmental Disabilities may not use public funds to pay county boards of mental retardation and developmental disabilities or local school districts for excess costs incurred in educating handicapped children unless the Department has statutory authority to make the payments and funds are available for that purpose; the Department may not charge the children or their families an amount to be used to pay the costs of the education.

To: Jerome C. Manuel, Director, Ohio Department of Mental Retardation and Developmental Disabilities, Columbus, Ohio
By: Lee Fisher, Attorney General, April 18, 1991

I have before me your predecessor's request for an opinion relating to the responsibility of providing for the cost of educating handicapped children who live in state developmental centers and receive their education in programs operated by county boards of mental retardation and developmental disabilities ("county MR/DD boards") pursuant to R.C. 5126.05 or in public schools pursuant to R.C. 3323.04. The particular concern is whether the Ohio Department of Mental Retardation and Developmental Disabilities ("Department of MR/DD"), which operates the state developmental centers, is responsible for providing for the costs of educating residents of those centers, in excess of costs provided for in R.C. 3317.04, R.C. 3317.022, R.C. 3317.023, and R.C. 3317.024, when the residents receive their education in programs of a county MR/DD board or school district.¹

The opinion request raises several questions concerning the responsibility for providing handicapped children with an appropriate public education. *See* R.C. 3323.02. A number of issues relevant to the request have been addressed in 1991 Op. Att'y Gen. No. 91-024, also issued on this date. That opinion is directed to the Department of Education and discusses the responsibilities of that Department and of the boards of education of school districts with respect to the provision of education for children who live in state developmental centers. Op. No. 91-024 provides a discussion of state and federal provisions that are relevant to the provision of education for the handicapped, and I shall not repeat that discussion here. I turn, instead, to the questions that are not answered in Op. No. 91-024. Those questions may be stated as follows:

1. When a handicapped child who lives in a state developmental center is properly placed, for educational purposes, in a program operated by a county MR/DD board or school district, who is responsible for the costs to educate the child which are in excess of the reimbursement provided by R.C. 3317.04, 3317.022, 3317.023, and 3317.024?
2. Since R.C. 3323.142 provides that the local school district of residence is responsible for excess costs of education for

¹ The request does not specifically refer to transportation costs and this opinion does not address such costs. I note that various statutory provisions govern the provision of transportation and the payment of transportation costs. *See, e.g.,* R.C. 3323.13; R.C. Chapter 3327; R.C. 5126.05; R.C. 5126.061; R.C. 5126.14; 1987 Op. Att'y Gen. No. 87-026.

handicapped children enrolled in county board of MR/DD programs and most of these children reside in licensed MR community facilities, who is responsible for excess costs of education for those other handicapped children enrolled in the same county board of MR/DD programs who happen to reside in developmental centers which are licensed under the same statute, R.C. 5123.19?

3. If the local school district is not responsible for such excess costs, what mechanism, if any, is available to the Ohio Department of MR/DD to pay either the county boards of MR/DD or the local school districts which would not violate the free and appropriate education requirement of R.C. 3323.02, incorporating R.C. 3323.01(D), and 20 U.S.C. Section 1400(c)?

The first question is phrased generally in terms of "who" is responsible for paying education costs in excess of the reimbursement provided by R.C. 3317.07, R.C. 3317.022, R.C. 3317.023, and R.C. 3317.024. The responsibilities of a local school district to pay for costs of the education of a handicapped child who lives in a state developmental center are discussed in Op. No. 91-024. My authority to render an opinion to the Department of MR/DD extends only to powers and duties of the Department. See R.C. 109.12 ("[t]he attorney general, when so requested, shall give legal advice to a state officer, board,...in all matters relating to their official duties"). In response to the request I am, therefore, authorized to address the responsibilities of the Department of MR/DD, and, in addition, the responsibilities of county MR/DD boards to the extent that those boards are subject to supervision or funding by the Department of MR/DD.² See, e.g., R.C. 5123.02; R.C. 5123.04; R.C. 5123.35-.36; R.C. 5126.05; R.C. 5126.08.

When a handicapped child who lives in a state developmental center is placed, for educational purposes, in a program operated by a county MR/DD board or school district, that board or district is responsible for providing the child with an education in accordance with its program. Provisions for reimbursement of certain of the expenses involved appear in R.C. 3317.04 (minimum amounts guaranteed to school districts under R.C. Chapter 3317); R.C. 3317.022 (formula for computing state aid to school districts); R.C. 3317.023 (computation of additional aid to school districts); and R.C. 3317.024. R.C. 3317.024 provides for the distribution of state funds for special education to, *inter alia*, county MR/DD boards and institutions of the Department of MR/DD, to be used for various purposes. See R.C. 3323.091; note 2, *supra*.

The first question relates to the payment of costs in excess of those reimbursed under R.C. 3317.04, R.C. 3317.022, R.C. 3317.023, and R.C. 3317.024. Provisions for the payment of such excess costs by a school district to a county MR/DD board in certain circumstances appear in R.C. 3323.142. See Op. No. 91-024. R.C. 3323.142³ states, in part:

When a school district places or has placed a child with a county [MR/DD] board for special education, but another district is

² Certain provisions for the payment of excess costs by a school district appear in R.C. 3323.14 and certain provisions for the payment of excess costs by a "home," as defined in R.C. 3313.64, appear in R.C. 3323.09 and R.C. 3323.141. Those provisions are discussed in 1991 Op. Att'y Gen. No. 91-024. R.C. 3313.981 provides for reimbursement of excess costs by the Department of Education when a student receives special education in an adjacent school district. See R.C. 3313.98.

³ Effective July 1, 1991, R.C. 3323.142 will not apply to any handicapped preschool child except if included in a unit approved under R.C. 3317.05(E). See Am. Sub. H.B. 248, 118th Gen. A. (1989) (eff. Oct. 30, 1989, with certain provisions eff. July 1, 1991).

responsible for tuition under section 3313.64 or 3313.65 of the Revised Code and the child is not a resident of the territory served by the county MR/DD board, the board may charge the district responsible for tuition with the educational costs in excess of the per pupil amount received by the board under Chapter 3317. of the Revised Code. The amount of the excess cost shall be determined by the formula established by rule of the department of education under section 3323.14 of the Revised Code, and the payment for such excess cost shall be made by the school district directly to the county MR/DD board.

A school district board of education and the county MR/DD board that serves the school district may negotiate and contract, at or after the time of placement, for payments by the board of education to the county MR/DD board for additional services provided to a child placed with the county MR/DD board for special education who is a resident of the territory served by the county MR/DD board and whose individualized education program established pursuant to section 3323.08 of the Revised Code requires additional services that are not routinely provided children in the county MR/DD board's program but are necessary to maintain the child's enrollment and participation in the program. Additional services may include, but are not limited to, specialized supplies and equipment for the benefit of the child and instruction, training, or assistance provided by staff members other than staff members for which funding is received under division (N) or (O) of section 3317.024 of the Revised Code.

See also 3 Ohio Admin. Code 3301-53-03.

By its terms, R.C. 3323.142 permits a county MR/DD board to charge the school district responsible for tuition with excess costs "[w]hen a school district places or has placed a child with a county [MR/DD] board for special education, but another district is responsible for tuition under [R.C. 3313.64 or 3313.65] and the child is not a resident of the territory served by the county MR/DD board." *Accord* 3 Ohio Admin. Code 3301-53-03. R.C. 3323.142 also permits charges to be made pursuant to contract. No charge for excess costs may be made under R.C. 3323.142 in circumstances that do not come within its provisions. Such costs must be paid pursuant to other statutory provisions. *See, e.g.,* Op. No. 91-024; note 2, *supra*. If no statutory provision is made for the reimbursement of excess costs, such costs must be borne by the entity that accrues them or paid pursuant to some other arrangement.

The second question also relates to R.C. 3323.142. Your predecessor stated that R.C. 3323.142 provides that the local school district of residence is responsible for excess costs of education for handicapped children enrolled in county board of MR/DD programs and that "most of these children reside in licensed MR community facilities." The request asks who is responsible for excess costs of education for handicapped children enrolled in the same county board of MR/DD programs who reside in state developmental centers.

R.C. 3323.142 authorizes a county MR/DD board to charge a school district with excess costs of educating a child when a school district places the child with a county MR/DD board for special education, but another school district is responsible for tuition under R.C. 3313.64 or 3313.65 and the child is not a resident of the territory served by the county MR/DD board. R.C. 3323.142 is not phrased in terms of the type of facility in which a child resides. Nowhere does the language of R.C. 3323.142 distinguish between children who reside in state developmental centers and those who reside in other types of facilities. R.C. 3323.142 grants a county MR/DD board the authority to charge a school district for excess costs whenever the criteria set forth in R.C. 3323.142 are satisfied.⁴ If those criteria are not satisfied,

⁴ I am not considering whether a child who resides in a state developmental center is a resident of the county in which the center is

funding must be determined under other applicable statutes. I am aware of no statute other than R.C. 3323.142 that addresses the reimbursement of excess costs incurred by a county MR/DD board. It follows that excess costs that do not come within R.C. 3323.142 must be borne by the county MR/DD board or paid pursuant to some other arrangement. *See generally, e.g.*, 1984 Op. Att'y Gen. No. 84-006 (where a situation does not come within the statutory provisions governing reimbursement for costs, no such reimbursement is available).

The third question is whether there is a method by which the Ohio Department of MR/DD may pay county boards of MR/DD or local school districts for excess costs incurred in educating handicapped children when the local school district is not responsible for those excess costs. There is a concern that the mechanism used not violate the free and appropriate education requirement of R.C. 3323.02, incorporating R.C. 3323.01(D), and 20 U.S.C. §1400(c).

The Federal Education of the Handicapped Act, 20 U.S.C. §§1400-1485 (1988), provides that, in order to receive federal funds, a state must have in effect a policy that assures all handicapped children the right to a free appropriate public education. 20 U.S.C. §1412(1) (1988); *see also* 20 U.S.C. §1400(c) (1988). R.C. 3323.02 sets forth this policy, as follows:

It is the purpose of this chapter to assure that all handicapped children of compulsory school age⁵ in this state shall be provided with an appropriate public education. No educational program for handicapped children shall be operated except in accordance with procedures, standards, and guidelines adopted by the state board of education, and no school district, county board of mental retardation and developmental disabilities, or other educational agency shall receive state or federal funds for a special education program unless such program is operated in accordance with all procedures, standards, and guidelines adopted by the state board. The state board of education shall establish standards for special education and related services for all handicapped children in the state, regardless of the severity of their handicap. (Emphasis and footnote added.)

R.C. 3323.01 contains the following definition of "appropriate public education":

- (D) "Appropriate public education" means special education and related services that:
- (1) *Are provided at public expense* and under public supervision;
 - (2) Meet the standards of the state board of education;
 - (3) Include an elementary and secondary education, and may include a preschool education;⁶

located, since that question is in litigation at this time. *Board of Education of the Austintown Local School District v. Mahoning County Board of Mental Retardation and Developmental Disabilities*, No. 87 CV 1770 (C.P. Mahoning County December 27, 1989), concluded that children who reside at a state developmental center are residents of the county in which the center is located; that case is currently being appealed.

⁵ Effective July 1, 1991, R.C. 3323.02 will be amended to provide for an appropriate public education for all handicapped children three to twenty-one years of age. *See* Am. Sub. H.B. 248, 118th Gen. A. (1989) (eff. Oct. 30, 1989, with certain provisions eff. July 1, 1991).

⁶ Effective July 1, 1991, existing R.C. 3323.01(D)(3) will be deleted because preschool education for the handicapped will be required. *See* Am. Sub. H.B. 248, 118th Gen. A. (1989) (eff. Oct. 30, 1989, with certain provisions eff. July 1, 1991).

(4) Are provided in conformity with the individualized education program required under this chapter. (Emphasis and footnote added.)

See also 20 U.S.C. §1401(a)(18) (1988).

The provisions requiring a free and appropriate education for handicapped children thus require that the education and related services be provided at public expense. Neither state nor federal provisions specify a particular source for the money. It appears, therefore, that there will be no violation of the free and appropriate education provisions of state and federal law as long as a public source of money is used to provide the education. Accordingly, if the Ohio Department of MR/DD were to use moneys derived from a public source to pay county boards of MR/DD or local school districts for excess costs incurred in educating handicapped children, there would be no violation of the free and appropriate education requirement. It should, however, be noted that the Department may not make such payments unless it has statutory authority to make the particular payments in question and has funds that are available for that purpose. The requirement of a free public education imposes the limitation that the Department may not charge the children or their families an amount to be used to pay for the costs of the education. See, e.g., *Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir.), cert. denied, 474 U.S. 918 (1985); *Gillette v. Fairland Board of Education*, 725 F.Supp. 343 (S.D. Ohio 1989), appeal dismissed, 895 F.2d 1413 (6th Cir. 1990); *Vander Malle v. Ambach*, 667 F.Supp. 1015 (S.D. N.Y. 1987); *North v. District of Columbia Board of Education*, 471 F.Supp. 136 (D.C. Cir. 1979); 3 Ohio Admin. Code 3301-51-01(D) ("[a]t no cost' means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged non-handicapped pupils as a part of the regular education program"); 3 Ohio Admin. Code 3301-51-01(DDD) ("[s]pecial education' means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child...").

On this point, it is relevant to consider a set of statutory provisions under which the Department of MR/DD is authorized to charge individuals and their families for costs relating to residence in an institution. R.C. 5121.06 provides that certain persons are jointly and severally liable for the support of a resident in an institution under the control of the Department of MR/DD. The statute lists the following persons: (1) the resident or his estate; (2) the resident's husband or wife; (3) the father and mother of a resident under age eighteen. R.C. 5121.04 sets forth a method to be used in determining the amount to be charged each such liable person. It is clear that the requirement for a free public education would be violated if the Department of MR/DD charged children or their families for the costs of providing an education under R.C. Chapter 3323. See, e.g., 20 U.S.C. §1412(1) (1988); 34 C.F.R. §300.302 (1990);⁷ R.C. 3323.01(D); R.C. 3323.02; *Parks v. Pavkovic*; *Vander Malle v. Ambach*; *North v. District of Columbia Board of Education*. It follows that moneys received from charges imposed pursuant to R.C. 5121.04 and R.C. 5121.06 may not be paid to county MR/DD boards or local school districts to cover costs incurred in educating handicapped children.⁸

⁷ 34 C.F.R. §300.302 (1990) states:

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child...

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped...

⁸ Your predecessor did not ask about the authority of the Ohio Department of MR/DD to use moneys received from charges imposed pursuant to R.C. 5121.04 and R.C. 5121.06 for the purpose of paying costs incurred by a state developmental center in connection with the support and

It is, thus, clear that the Department of MR/DD may not use moneys received from charges imposed pursuant to R.C. 5121.04 and R.C. 5121.06 to pay county MR/DD boards or school districts for the cost of educating handicapped children. Certain statutory provisions do, however, authorize the Department of MR/DD to provide federal and state funds to county MR/DD boards for various purposes. For example, R.C. 5123.351 states, in part:

The director of mental retardation and developmental disabilities with respect to the eligibility for state reimbursement of expenses incurred by facilities and programs established and operated under Chapter 5126. of the Revised Code for mentally retarded and developmentally disabled persons, shall:

....

(G) Establish, operate, develop, and fully support a clinic or other mental retardation or developmental disability programs in an area where he determines that services are urgently needed but local funds for the support of the program are not available;

(H) Provide state funds to county boards of mental retardation and developmental disabilities, in addition to those allocated pursuant to section 5123.36 of the Revised Code, for special programs or projects he considers necessary, but for which local funds are not available....

See also R.C. 5123.35; R.C. 5123.36; R.C. 5126.11 (providing for reimbursement to a mentally retarded or developmentally disabled person or his family for expenditures for services "that would promote self-sufficiency and normalization, prevent or reduce inappropriate institutional care, and further the unity of the family by enabling the family to meet the special needs of the mentally retarded or developmentally disabled person").

R.C. 5126.12 provides for payments to county MR/DD boards by the Department of MR/DD based on the average daily membership of persons receiving various types of services. No such payments are provided for the special education of handicapped children in an "approved unit" - that is, in a class or unit operated by county MR/DD board and approved by the State Board of Education under R.C.

maintenance of children who reside there, and I am not considering such authority. It appears, however, that the requirement of a free public education includes the cost of providing a residential setting when that setting is required for educational purposes. See, e.g., *Parks v. Pavkovic*, 753 F.2d 1397, 1405 (7th Cir. 1985) ("Congress took for granted that room and board were components of a free public education when the education had to be conducted in a residential institution"), *cert. denied*, 474 U.S. 918 (1985); *Vander Malle v. Ambach*, 667 F.Supp. 1015, 1038-39 (S.D. N.Y. 1987) ("[i]f a residential placement is required [under the Education of the Handicapped Act, 20 U.S.C. §§1400-1485 (1988)], room, board, and related services must be provided at no cost to the child's parents. States may not escape responsibility for the costs properly associated with a residential placement simply by stating that the placement addresses physical, emotional, psychological, or behavioral difficulties rather than or in addition to educational problems" (footnote and citations omitted)); *North v. District of Columbia Board of Education*, 471 F.Supp. 136 (D.C. Cir. 1979); 34 C.F.R. §300.302 (1990); see also 29 U.S.C. §794 (1988) (Section 504 of the Federal Rehabilitation Act of 1973); 45 C.F.R. §84.33(c)(3) (1990) ("[i]f placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian"). Whether placement in a residential setting is necessary for educational purposes must be determined on a case-by-case basis. See, e.g., 1991 Op. Att'y Gen. No. 91-024.

3317.05⁹ – but those individuals are included in determining the reimbursement of a county MR/DD board for the provision of case management and family resource services and other services required or approved by the Director. *See* R.C. 5126.12; *see also* R.C. 5126.14 (providing for reimbursement by the State Department of MR/DD to county MR/DD boards for transportation costs for early childhood education programs and adult programs, but not including special education for preschool or school-age children under R.C. Chapter 3323).

The Department of MR/DD has authority to pay for certain activities undertaken outside its facilities. *See, e.g.*, R.C. 5123.17 ("[t]he department of [MR/DD] may provide for the custody, supervision, control, treatment, and training of mentally retarded persons elsewhere than within the enclosure of an institution under its jurisdiction, if the department so determines with respect to any individual or group of individuals"). Any expenditures for "excess costs" that come within the statutory authority of the Department of MR/DD may be paid by the Department if funds are available.

It has been suggested that the Department of MR/DD might receive unit funding for all residents of a developmental center under R.C. 3317.024 and 3323.091 and transfer some of those funds to a county MR/DD board that operates a program in which certain of the residents are enrolled. It does not, however, appear that the Department is entitled to receive such unit funding except for individuals who are enrolled in programs that are established and maintained by the Department in institutions under its jurisdiction. *See* R.C. 3329.091; Op. No. 91-024. If a resident of a state developmental center is placed in a special education program of a county MR/DD board, the state unit funding for that program will go directly to the county MR/DD board. *See* R.C. 3317.024.

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

1. Pursuant to R.C. 3323.142, when a school district places a child with a county board of mental retardation and developmental disabilities for special education, but another district is responsible for tuition under R.C. 3313.64 or R.C. 3313.65 and the child is not a resident of the territory served by the board, the board may charge the school district that is responsible for tuition with educational costs in excess of the per pupil amount received by the board under R.C. Chapter 3317. Charges may also be made pursuant to contracts entered into under R.C. 3323.142. No charge for excess costs may be made under R.C. 3323.142 in circumstances that do not come within its provisions.
2. If no statutory provision is made for the reimbursement of excess costs, such costs must be borne by the entity that accrues them or paid pursuant to some other arrangement.
3. Pursuant to R.C. 3323.01(D) and R.C. 3323.02, all handicapped children of compulsory school age in Ohio shall be provided with an appropriate education at public expense.
4. The Ohio Department of Mental Retardation and Developmental Disabilities may not use public funds to pay boards of mental retardation and developmental disabilities or local school districts for excess costs incurred in educating handicapped children unless the Department has statutory authority to make the payments and funds are available for that purpose; the Department may not charge the children or their families an amount to be used to pay the costs of the education.

⁹ Effective July 1, 1990, R.C. 3317.05 will include additional provisions relating to classes for handicapped preschool children. *See* Am. Sub. H.B. 248, 118th Gen. A. (1989) (eff. Oct. 30, 1989, with certain provisions eff. July 1, 1991).