

## OPINION NO. 88-069

## Syllabus:

Teachers employed in education programs operated by county boards of mental retardation and developmental disabilities pursuant to R.C. Chapter 3323 are members of the State Teachers Retirement System under R.C. 3307.01(B) and (E).

To: C. James Grothaus, Executive Director, State Teachers Retirement System of Ohio, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, October 13, 1988

I have before me your request for my opinion as to whether teachers employed by county boards of mental retardation and developmental disabilities (county MR/DD boards) are members of the State Teachers Retirement System (STRS) under R.C. 3307.01.

R.C. 3307.01(E) provides that all "teachers," as defined in R.C. 3307.01(B), are members of STRS. R.C. 3307.01(B) provides, in pertinent part:

"Teacher" means any person paid from public funds and employed in the public schools of the state under any type of contract described in section 3319.08 of the Revised Code in a position for which he is required to have a certificate issued pursuant to sections 3319.22 to R.C. 3319.31 of the Revised Code; *and any other teacher or faculty member employed in any school, college, university, institution, or other agency wholly controlled and managed, and supported in whole or in part, by the state or any subdivision thereof....* (Emphasis added.)

Under R.C. 5126.05(H), county MR/DD boards are required to provide special education programs according to R.C. Chapter 3323. Teachers in such programs are required to hold teachers' certificates issued by the board of education pursuant to R.C. 3319.22-31. See R.C. 3323.11; R.C. 3319.30. However, because the teachers in question are not employed in public schools under any type of contract described in R.C. 3319.08, they fail to qualify as members of STRS under the first

definition of "teacher" in R.C. 3307.01(B). See R.C. 3319.08 (pertaining to contracts entered into by the boards of education of cities, exempted villages, and local and joint vocational school districts for the employment of teachers). The question thus arises as to whether the teachers in question qualify as members of STRS under the second part of R.C. 3307.01(B), which defines "teacher" as any "teacher or faculty member employed in any school, college, university, institution, or other agency wholly controlled and managed, and supported in whole or in part, by the state or any subdivision thereof."<sup>1</sup>

The board of education in each school district is required to place each handicapped child of compulsory school age in the district in an appropriate education program, which may include regular class instruction, a special education program, or a combination thereof. R.C. 3323.04. R.C. 3323.09(B) requires each county MR/DD board to "establish special education programs for all handicapped children who, in accordance with [R.C. 3323.04], have been placed in special education programs operated by the county board...." The teachers in these programs must possess the same qualifications as those required of special education teachers in the public schools. R.C. 3323.11. An education program for handicapped children operated by a county board qualifies as a "school...institution, or other agency" for purposes of R.C. 3307.01(B).

R.C. 3307.01(B) requires that the school, institution or agency at which the teacher is employed be "wholly controlled and managed, and *supported in whole or in part*, by the state or any subdivision thereof." (Emphasis added.) The county board programs are clearly supported by the state or a subdivision. See R.C. 3317.024 (providing for funding by the state board of education for county MR/DD board education programs); R.C. 5126.05 (requiring the board of county commissioners to levy taxes and make appropriations for county MR/DD boards). See generally 1986 Op. Att'y Gen. No. 86-040.

For the following reasons, I also find that the education programs operated by county MR/DD boards are "wholly controlled and managed...by the state or any subdivision thereof." The term "subdivision" is not defined for purposes of R.C. Chapter 3307. Various other chapters of the Revised Code contain definitions of the term "political subdivision" for purposes of those chapters, and reference to those definitions is instructive. R.C. 2744.01(F) provides that for purposes of R.C. Chapter 2744, which defines political subdivision tort liability, "political subdivision" includes a "county or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state." R.C. 2744.01(C)(2)(n) includes the operation of MR/DD facilities as a governmental function of a subdivision. In providing MR/DD facilities, the county, which is a political subdivision of the state, acts through the county MR/DD board. I find, therefore, that for purposes of R.C. 3307.01(B), the subdivision is the county, which is acting through the county MR/DD board.

Having reached this conclusion, I may now examine whether county MR/DD boards wholly control and manage the education programs in which the teachers in question are employed. Each board is statutorily required to establish such a program for handicapped children who have been placed in the program by the local board of education. R.C. 3323.09(B). The boards must administer and operate these education programs. See R.C. 5126.05(A). The boards are required to adopt budgets for the programs, see R.C. 5126.05(J), hire the necessary employees, see R.C. 5126.05(L), and draw up annual plans for the programs. See R.C. 3323.09(B). I conclude, therefore, that for purposes of R.C. 3307.01(B), the county, acting through the county board, wholly controls and manages the education programs in which the teachers in question are employed. Thus, such education programs qualify, for purposes of R.C. 3307.01(B), as "any school...institution, or other agency wholly controlled and managed" by a subdivision of the state, that

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<sup>1</sup> Based upon conversations with your staff, I understand that whether the individuals are teachers and are employed is not at issue. For purposes of this opinion I will assume without further analysis that they are teachers and that they are employed.

subdivision being a county, acting through its MR/DD board.<sup>2</sup> Because I find that an education program operated by a county MR/DD board qualifies for purposes of R.C. 3307.01(B) as a "school...institution, or other agency wholly controlled and managed, and supported in whole or in part, by the state or any subdivision thereof," I conclude that teachers employed in such programs are members of STRS pursuant to R.C. 3307.01(B) and (E).<sup>3</sup>

Therefore, it is my opinion and you are advised that teachers employed in education programs operated by county boards of mental retardation and developmental disabilities pursuant to R.C. Chapter 3323 are members of the State Teachers Retirement System under R.C. 3307.01(B) and (E).

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<sup>2</sup> I reach this conclusion notwithstanding the fact that the state board of education has some supervisory authority over the education programs maintained and operated by county MR/DD boards. *See* R.C. 3301.07(J) (authorizing the state board of education to adopt procedures, standards and guidelines governing county MR/DD board education programs); R.C. 3323.09(B) (requiring county MR/DD boards to annually submit plans for their education programs to the state board of education for approval). R.C. 3307.01(B) requires that schools be "wholly controlled and managed" by the state or subdivision. To the extent that the state board of education has authority over all public schools, no school is wholly controlled by a subdivision. Rather, schools in general are controlled by both the state and a subdivision. *See* R.C. 3301.07 (providing that the state board of education shall have certain powers relating to all public schools, including that of prescribing minimum standards); R.C. 3313.47 (providing that each local board of education shall have management and control of the public schools in its district). Therefore, I do not find the fact that the state board of education has limited authority over the county MR/DD board educational programs to be inconsistent with my conclusion that county MR/DD boards wholly control and manage their education programs.

<sup>3</sup> I understand that a question has arisen as to whether these teachers are members of the Public Employees Retirement System (PERS) rather than STRS. PERS is established and governed by R.C. Chapter 145. R.C. 145.01(A) specifically excludes those persons covered by R.C. 3307.01 from PERS membership. Thus, since teachers employed by county MR/DD boards are members of STRS under R.C. 3307.01, they are not members of PERS. I note that in 1979 Op. Att'y Gen. No. 79-015, my predecessor concluded that teachers employed by the state Department of Mental Retardation and Developmental Disabilities are members of STRS. Furthermore, in 1982 Op. Att'y Gen. No. 82-055 my predecessor examined the status of substitute teachers employed by county MR/DD boards under personal services contracts, and concluded that such teachers are not members of PERS. I am aware that in Op. No. 82-055, my predecessor based his conclusion on R.C. 145.03, which exempts persons employed under personal service contracts from membership in PERS. My predecessor stated that employees of county MR/DD boards are "members of PERS unless they are specifically exempted." Op. No. 82-055 at 2-159. Because he found an exemption under R.C. 145.03, he did not address whether the teachers were exempted from PERS membership under R.C. 145.01(A). However, the result reached, that the teachers were not members of PERS, is consistent with the result I reach in response to your question.