

OPINION NO. 91-024**Syllabus:**

1. The board of education of the appropriate school district is responsible for the educational placement of a handicapped child who lives in a state developmental center. Such placement may be, *inter alia*, in a program operated by a state developmental center, in a program operated by a county board of mental retardation and developmental disabilities, or in a program operated by a school district. (1977 Op. Att'y Gen. No. 77-069, overruled in part.)
2. Under R.C. 3323.091, when a handicapped child under age twenty-two resides in a developmental center operated by the Ohio Department of Mental Retardation and Developmental Disabilities and receives special education in a program established and maintained by that center, and when the center submits a proper statement, the State Department of Education shall either: (1) pay to the center the amount of tuition calculated under R.C. 3317.08 and deduct that amount from state funds payable under R.C. 3317.022 and R.C. 3317.023 to the child's school district of residence; or (2) if the amount of such

state funds is insufficient, require the child's school district of residence to pay the amount of tuition to the center.

3. When a handicapped child under age twenty-two resides in a developmental center operated by the Ohio Department of Mental Retardation and Developmental Disabilities and receives special education in a program operated by a county board of mental retardation and developmental disabilities or a school district, there is no obligation for the State Department of Education or a school district to pay any amount of tuition to the developmental center pursuant to R.C. 3323.091.
4. A school district is responsible for making payments in accordance with R.C. 3323.142 to a county board of mental retardation and developmental disabilities for the provision of special education by the board.
5. A school district is responsible for making payments in accordance with R.C. 3313.64, R.C. 3323.13, and R.C. 3323.14 to another school district for the provision of special education by that other school district.

To: Franklin B. Walter, Superintendent of Public Instruction, Department of Education, Columbus, Ohio
By: Lee Fisher, Attorney General, April 18, 1991

I have before me your request for an opinion "regarding the responsibility for providing the education of handicapped children who have been placed in the care of the state's developmental centers under the jurisdiction of the Ohio Department of Mental Retardation and Developmental Disabilities (MR/DD)." You have asked whether a school district is responsible for providing special education to a handicapped child who lives in a state developmental center. Your representatives have indicated that you are interested in determining whether school districts are responsible for paying any of the costs of educating handicapped children who live in state developmental centers.

State developmental centers are operated by the Ohio Department of Mental Retardation and Developmental Disabilities ("Department of MR/DD") pursuant to R.C. Chapter 5123. See R.C. 5123.03. Individuals may be admitted to such centers voluntarily or by court order. See, e.g., R.C. 5123.03; R.C. 5123.69; R.C. 5123.71.

In order to answer your question, it is appropriate to consider how a child is placed in a particular program for special education. The Education of the Handicapped Act, 20 U.S.C. §§1400-1485 (1988) ("the Federal Act"), provides for federal assistance for the education of handicapped children and establishes conditions that must be satisfied in order for a state to receive federal aid. Ohio's provisions governing the education of handicapped children appear primarily in R.C. Chapter 3323.

In order to receive federal funds under the Federal Act, 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). Ohio has adopted this requirement in R.C. 3323.02. Consistent with federal law, Ohio has adopted the following definition:

"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;¹

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

R.C. 3323.01(D) (footnote added). *See also* 20 U.S.C. §1401(a)(18) (1988). Ohio law places upon the school district the responsibility of providing an appropriate public education to each handicapped child. *See* R.C. 3323.08; 3 Ohio Admin. Code 3301-51-01(T)(5)(b) ("[e]ach school district shall provide a free and appropriate education to all handicapped children..."); 1980 Op. Att'y Gen. No. 80-009. *See generally* R.C. 3319.01 (providing for assignment to schools by the superintendent, and requiring that assignment to a school outside a pupil's district of residence be approved by the board of the district of residence of the pupil).

Federal law provides for the development of an individualized education program ("IEP") for each handicapped child. *See* 20 U.S.C. §§1412, 1414 (1988). Ohio law defines the IEP as follows:

"Individualized education program" means a written statement for each handicapped child designed to meet the unique needs of a handicapped child, which statement shall include:

(1) A statement of the present levels of educational performance of such child;

(2) A statement of annual goals, including short-term instructional objectives;

(3) A statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs;

(4) The projected date for initiation and anticipated duration of such services;

(5) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved, and whether current placement is appropriate.

R.C. 3323.01(E) (emphasis added); *see also* 20 U.S.C. §1401(a)(19) (1988). Pursuant to federal law, the IEP is to be "developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child." 20 U.S.C. §1401(a)(19) (1988); *see also* 34 C.F.R. §§300.343-.345 (1990).

The State Board of Education is directed by R.C. 3323.04 to "require the board of education of each school district to place each handicapped child of compulsory school age residing within the district in an appropriate education program."² The program may "include instruction in regular classes, a special education program, or any combination thereof." R.C. 3323.04. The board of education must evaluate the educational placement of each handicapped child at least once each year. R.C. 3323.04. Ohio law requires that each school district have a plan for a special education program, and that the plan be approved by the State Board of Education. R.C. 3323.08. The plan must, *inter alia*, provide for

¹ 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).

² Effective July 1, 1991, this requirement will extend to 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).

educational placement of all identified handicapped children of compulsory school age,³ provide for an IEP for each handicapped child at the time of placement and by December first of each subsequent school year, and provide for annual review of the IEP. R.C. 3323.08.

The Department of Education has, by rule, provided for a variety of types of placements for special education. 3 Ohio Admin. Code 3301-51-03(A)(2) provides that "each school district shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services." *See also* 3 Ohio Admin. Code. 3301-51-02(E)(3)(f). 3 Ohio Admin. Code 3301-51-01(H) contains the following definition:

"Continuum of alternative placements" means the availability of different types of educational environments, including, but not limited to:

- (1) Regular classes;
- (2) Supplemental services;
- (3) Individual/small group instruction;
- (4) Special class/learning center located in:
 - (a) A public school building;
 - (b) A separate school in the school district;
 - (c) A separate facility, such as:
 - (i) A county board of mental retardation and developmental disabilities facility;
 - (ii) The Ohio state school for the blind or the Ohio school for the deaf; or
 - (iii) A state institution operated by the Ohio department of mental health, the Ohio department of mental retardation and developmental disabilities, or the Ohio youth commission; or
- (5) Home instruction.

See also 3 Ohio Admin. Code 3301-51-01(DDI). The provision of a continuum of alternative placements is consistent with federal requirements. *See* 34 C.F.R. §300.551 (1990).

A limitation on the educational placement of a handicapped child is imposed by state and federal provisions governing the mainstreaming of handicapped children. In order to qualify under the Federal Act for federal assistance for education for the handicapped, a state must establish:

procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily....

20 U.S.C. §1412(5)(B) (1988); *see also* 34 C.F.R. §§300.551-556 (1990). Ohio has, in R.C. 3323.04 and R.C. 3311.51, adopted the requirement that, to the maximum extent appropriate, handicapped children shall be educated with children who are not handicapped. This mainstreaming requirement is also phrased in terms of providing educational placement in the "least restrictive environment." *See* 34 C.F.R. §300.552(d) (1990); 3 Ohio Admin. Code 3301-51-01(AA); Op. No. 80-009.

The result of the mainstreaming requirement is that, even though a child lives in an institution (such as a state developmental center), the child must be

³ Effective July 1, 1991, this requirement will extend to all handicapped children three to twenty-one years of age. *See* Am. Sub. II.B. 248, 118th Gen. A. (1989) (eff. Oct. 30, 1989, with certain provisions eff. July 1, 1991).

educated in a less restrictive environment – such as a program operated by a school district or by a county board of mental retardation and developmental disabilities ("county MR/DD board") – if that environment is appropriate for the child. See generally *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) ("[the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 *et seq.*] does not require mainstreaming in every case but its requirement that mainstreaming be provided to the *maximum* extent appropriate indicates a very strong congressional preference"), *cert. denied*, 464 U.S. 864 (1983); *Gillette v. Fairland Board of Education*, 725 F.Supp. 343, 350 (S.D. Ohio 1989) ("the administrative burden imposed by educating a handicapped child together with non-handicapped children cannot overcome the strong Congressional preference for mainstreaming, absent evidence the handicapped child would not benefit from mainstreaming; that the benefits to be gained from instruction in a segregated setting far outweigh the benefits to be received from mainstreaming; or that the child would be a disruptive force in a non-segregated setting"), *appeal dismissed*, 895 F.2d 1413 (6th Cir. 1990). The requirement that handicapped children be mainstreamed to the maximum extent appropriate has resulted in situations in which children who reside in a state developmental center attend a program operated by a county MR/DD board or a board of education for some or all of their education, rather than being educated exclusively within the center.

It should be noted that the provisions of R.C. Chapter 3323 govern placement for purposes of special education only, and such placement may be different from placement made for other purposes.⁴ A child may, for example, be admitted to a state developmental center, either voluntarily or by court order, because the center is an appropriate environment for the child for medical, social, or emotional reasons, rather than specifically for educational purposes. See, e.g., R.C. 5123.03; R.C. 5123.69; R.C. 5123.71. See generally, e.g., *Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir.), *cert. denied*, 474 U.S. 918 (1985); *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981) (discussing the difficulty of determining whether residential placement is necessary for educational purposes or whether it is needed for medical, social, or emotional problems that can be separated from the learning process); *North v. District of Columbia Board of Education*, 471 F.Supp. 136 (D.C. Cir. 1979). Admission to a state developmental center does not, in itself, constitute a determination that the child should be educated only in the programs established and maintained by the developmental center. Rather, the appropriate board of education⁵ is required to consider each

⁴ 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, such as a State school for the deaf or blind.

⁵ I am not, for purposes of this opinion, determining which school district is responsible for making the educational placement of a child who resides in a state developmental center, or which school district is the district in which such a child "resides" for purposes of educational placement. The issue of whether children who live in a state developmental center must be accepted into a program of the county MR/DD board of the county in which the center is located was addressed in *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). That case is currently being appealed.

I note, however, that, in addition to requirements imposed by the Education of the Handicapped Act, 20 U.S.C. §§1400-1485 (1988), requirements relating to education of the handicapped have been imposed under Section 504 of the Federal Rehabilitation Act of 1973

child and to place the child in an appropriate educational program. See R.C. 3323.04; Op. No. 80-009; 1977 Op. Att'y Gen. No. 77-069 at 2-249 ("the ultimate responsibility for educational placement of handicapped children rests with the local school boards under R.C. 3323.04"). That program may be one that is established and maintained by the developmental center, or it may be a program provided by another entity, such as a county MR/DD board or a school district.

Your request references R.C. 3323.091, which states:

(A) The department of mental health, *the department of mental retardation and developmental disabilities*, the department of youth services, the department of rehabilitation and correction, and the board of trustees of the Ohio veterans' children's home *shall establish and maintain special education programs for handicapped children in institutions under their jurisdiction according to standards adopted by the state board of education*. The superintendent of each institution providing special education under this chapter may apply to the state department of education for unit funding, which shall be paid in accordance with divisions (N) and (O)(1) of section 3317.024 of the Revised Code.

(B) This division does not apply to the Ohio veterans' children's home. On or before the thirtieth day of June of each year, *the superintendent of each institution that during the school year provided special education pursuant to this section shall prepare a statement for each handicapped child under twenty-two years of age who has received special education*. The statement shall contain the child's name and the name of the child's school district of residence. Within sixty days after receipt of such statement, *the department of education shall:*

(1) *Pay to the institution submitting the statement an amount equal to the tuition calculated under section 3317.08 of the Revised Code for the period covered by the statement, and deduct the same from the amount of state funds, if any, payable under sections 3317.022 and 3317.023 of the Revised Code, to the child's school district of residence; or*

(2) *If the amount of such state funds is insufficient, require the child's school district of residence to pay the institution submitting the statement an amount equal to the amount determined under division (B)(1) of this section.*⁶ (Emphasis and footnote added.)

("Rehabilitation Act"), 29 U.S.C. §794 (1988). The Rehabilitation Act is designed to eliminate discrimination on the basis of any handicap in any program or activity receiving federal funds. Rules promulgated under the Rehabilitation Act require that "[a] recipient [of federal financial assistance] that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction," 34 C.F.R. §104.33(a) (1989), and provide mainstreaming requirements. 34 C.F.R. §104.34(a) (1989). It has been found that the failure of a school district to provide an appropriate educational program to handicapped children residing in an institution within its jurisdiction violates 34 C.F.R. §§104.33 and 104.34. Office for Civil Rights, Complaint No. 04-83-1123 against Tuscaloosa City (AL) School District (June 27, 1986), Educ. for the Handicapped L. Rep. (CRR) 352:273 (Feb. 13, 1987).

⁶ Effective July 1, 1991, R.C. 3323.091(B) will be modified so that it also contains provisions relating to the funding of education 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).

I am aware that, in Op. No. 77-069 (syllabus, paragraph 3), my predecessor concluded:

Under R.C. 3323.091, all educational programs for handicapped children placed in institutions operated by or under the direction of either the Department of Mental Health and Mental Retardation⁷ or the Ohio Youth Commission, including individual educational programs (IEP) as defined in R.C. 3323.01(E), are to be established by the departments which operate those institutions according to standards adopted by the State Board of Education. (Footnote added.)

This statement may be read as suggesting that handicapped children who reside in a state developmental center may participate only in programs operated by the Department of MR/DD. Such a proposition is inconsistent with the mainstreaming requirements of state and federal law and is not required by the language of R.C. 3323.091. The language of R.C. 3323.091 stating that the Department of MR/DD "shall establish and maintain special education programs for handicapped children in institutions under their jurisdiction according to standards adopted by the state board of education" appears, instead, to require that the Department of MR/DD look to standards adopted by the State Board of Education to determine what types of special education programs it is authorized to provide and what criteria such programs must satisfy. Such an interpretation is consistent with R.C. 3323.07, which requires the State Board of Education to authorize the establishment and maintenance of programs for the education of all handicapped children of compulsory school age⁸ and states: "The state board [of education] shall require the boards of education of school districts, shall authorize the department of mental health and the department of mental retardation and developmental disabilities, and may authorize any other educational agency, to establish and maintain such special educational programs in accordance with standards adopted by the state board of education." *See also* R.C. 3323.02 ("[n]o educational program for handicapped children shall be operated except in accordance with procedures, standards, and guidelines adopted by the state board of education..."); 3 Ohio Admin. Code 3301-51-06(A)(1); 1988 Op. Att'y Gen. No. 88-096; 1980 Op. Att'y Gen. No. 80-009. *See generally* R.C. 3301.15. Such an interpretation is consistent with federal requirements that each educational program for handicapped children administered within a state meet educational standards of the state educational agency and be under the general supervision of the persons responsible for educational programs for handicapped children in the state educational agency. 20 U.S.C. §1412(6) (1988); 34 C.F.R. §300.600 (1990).⁹ Relevant rules of the State Board of Education appear in 3 Ohio Admin. Code Chapter 3301-55. Rule 3301-55-01 states that a state developmental center shall provide a special education program "for eligible pupils placed in" such program pursuant to rule 3301-51-02, which sets forth procedural safeguards for the provision of special education, including the creation and implementation of an IEP. The eligibility of children for such a program shall be determined in accordance with rules promulgated by the State Board of Education. 3

⁷ When 1977 Op. Att'y Gen. No. 77-069 was issued, Ohio had a single department known as the Department of Mental Health and Mental Retardation. *See* 1971-1972 Ohio Laws, Part II, 1724 (Am. Sub. H.B. 494, eff. July 12, 1972). The existing Department of Mental Health and Department of Mental Retardation and Developmental Disabilities were created by 1979-1980 Ohio Laws, Part II, 3847 (Am. Sub. H.B. 900, eff. May 22, 1980, with certain provisions eff. July 1, 1980).

⁸ Effective July 1, 1991, this requirement will extend to 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).

⁹ A comment to 34 C.F.R. §300.600 (1990) states:

The requirement [for State educational agency responsibility]...reflects the desire of the Congress for a central

Ohio Admin. Code 3301-55-01(C) ("[s]tate developmental centers operated by the [department of MR/DD] shall provide programs to serve school-age multi-handicapped and developmentally handicapped children determined eligible [under 3 Ohio Admin. Code 3301-51-04(A) and 3301-51-04(F)]"). The program shall be offered to pupils who are admitted to the center and are eligible under R.C. Chapter 5123. 3 Ohio Admin. Code 3301-55-01(C)(2). "A pupil may be enrolled in the program if admitted to the center...on a day basis." 3 Ohio Admin. Code 3301-55-01(C)(3). The State Board of Education has, thus, as part of its program of assuring that an appropriate public education shall be available to all handicapped children, prescribed the type of education that state developmental centers are to provide and the type of educational needs that such programs will meet.

In accordance with 3 Ohio Admin. Code Chapter 3301-55, I read R.C. 3323.091 as requiring that special education programs established and maintained in a state developmental center must comply with standards adopted by the State Board of Education. I do not find that R.C. 3323.091 mandates that children who reside at a state developmental center must receive their special education at the developmental center; such an interpretation would violate the requirement that each handicapped child be educated in the least restrictive environment. I overrule Op. No. 77-069 to the extent that it is inconsistent with the analysis set forth in this opinion.¹⁰

I conclude generally, in response to your question, that the board of education of the appropriate school district is responsible for the educational placement of a child who lives in a state developmental center.¹¹ I turn now to

point of responsibility and accountability in the education of handicapped children within each State. With respect to State educational agency responsibility, the Senate Report on Pub. L. 94-192 includes the following statements:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency***.

Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many states, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (Senate Report No. 94-168, p. 24 (1975))

¹⁰ 1977 Op. Att'y Gen. No. 77-069 also concluded that the IEP of a handicapped child placed in an institution under the direction of the Department of MR/DD should be established by that Department according to standards adopted by the State Board of Education. Because you have not raised any question as to which entity is responsible for preparation of an IEP, I am not considering that issue at this time. The fact that I am not addressing that issue should not, however, be interpreted as agreement with the analysis set forth in Op. No. 77-069 with respect to the question of who is responsible for assuring the proper development, implementation, and review of an IEP.

¹¹ This conclusion is consistent with the Federal Rehabilitation Act. See note 5, *supra*.

your concerns relating to the obligations of the school district to pay for the education provided in accordance with that placement.

R.C. 3323.091, which is referenced in your opinion request and quoted above, requires that the Department of MR/DD "establish and maintain special education programs for handicapped children" in state developmental centers. R.C. 3323.091 authorizes the superintendent of each such center to apply to the State Department of Education for unit funding for such special education, to be paid in accordance with R.C. 3317.024.

Pursuant to R.C. 3323.091, when a state developmental center provides special education pursuant to R.C. 3323.091 to a handicapped child under age twenty-two, it so informs the Department of Education. The developmental center is then entitled to the amount of tuition calculated under R.C. 3317.08.¹² If funds in the amount of such tuition are payable to the child's school district of residence¹³ by the state under R.C. 3317.022 and 3317.023, the Department of

¹² R.C. 3317.08 states, in part:

Unless otherwise provided by law, tuition shall be computed in accordance with this section. A district's tuition charge for a school year shall be the quotient obtained by dividing:

(A) The district's total taxes charged and payable for current expenses for the tax year preceding the tax year in which the school year begins as certified under division (A)(3) of section 3317.021 of the Revised Code, by

(B) The district's average daily membership less one-half the kindergarten average daily membership certified pursuant to section 3317.03 of the Revised Code for the preceding school year.

Effective July 1, 1991, R.C. 3317.08 will contain additional provisions for the computation of tuition 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).

¹³ The definition of "school district of residence" is set forth in R.C. 3323.01, as follows:

(I) As used in sections 3323.09, 3323.091, 3323.13, and 3323.14 of the Revised Code, "school district of residence" means:

(1) The school district in which the child's parents reside, or if not so determined;

(2) The last school district in which the child's parents are known to have resided if the parents' whereabouts are unknown, or if not so determined;

(3) The school district determined by the court under section 2151.357 of the Revised Code, or if no district has been so determined, the school district as determined by the probate court of the county in which the child resides. The school district of residence that had been established under this section on December 12, 1983 shall remain the child's school district of residence unless a district of residence can be determined under division (I)(1) or (2) of this section.

(4) Notwithstanding divisions (I)(1) to (3) of this section, if a school district is required by section 3313.65 of the Revised Code [admission and tuition for children of institutionalized or incarcerated parents] to pay tuition for a child, that district shall be the child's school district of residence.

See generally note 5, *supra*; 1987 Op. Att'y Gen. No. 87-026; 1983 Op. Att'y Gen. No. 83-041; 1982 Op. Att'y Gen. No. 82-106; 1975 Op. Att'y Gen. No. 75-019 (discussing earlier version of Ohio law).

Education shall pay that amount to the developmental center and deduct that amount from the state funds payable to the school district; otherwise, the child's school district of residence shall pay the amount of such tuition directly to the developmental center.¹⁴

The provisions of R.C. 3323.091 are clear in their application to a situation in which a handicapped child under age twenty-two resides in a state developmental center and receives special education in a program established and maintained by that center. The center may apply for unit funding under R.C. 3317.024. The center is also entitled to receive the amount of tuition calculated pursuant to R.C. 3317.08 for providing the child with special education through a program that it establishes and maintains. The tuition is to be paid by the State Department of Education from state funds that are payable to the child's school district of residence under R.C. 3317.022 and 3317.023 or, if such amounts are insufficient, the State Department of Education is to require that the child's school district of residence pay the tuition to the developmental center. *See* Op. No. 77-069.

R.C. 3323.091 does not, however, appear to be applicable to a situation in which a handicapped child under age twenty-two resides in a state developmental center and receives special education either in a program established and maintained by a county MR/DD board or in a program established and maintained by a school district. A program operated by a county MR/DD board or a board of education is not a program established and maintained by a state developmental center, and it does not appear that the center is permitted to receive unit funding or payments of tuition under R.C. 3323.091 for special education provided by a county MR/DD board or a board of education. *Cf.* 1986 Op. Att'y Gen. No. 86-040 (concluding that a county MR/DD board may receive state unit funding for programs provided by other entities pursuant to contract with the county MR/DD board). It appears, instead, that when a child who resides in a state developmental center receives special education from a county MR/DD board or a school district, the duty of the State Department of Education or a school district to pay for such special education is governed by statutes other than R.C. 3323.091.

The issue of funding education for the handicapped is a broad one. I note that the provisions governing state aid to education appear for the most part in R.C. Chapter 3317, and that certain of those provisions relate specifically to funds for the education of handicapped children by school districts or county MR/DD boards. *See, e.g.,* R.C. 3317.024; R.C. 3317.03; R.C. 3317.05; R.C. 3317.052; R.C. 3317.11; R.C. 3317.16; *see also* R.C. 3313.981; R.C. 3323.15 (authorizing the State Board of Education to "arrange to pay to any board of education, the board for any handicapped children who are not residents of the district but for whom the district is providing special education," in accordance with established rules and standards); 3 Ohio Admin. Code 3301-51-28 (providing that payment by the state of all or any part of the expense of providing educational services to severely multiply handicapped children may be granted to a board of education or county MR/DD board). Your question does not relate directly to the duties of the State Department of Education in this regard, and I shall not address those duties.

Specific provisions govern situations in which a school district has the statutory duty or authority to make payments to a county MR/DD board or a school district. I shall not attempt to discuss in detail the application of these statutes to various situations. Rather, for purposes of this opinion I shall simply refer you to various statutes that may be applicable and describe their general subject matter. I recognize that the application of these provisions to particular circumstances may be complex and may involve issues that have not yet been clearly resolved. *See, e.g.,* note 5, *supra*.

¹⁴ Effective July 1, 1991, R.C. 3323.091(B) will contain additional provisions for the payment of tuition 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).

Provisions governing payments by a school district to a county MR/DD board for the provision of special education appear in R.C. 3323.142. R.C. 3323.142 authorizes a county MR/DD board to charge a school district for "educational costs in excess of the per pupil amount received by the board under [R.C. Chapter 3317]" (also known as "excess costs"). This provision applies to the school district that is responsible for tuition and is effective "[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."¹⁵ See generally 1991 Op. Att'y Gen. No. 91-025. The amount of the excess cost is to be determined in accordance with rules established by the Department of Education under R.C. 3323.14, and payment is to be made by the school district directly to the county MR/DD board. R.C. 3323.142; see 3 Ohio Admin. Code 3301-53-03.

R.C. 3323.142 also authorizes a school district and the county MR/DD board that serves the school district to negotiate and contract for payments by the school district 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"¹⁶ and whose IEP 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." Such contracts may be entered into at or after the time of placement. See also R.C. 3323.08.

Provisions governing payments by a school district to another school district for the provision of special education appear in R.C. 3313.64, R.C. 3323.13, and R.C. 3323.14. R.C. 3313.64 deals generally with the public schools that a child may attend free of charge, and with the obligation of one school district to pay tuition to another school district for the education of a particular child. R.C. 3317.08, R.C. 3317.081, and R.C. 3327.06 govern the computation and collection of such tuition. With respect to the education of handicapped children, R.C. 3313.64(C)(1) provides that, if a child receives special education in accordance with R.C. Chapter 3323, "tuition shall be paid in accordance with [R.C. 3323.13, 3323.14, or 3323.141], regardless of who has custody of the child or whether he resides in a home."

R.C. 3323.13 provides that, when a child who is a school resident of one school district receives special education from another district,¹⁷ the district providing the education may require the district of residence to pay an amount not exceeding the tuition charged for the education for a child of normal needs of the same school grade.¹⁸ See R.C. 3317.05; R.C. 3317.08. The district of residence may contract with another district for transportation of the child into a school in the

¹⁵ The question whether a child who lives in a state developmental center is a resident of the county in which the center is located is currently in litigation. See note 5, *supra*.

R.C. 3313.64 pertains to the provision of free schooling for residents and sets forth circumstances in which tuition must be paid. R.C. 3313.64(C)(1) states: "If the child receives special education in accordance with [R.C. Chapter 3323], tuition shall be paid in accordance with [R.C. 3323.13, 3323.14, or 3323.141] regardless of who has custody of the child or whether he resides in a home." R.C. 3313.65 governs tuition for children of institutionalized or incarcerated parents.

¹⁶ See note 5, *supra*.

¹⁷ See note 5, *supra*.

¹⁸ Effective July 1, 1991, R.C. 3323.13 will contain provisions governing the payment of tuition 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).

other district. Upon direction of the State Board of Education, the board of the district of residence shall pay for transportation and tuition. R.C. 3323.13. *See generally* 1987 Op. Att'y Gen. No. 87-026; 1983 Op. Att'y Gen. No. 83-041.

R.C. 3323.14 provides that, when a child who is a school resident of one school district¹⁹ receives special education from another district and the per capita cost exceeds the per capita amounts received by the district of attendance under R.C. Chapter 3317 and from the State Board of Education, the district of residence shall pay to the district providing the special education the "excess cost" as determined by using the formula approved by the Department of Education and agreed upon in contracts when the child was accepted for enrollment.²⁰ R.C. 3323.14 does not authorize the payment of corresponding costs to a county MR/DD board. *See* 1984 Op. Att'y Gen. No. 84-006.

There are certain provisions of the Revised Code that govern the payment of tuition for special education provided to an out-of-state child who resides in a "home" in Ohio. "Home" is defined to mean "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: (1) the home is licensed, certified, or approved for such purpose by the state; (2) the home is operated by a person who is licensed, certified, or approved by the state; (3) the home accepted the child through placement by a person who is licensed, certified, or approved by the state; or (4) the home is a children's home created under R.C. 5153.21 [county children's home] or R.C. 5153.36 [district children's home]. R.C. 3313.64(A)(4). R.C. 3323.141 provides that a "home," as defined in R.C. 3313.64, shall pay tuition for certain children who reside in the home and who receive special education and related services from a school district or county MR/DD board.²¹ R.C. 3313.141 applies to any child who is not in the legal or permanent custody of an Ohio resident or a government agency in this state and whose parents are not known to have been residents of Ohio after the child's birth. R.C. 3323.09(C)(1) provides that the county MR/DD board may collect tuition from a "home," as defined in R.C. 3313.64, for providing special education to a resident of the home who was not in the legal or permanent custody of an Ohio resident or government agency in this state, and whose parents are not known to have been Ohio residents after the child's birth. The tuition is to be computed in the manner prescribed by R.C. 3323.141. The issue of who pays tuition and other costs incurred in connection with out-of-state children who are placed in state developmental centers in Ohio is a specialized one and this opinion does not address that issue. Costs relating to such children are governed by various provisions of law in addition to R.C. Chapter 3323. *See, e.g.*, R.C. 5103.20 (Interstate Compact on Placement of Children); R.C. 5103.21; R.C. 5119.50 (Interstate Compact on Mental Health); R.C. 5119.51-53.

R.C. 3323.09(C)(2) provides that a county MR/DD board shall prepare a report for the school district of residence of a child for which it provides an education and who is not an out-of-state child covered by R.C. 3323.09(C)(1). There is, however, no provision for payment by the school district to the county MR/DD board in response to the receipt of such report. *Compare* R.C. 3323.09(C)(2) with Op. No. 84-006 and 1981 Op. Att'y Gen. No. 81-028 (discussing earlier version of R.C. 3323.09 that provided for the payment of tuition by a school district

¹⁹ *See* note 5, *supra*.

²⁰ Effective July 1, 1991, R.C. 3323.14 will apply to a handicapped preschool child who is 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).

²¹ Effective July 1, 1991, R.C. 3323.141 will contain provisions relating to the computation of tuition 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).

to a county MR/DD board; the bill that removed the tuition provision added language providing state educational funding for county MR/DD boards, see 1985-1986 Ohio Laws, Part II, 2761, 2801-2809, 2817-18 (Am. Sub. H.B. 238, eff. July 1, 1985) (amending, *inter alia*, R.C. 3317.024, 3317.03, 3317.05)).

For the reasons set forth above, it is my opinion, and you are advised, as follows:

1. The board of education of the appropriate school district is responsible for the educational placement of a handicapped child who lives in a state developmental center. Such placement may be, *inter alia*, in a program operated by a state developmental center, in a program operated by a county board of mental retardation and developmental disabilities, or in a program operated by a school district. (1977 Op. Att'y Gen. No. 77-069, overruled in part.)
2. Under R.C. 3323.091, when a handicapped child under age twenty-two resides in a developmental center operated by the Ohio Department of Mental Retardation and Developmental Disabilities and receives special education in a program established and maintained by that center, and when the center submits a proper statement, the State Department of Education shall either: (1) pay to the center the amount of tuition calculated under R.C. 3317.08 and deduct that amount from state funds payable under R.C. 3317.022 and R.C. 3317.023 to the child's school district of residence; or (2) if the amount of such state funds is insufficient, require the child's school district of residence to pay the amount of tuition to the center.
3. When a handicapped child under age twenty-two resides in a developmental center operated by the Ohio Department of Mental Retardation and Developmental Disabilities and receives special education in a program operated by a county board of mental retardation and developmental disabilities or a school district, there is no obligation for the State Department of Education or a school district to pay any amount of tuition to the developmental center pursuant to R.C. 3323.091.
4. A school district is responsible for making payments in accordance with R.C. 3323.142 to a county board of mental retardation and developmental disabilities for the provision of special education by the board.
5. A school district is responsible for making payments in accordance with R.C. 3313.64, R.C. 3323.13, and R.C. 3323.14 to another school district for the provision of special education by that other school district.