

OPINION NO. 87-037**Syllabus:**

1. Under R.C. 3319.321, a non-custodial parent of a handicapped student has the same right of access to the student's records as a custodial parent except where access is limited by an agreement between the parents or a court order affecting the rights of the parents. Parents of handicapped students have the same right of access to their child's school records as parents of non-handicapped students.
2. R.C. 3323.05 does not limit a non-custodial parent's right of access to his handicapped child's student records.
3. R.C. 1347.08 does not affect the right of parents to have access to their child's school records under R.C. 3319.321.

To: Franklin B. Watter, Superintendent of Public Instruction, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 4, 1987

I have before me your request for my opinion as to whether and under what circumstances a non-custodial parent may have access to the school records of a handicapped child. You also ask whether R.C. 1347.08, a section of the so-called "Privacy Act", would affect the answer to this question.

Access to student records is governed by R.C. 3319.321, which reads as follows:

(A) No person shall release, or permit access to, the names or other personally identifiable information concerning any pupils attending a public school, to

any person or group for use in a profit-making plan or activity.

(B) No person shall release, or permit access to, personally identifiable information other than directory information concerning any pupil attending a public school, for purposes other than those identified in division (C) or (E) of this section, without the written consent of the parent, guardian, or custodian of each such pupil who is less than eighteen years of age, or without the written consent of each such pupil who is eighteen years of age or older.

(1) For purposes of this section, "directory information" includes a pupil's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, date of graduation, and awards received.

(2) Except for directory information and except as provided in division (E) of this section, information covered by this section that is released shall only be transferred to a third or subsequent party on the condition that such party will not permit any other party to have access to such information without written consent of the parent, guardian, or custodian, or of the pupil who is eighteen years of age or older.

(3) Except as otherwise provided in this section, any parent of a pupil may give the written parental consent required under this section. Where parents are separated or divorced, the written parental consent required under this section may be obtained from either parent, subject to any agreement between such parents or court order governing the rights of such parents. In the case of a pupil whose legal guardian is in an institution, a person independent of the institution who has no other conflicting interests in the case shall be appointed by the board of education of the school district in which the institution is located to give the written parental consent required under this section.

(C) Nothing in this section shall limit the administrative use of public school records by a person acting exclusively in his capacity as an employee of a board of education or of the state or any of its political subdivisions, any court, or the federal government, and nothing in this section shall prevent the transfer of a pupil's record to an education institution for a legitimate educational purpose. However, except as provided in this section, public school records shall not be released or made available for any other purpose. Fingerprints, photographs, or records obtained pursuant to section 3313.96 or 3319.322 [3319.32.2] of the Revised Code, or pursuant to division (E) of this section, or any medical, psychological, guidance, counseling, or other information that is derived from the use of the fingerprints, photographs, or records, shall not be admissible as evidence against the minor who is the subject of the fingerprints, photographs, or records in any proceeding in any court. The provisions of this division regarding the administrative use of records by an employee of the state or any of its

political subdivisions or of a court or the federal government shall be applicable only when the use of the information is required by state statute adopted before November 19, 1974, or by Federal law.

(D) A board of education may require, subject to division (E) of this section, a person seeking to obtain copies of public school records to pay the cost of reproduction, which shall not exceed the actual cost to the school.

(E) A principal or chief administrative officer of a public school or any employee of a public school who is authorized to handle school records, shall provide access to a student's records to a law enforcement officer who indicates that he is conducting an investigation and that the student is or may be a missing child, as defined in section 2901.30 of the Revised Code. Free copies of information in the student's record shall be provided, upon request, to the law enforcement officer, if prior approval is given by the student's parent, guardian, or legal custodian. Information obtained by the officer shall be used solely in the investigation of the case. The information may be used by law enforcement agency personnel in any manner that is appropriate in solving the case, including, but not limited to, providing the information to other law enforcement officers and agencies and to the bureau of criminal identification and investigation for purposes of computer integration pursuant to section 2901.30 of the Revised Code. (Emphasis added.)

Under R.C. 3319.321(B), parents of students under age eighteen must consent to the release of non-directory information pertaining to their children. Nothing in this section prevents the parents from being the recipients of the released information. Thus, parents have a right of access to their child's student records. Also, the section specifically states that where the parents are divorced or separated the consent of either parent is valid unless parental access is limited by an agreement between the parents or a court order affecting the rights of the parents. Thus, by virtue of R.C. 3319.321, a non-custodial parent of a student has as much right of access to his child's school records as a custodial parent unless such an agreement or court order is in effect.

Nothing in R.C. 3319.321 evidences an intention to impose additional or different limitations upon access to records of handicapped students which would not apply to non-handicapped students. As a result, the parents of a handicapped student have as much right of access to the student's records as parents of a non-handicapped student have to their child's records. Also, by the terms of R.C. 3319.321(B)(3), the non-custodial parent of a handicapped student has as much right of access to the student's records as the custodial parent except where access is limited by an agreement between the parents or a court order affecting the rights of the parents.

In your letter, you express concern about an apparent conflict between R.C. 3323.05 and R.C. 3319.321. R.C. 3323.05 reads, in part, as follows:

The state board of education shall establish procedures to assure that handicapped children and their parents are guaranteed procedural safeguards in

decisions under this chapter relating to the identification, evaluation, or educational placement of a handicapped child or the provision of education or related services under this chapter.

The procedures shall include, but need not be limited to:

(A) An opportunity for the parents to examine all relevant records with respect to identification, evaluation, or educational placement of the child, and to obtain at their own expense an independent educational evaluation of the child;

(B) Procedures to protect the rights of the child when the parents of the child are unknown or unavailable, or when the child is a ward of the state, including the assignment, in accordance with section 3323.051 [3323.05.1] of the Revised Code, of an individual to act as a surrogate for the parents;

(C) Prior written notice to the child's parents of any proposal or refusal to initiate or change the identification, evaluation, or educational placement of the child, including notice of all procedures available under this section. The state board of education may establish procedures to provide for the written acknowledgment by the parent of a notice of a child's placement or change of placement. In cases when no written acknowledgment has been obtained, notice of placement or change of placement shall be made by certified mail. A parent's acknowledgment under this division does not negate his rights to present complaints and appeal a placement decision under this section.

R.C. 3323.01(H) defines the term "parents" as follows:

As used in this chapter and Chapter 3321. of the Revised Code;

....
 (H) "Parents" means either parent. If the parents are separated or divorced, "parent" means the parent with legal custody of the handicapped child. Except as used in division (I) of this section and in sections 3323.09 and 3323.141 [3323.14.1] of the Revised Code, "parents" includes a child's guardian or custodian. This definition does not apply to Chapter 3321. of the Revised Code. (Emphasis added.)

Your concern appears to be that R.C. 3323.05, when read in conjunction with the definition of "parents" in R.C. 3323.01(H), limits access of the non-custodial parent to the records of a handicapped student. As a general rule, the naming of a class within a statute excludes those not named. See State ex rel. Boda v. Brown, 157 Ohio St. 368, 105 N.E.2d 643 (1952). Thus, an argument might be made that by specifically stating that custodial parents shall have an opportunity to examine the records of a handicapped student, R.C. 3323.05 excludes a non-custodial parent from such access. However, I do not believe such an interpretation to be the correct reading of R.C. 3323.05. It must be noted that the definition of "parent" found in R.C. 3323.01(H) expressly applies only to R.C. Chapter 3323. Since the more limited definition of the term "parent" found in R.C. 3323.01(H) expressly does not apply to any statute outside of R.C. Chapter 3323., there is no reason to read the limited definition of "parent" into R.C. 3319.321, particularly since it expressly

permits both custodial and non-custodial parents to release student information. Moreover, R.C. 3323.05 requires the State Board of Education to establish procedures which will insure that "parents" (as defined by R.C. 3323.01(H)), are involved in identification, evaluation, and placement of handicapped students. It does not create a right of parental access to school records, since that right exists independently by virtue of R.C. 3319.321. Rather, R.C. 3323.05 affects timing and notice, and imposes an obligation upon the state board to establish procedures applicable to "parents" of handicapped children. The right of parental access to school records stems from R.C. 3319.321, not R.C.3323.05. Since 3323.05 does not create a right of access for any parent, it should not be viewed as limiting the non-custodial parent's right to access to his child's records.

Your letter also asks "[w]ould Section 1347.08 of the Revised Code, a section of the Ohio Privacy Act have any relevance to the question of whether a non-custodial parent may have access to school records for a handicapped child." R.C. 1347.08 reads, in part, as follows:

(A) Every state or local agency that maintains a personal information system, upon the request and the proper identification of any person who is the subject of personal information in the system, shall:

(1) Inform the person of the existence of any personal information in the system of which he is the subject;

(2) Except as provided in divisions (C) and (E)(2) of this section, permit the person, his legal guardian, or an attorney who presents a signed written authorization made by the person, to inspect all personal information in the system of which he is the subject;

(3) Inform the person about the types of uses made of the personal information, including the identity of any users usually granted access to the system.

(B) Any person who wishes to exercise a right provided by this section may be accompanied by another individual of his choice.

(C) A state or local agency, upon request, shall disclose medical, psychiatric, or psychological information to a person who is the subject of the information or to his legal guardian, unless a physician, psychiatrist, or psychologist determines for the agency that the disclosure of the information is likely to have an adverse effect on the person, in which case the information shall be released to a physician, psychiatrist, or psychologist who is designated by the person or by his legal guardian.

This section provides a general right of access to personal information in systems maintained by state and local agencies. Under the facts you present, the only possible conflict between R.C. 1347.08 and R.C. 3319.321 is the requirement in R.C. 1347.08(C) that where a physician, psychiatrist or psychologist determines that release will have an adverse impact on the person, the information must be released to a physician, psychiatrist or psychologist who is designated by the person or his legal guardian. However, I believe that any conflict between R.C. 1347.08 and R.C. 3319.321 must be resolved in favor of R.C. 3319.321. "[A] specific statute will prevail

over a prior enacted general statute. [Citations omitted]." Cincinnati v. Bossert Machine Co., 16 Ohio 2d 76 at 79, 243 N.E.2d 105 at 107 (1968). See R.C. 1.51. R.C. 1347.08 was enacted on April 21, 1976. 1976 Ohio Laws 236 (Am. Sub. S.B. No. 99, eff. July 21, 1976). The preamble of the bill states that its purpose is "to regulate the use of personal information by state and local governments." Am. Sub. S.B. No. 99. Thus, by the terms of the preamble, 1347.08 was intended to apply to government generally. R.C. 3319.321 was enacted on May 15, 1976. 1976 Ohio Laws 818 (Am. S.B. No. 367, eff. August 24, 1976). The stated purpose of this bill is "to restrict the release of information about public school pupils." Am. S.B. No. 367. Thus, R.C. 3319.321 is both more recent and more specific, and prevails over R.C. 1347.08. This interpretation is reinforced by the observation that R.C. 3319.321 was apparently passed in order to bring the state's public schools into compliance with federal law. The Family Education Rights and Privacy Act of 1974, 20 U.S.C. 1232g(a)(1)(A), states that "no funds shall be available...to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students...the right to inspect and review the education records of their children." This federal law has no exception similar to the one found in R.C. 1347.08(C).¹ Thus, to read the prohibition of R.C. 1347.08(C) into R.C. 3319.321 thereby preventing parents from directly viewing their children's records, even under the circumstances described in R.C. 1347.08(C), might jeopardize federal funding.

Your question asks in part: "under what circumstances [may] a non-custodial parent...have access to the record of a handicapped student." Based upon your letter of request, it is my understanding that you are interested in a comparing of the rights of custodial parents, non-custodial parents and parents of non-handicapped students. In making that comparison, I conclude that a non-custodial parent of a handicapped student has the same right of access to his child's records as do other parents. It is not my purpose to attempt to compile an exhaustive list of the circumstances when parents may examine the school records of their children.

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

1. Under R.C. 3319.321, a non-custodial parent of a handicapped student has the same right of access to the student's records as a custodial parent except where access is limited by an agreement between the parents or a court order affecting the rights of the parents. Parents of handicapped students have the same right of access to their child's school records as parents of non-handicapped students.

¹ Although 20 U.S.C. 1232g(a)(4)(B)(IV) does restrict viewing of medical psychiatric, or psychological records in certain instances, this restriction only applies in situations where the student is eighteen years of age or older, or is attending a post-secondary institution. The restriction in 20 U.S.C. 1232g(a)(4)(B)(IV) does not apply where parents are attempting to examine the records of their child and the child is under eighteen years of age.

2. R.C. 3323.05 does not limit a non-custodial parent's right of access to his handicapped child's student records.
3. R.C. 1347.08 does not affect the right of parents to have access to their child's school records under R.C. 3319.321.