

OPINION NO. 81-028**Syllabus:**

R.C. 3323.09 requires that the board of education of the school district of residence of a handicapped child under twenty-two years of age who has received special education from a county board of mental retardation and developmental disabilities make tuition payments for such child.

To: Thomas S. Delay, Jackson County Pros. Atty., Jackson, Ohio
By: William J. Brown, Attorney General, May 8, 1981

June 1981

I have before me your request for an opinion concerning an interpretation of R.C. 3323.09. Specifically, your question is as follows:

Does Section 3323.09 Revised Code require tuition payments by school districts for all handicapped children under the age of twenty-two years or only those of compulsory school age, in special education programs operated by or under the direction of the Department of Mental Retardation?

The statutory provision most directly applicable to your question is the second paragraph of R.C. 3323.09, which provides in pertinent part as follows:

A county board of mental retardation and developmental disabilities that during the school year provided special education pursuant to this section for mentally handicapped children shall prepare a statement for each mentally handicapped child under twenty-two years of age who has received such special education. The statement shall contain the child's name, the name of his school district of residence, the name of the county board providing the special education, and the number of months it was provided. Not later than the thirtieth day of June, the board shall forward a certified copy of such statement to the director of the department of mental retardation and developmental disabilities and to the treasurer of the board of education of the child's school district of residence or if the child is a resident of a private children's home, institution, or other residential facility and is not a school resident of this state, to the private children's home, institution, or other residential facility. Within thirty days after the receipt of such statement the board of education or the home, institution, or facility shall pay to the county board submitting the statement an amount equal to the computed amount of tuition that would be due the district if a nonresident pupil attended the schools of the district for the same period of time that the mentally handicapped child received special education. (Emphasis added.)

The statute appears both clear and authoritative in mandating that the "county board of mental retardation and developmental disabilities. . . shall prepare a statement for each mentally handicapped child under twenty-two years of age who has received such special education," and that "the board of education of the child's school district of residence"¹ shall make payment within thirty days after the receipt of such a statement. This statute, with its consistent use of the verb shall instead of the discretionary may, expresses the obvious legislative intent to establish procedures that are to be mandatory in scope with respect to the education of and the funding for Ohio's handicapped children. See Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971).

"Handicapped child," as defined by R.C. 3323.01(A) for purposes of R.C. Chapters 3321 and 3323, "means a person under twenty-two years of age who is mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, multiply impaired, or otherwise health impaired, or who has specific learning disabilities, and by reason thereof requires special education." Thus, the use of the term "handicapped child" in the above-quoted paragraph in itself indicates that all handicapped persons under twenty-two years of age are covered by its provisions. The express use of the words "for each mentally handicapped child under twenty-two years of age" emphasizes that the full age range of handicapped children is included. Therefore, it appears that the answer to your question is directly found within R.C. 3323.09 itself.

¹See 1980 Op. Atty Gen. No. 80-095 (discussion of "district of school residence").

I note, however, that although the foregoing supports the conclusion that R.C. 3323.09 requires tuition payments by school districts for all handicapped children under twenty-two years of age who receive special education from a county board of mental retardation and developmental disabilities, an argument to the contrary may be raised. The portion of R.C. 3323.09 quoted above is limited to county boards of mental retardation and developmental disabilities "that during the school year provided special education pursuant to this section for mentally handicapped children" (emphasis added), and provides for payment only for "each mentally handicapped child. . .who has received such special education" (emphasis added). The first paragraph of R.C. 3323.09 specifies the special education programs to which that section relates. It states:

The director of the department of mental retardation and developmental disabilities, as authorized by the state board of education, shall establish special education programs for handicapped children to be operated and maintained by county boards of mental retardation and developmental disabilities in accordance with a plan submitted to and approved by the director. Such plan shall include a request for funding that will allow the county board to provide special education to all handicapped children who in accordance with section 3323.04 of the Revised Code, have been placed in special education programs operated by the county board. The director shall compile the plans submitted by county boards and shall submit a comprehensive plan to the state board of education. (Emphasis added.)

It is the reference in this paragraph to R.C. 3323.04 which apparently provides the basis for your question. R.C. 3323.04 requires the State Board of Education, in consultation with the Department of Mental Health and the Department of Mental Retardation and Developmental Disabilities, to establish procedures and standards for the placement of handicapped children in appropriate educational programs; as discussed above, use of the term "handicapped children" indicates that persons through age twenty-one are included. With respect to the placement in special education programs to which R.C. 3323.09 refers, however, R.C. 3323.04 provides that the "state board shall 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. . . , which may include instruction in regular classes, a special education program, or any combination thereof" (emphasis added). "Compulsory school age" is not defined for purposes of R.C. Chapter 3323. However, R.C. 3321.01 states: "A child between six and eighteen years of age is 'of compulsory school age' for the purpose of sections 3321.01 to 3321.13 of the Revised Code." The use in R.C. Chapter 3323 of the terms "handicapped children of compulsory school age" and "handicapped children not of compulsory school age" suggests that the statutory definition of "compulsory school age" is also applicable to R.C. Chapter 3323. See, e.g., R.C. 3323.02 ("[i]t is the purpose of this chapter to assure that all handicapped children of compulsory school age in this state shall be provided with an appropriate public education"); R.C. 3323.06 ("[t]he state board of education shall develop. . .a state plan. . .for the placement and provision of special education and related services for all handicapped children of compulsory school age, and for the availability of educational placement and special education for handicapped children not of compulsory school age"); R.C. 3323.07. Hence, I conclude that, because R.C. 3323.04 expressly applies to "handicapped children of compulsory school age," it provides for the required placement only of handicapped children between ages six and eighteen.

Because R.C. 3323.04 provides for mandatory placement only of handicapped children between ages six and eighteen, the portion of R.C. 3323.09, quoted above, which requires that the plan for establishment of special education programs submitted pursuant to that section "shall include a request for funding that will allow the county board of mental retardation to provide special education to all handicapped children who, in accordance with section 3323.04 of the Revised Code,

have been placed in special education programs operated by the county board of mental retardation," applies only to the education of handicapped persons between the ages of six and eighteen. I do not find, however, that special education provided pursuant to R.C. 3323.09 is limited to persons of compulsory school age. The first sentence of R.C. 3323.09 specifically authorizes the establishment of special education programs for "handicapped children," a term which includes all handicapped persons under age twenty-two. The reference to R.C. 3323.04 is inclusive, but not restrictive. The funding must cover all persons placed pursuant to R.C. 3323.04; there is, however, no indication that the plan for special education may not also include other handicapped children. Although R.C. 3323.02 states that it is the purpose of R.C. Chapter 3323 "to assure that all handicapped children of compulsory school age in this state shall be provided with an appropriate public education," R.C. Chapter 3323 also clearly authorizes the provision of education to handicapped children who are not of compulsory school age. R.C. 3323.06, 3323.07. The Director of the Department of Mental Retardation and Developmental Disabilities obtains his authority to establish special education programs from the State Board of Education pursuant to R.C. 3323.07, which requires the State Board to authorize programs for the education of all handicapped children of compulsory school age and permits the State Board to authorize such programs for handicapped children who are not of compulsory school age. If the Director is authorized pursuant to R.C. 3323.07 to establish programs for handicapped children who are not of compulsory school age, such programs come within R.C. 3323.09 and are subject to the payment provisions contained therein.

It is, therefore, my conclusion, and you are hereby advised, that R.C. 3323.09 requires that the board of education of the school district of residence of a handicapped child under twenty-two years of age who has received special education from a county board of mental retardation and developmental disabilities make tuition payments for such child.

²I note that Ohio's program of education for the handicapped is designed to comply with the Federal Education for All Handicapped Children Act of 1975, Public Law 94-142, 89 Stat. 773, 20 U.S.C. §1401 et seq. The federal law is, however, of little guidance on the question considered herein, since it provides that, for a state to qualify for federal assistance, the state must have a plan which assures that:

a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State. . . .

20 U.S.C. §1412(2)(B). A determination as to whether handicapped children aged three through five and eighteen through twenty-one are included in the education requirements of a state plan is, therefore, dependent upon state law.