

OPINION NO. 1285**Syllabus:**

1. Under authority of Section 3313.811, Revised Code, a board of education may purchase and install vending machines that serve and dispense lunches, other meals or refreshments.
2. Vending machines installed as a part of a school lunchroom facility under Section 3313.81, Revised Code, may not be operated for profit.
3. Proceeds derived from vending machines installed by a board of education under authority of Section 3313.81, Revised Code, that serve and dispense lunches, and other meals or refreshments must be deposited into the school lunch fund as provided by this section.
4. Under authority of Section 3313.811, Revised Code, a board of education or class organization may purchase and install vending machines that sell uniform school supplies, foods, candies, or like supplies for profit.
5. Proceeds derived from vending machines installed by a board of education under authority of Section 3313.811, Revised Code, that sell uniform school supplies for profit must be first deposited into the uniform school supply fund as provided by that section.

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To: Roger W. Tracy, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, August 12, 1964

I am in receipt of your letter in which you ask the following questions:

"1. May a board of education authorize a private contractor to place a contractor-owned vending machine on school premises for the sale of milk, sandwiches, etc., with the profits or a predetermined pro rata share of such profits being used for school activity purposes instead of being deposited into the School Lunch Fund, as provided by Section 3313.81, Revised Code?

"2. May a board of education or an activity group purchase a vending machine to be placed on school premises to permit the sale of sandwiches and milk, with the total profits of such transactions being used for activity purposes instead of being deposited into the School Lunch Fund, as provided by Section 3313.81, Revised Code?

"3. May a board of education permit a vendor to place a privately owned vending machine upon the school premises for the purpose of selling or offering for sale uniform school supplies, foods, candies, or like supplies for profit where a predetermined pro rata share of such profits is disbursed to or retained by the contractor-vendor instead of depositing such moneys into the Uniform School Supplies Fund, as provided by Section 3313.811, Revised Code?

"4. May a board of education or an activity group purchase a vending machine to be placed on school premises to permit the sale of uniform school supplies, with the total profits of such transaction being used for activity purposes instead of depositing such moneys into the Uniform School Supplies Fund, as provided by Section 3313.811, Revised Code?"

Your inquiry may be divided into two parts. Questions No. 1 and 2 come within the purview of Section 3313.81, Revised Code, and questions No. 3 and 4 are provided for in Section 3313.811, Revised Code. Section 3313.81, Revised Code, pertains to school lunchroom programs while Section 3313.811, Revised Code, encompasses the sales of uniform school supplies.

It must be first determined whether a board of education may purchase and install vending machines which serve and dispense lunches and other meals or refreshments. In order to determine this question it is necessary to examine Section 3313.81, Revised Code, which provides as follows:

"The board of education of any city, exempted village, or local school districts may establish lunchrooms, provide facilities and

equipment, and pay operating costs in the schools under its control for the preparation and serving of lunches, and other meals or refreshments to the pupils, the teachers, and to other employees therein, and to other persons taking part in or patronizing any activity in connection with the schools, provided that such privileges and facilities shall apply to all pupils and teachers and no restrictions or limitations shall operate against any such pupil or teacher in the use of such facilities except for reasons applicable to all alike.

"Such facilities shall be under the management and control of the board and the operation of such facilities for school lunch purposes shall not be for profit. In the operation of such facilities for school lunch purposes there shall be established a lunchroom fund in the clerk's cash journal, which shall be separate from all other funds of the board. All receipts and disbursements in connection with the operation of lunchrooms for school lunch purposes and the maintenance, improvement and purchase of equipment of lunchrooms shall be paid directly into and disbursed from the lunchroom fund which shall be kept in a legally designated depository of the board. Revenues for the operating, maintenance, improvement and purchase of equipment shall be provided by the lunchroom fund, appropriations transferred from the general fund, and from other proper sources.

"The board may also make provisions by appropriations transferred from the general fund of the district or otherwise for serving free lunches to such children as it determines are in need thereof."

It has been held in numerous cases that boards of education have only such powers as are conferred by statute or that are clearly implied and necessary for the execution of the powers expressly granted. Verberg v. Board of Education, 135 Ohio St., 246 (1939), Board of Education v. Best, 52 Ohio St., 138 (1894), Harrison v. Board of Education, 60 Ohio App. 45, (1938).

The applicable provisions of Section 3313.81, Revised Code, state that a board of education may establish lunchrooms and "provide facilities and equipment in the schools under its control for the preparation and serving of lunches and other meals or refreshments." Thus, it may be concluded that vending machines that dispense or serve lunches and other meals or refreshments are facilities or equipment as these terms are used in Section 3313.81, Revised Code, and may be purchased and installed by a board of education under authority of said section.

However, a class organization or activity group has no authority under Section 3313.81, Revised Code, to purchase and install vending machines that serve and dispense lunches, and other meals or refreshments since that section states that "(s)uch facilities shall be under the management and control of the board."

Based on this restriction, I ruled in Opinion No. 455, Opinions of the Attorney General for 1963, as follows:

"A local board of education may not contract with a caterer to:

"(1) Prepare meals outside the school premises and sell them in the school lunch facility;

"(2) Prepare and sell meals in the school lunch room facility;

"(3) Furnish management services in the nature of a consultant."

In both questions No. 1 and 2 you state that the vending machines would be operated for a profit. Such a practice is expressly prohibited by Section 3313.81, Revised Code, which states in paragraph two that "such facilities for school lunch purposes shall not be for profit."

Furthermore, you state that the proceeds, or a part thereof, derived from the vending machines would be used for school activity purposes instead of being deposited into the school lunch fund. Again, such practice is barred by Section 3313.81, Revised Code, which states that "all receipts and disbursements in connection with the operation of lunchrooms for school lunch purposes * * * shall be paid directly into and disbursed from the lunchroom fund which shall be kept in a legally designated depository of the board."

To answer questions No. 3 and 4, pertaining to the sale of uniform school supplies, it is necessary to examine Section 3313.811, Revised Code, which reads as follows:

"No board, the principal or teacher of any schoolroom, or class organization of any school district shall sell or offer for sale, or supervise the sale of uniform school supplies, foods, candies, or like supplies for profit on the school premises except when the profit derived from such sale is to be used for school purposes or for any activity in connection with the school on whose premises such uniform school supplies, food, candies, or supplies are sold or offered for sale. No individual student or class of students, acting as an agent for any person or group of persons directly connected with the school shall sell or offer for sale or profit outside the school building, any such articles, except when the profit derived from such sale is to be used for school purposes or for any activity in connection with the school.

"Uniform school supplies are those adopted by the board for use in the schools of the district.

"The enforcement of this section shall be under the jurisdiction of the state board of education.

"The school district board of education shall provide rotary funds for the purchase and sale of uniform school supplies either by appropriations from the general fund or accumulation from sales or receipts. Such funds shall be kept separate from other transactions of the board."

It will be noted that unlike Section 3313.81, supra, this statute contains no express authority to provide facilities and equipment for use in sales of school supplies, food, candies or like supplies. Nevertheless, I am of the opinion that the express authority to sell supplies and foods, even though expressed in the negative, carries with it the implied authority to provide facilities and equipment reasonably necessary to effect such sales. While some adaptable facilities may be in existence, having been provided under Section 3313.81, supra, this section is permissive and there is no assurance that lunchroom facilities are provided by a board of education. Thus, I can perceive situations in which vending machines may be said to be reasonably necessary to accomplish the sales of materials authorized under Section 3313.811, supra. Therefore, it is my opinion that a board of education or class organization may purchase and install vending machines that dispense and sell uniform school supplies, foods, candies, or like supplies.

This conclusion leads to the further question which you have raised. That is, must the profits from such transactions be deposited in the uniform school supplies' fund created by Section 3313.811, Revised Code.

With regard to any such activities undertaken by the school board or the principal or teachers of a school, the answer seems to be clearly yes. The proceeds from sales of uniform school supplies by a school, acting through its principal or other employees, must be deposited in a rotary fund which shall be provided by the board of education for that school.

The contrary conclusion seems to be required when the activity is by a "class organization." In the first place the very statute, Section 3313.811, Revised Code, which creates the uniform school supplies fund, permits a class organization to sell supplies and foods and candies for profit if the profit is to be used for any activity in connection with the school. I conceive such activities to be school dances and class picnics, and similar social exercises. It would seem, then, that such funds are not under the direct control of the school board of education and it would follow that they need not, therefore, be deposited in the rotary fund. This follows unless it is reasoned that despite the lack of board control such profits should be run through the rotary fund. Such reasoning I find persuasive.

In the second place, such rotary funds may be created either by appropriations from the general fund or by accumulations from sales and receipts, and may be used for the purchase of the school supplies and other items to be offered for sale. I cannot believe that the legislature intended that class organizations be permitted to use monies from the general fund to purchase supplies to be sold for the purpose of financing class organization dances or picnics or similar functions. This result would logically follow if it is concluded that the provisions regarding rotary funds apply to class organization activities.

All things considered, I am of the opinion that the cre-

ation of rotary funds under Section 3313.811, Revised Code, is only required in connection with activities by a school or undertaken in behalf of a school, and not in connection with activities by a class organization.

It should be pointed out that my answers to the questions set forth by you do not mean that a contractor-vendor may not be compensated for the leasing or rental of vending machines to a board of education or that a vendor of cafeteria supplies must be expected to operate without a profit.

Therefore, it is my opinion and you are accordingly advised that:

1. Under authority of Section 3313.811, Revised Code, a board of education may purchase and install vending machines that serve and dispense lunches, other meals or refreshments.
2. Vending machines installed as a part of a school lunchroom facility under Section 3313.81, Revised Code, may not be operated for profit.
3. Proceeds derived from vending machines installed by a board of education under authority of Section 3313.81, Revised Code, that serve and dispense lunches, and other meals or refreshments must be deposited into the school lunch fund as provided by this section.
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