

OPINION NO. 75-049

Syllabus:

1. A board of education may enter into a plan or contract with other school districts in accordance with R.C. 3323.011 and pay a share of the operating costs which exceed state support of the special education program of another school district on the basis that the program will be available if and when needed, even though such board of education may not presently have a student enrolled in the program.

2. A board of education may enter into a plan or contract with other school districts in accordance with R.C. 3323.011 and share in the initial start up costs of a special education program pursuant to R.C. 3313.841 and R.C. 3313.92 on the basis that the program will be available if and when needed, even though such board

of education may not presently receive service or have a student enrolled in the program.

To: Martin W. Essex, Supt. of Public Instruction, Dept. of Education, Columbus, Ohio

By: William J. Brown, Attorney General, July 17, 1975

I have before me your request for my opinion which reads as follows:

"In compliance with the mandate of Section 3323.011 of the Revised Code, every board of education has submitted to the State Board of Education a comprehensive plan for special education. Approval of state funds for the cooperation of such programs and services are contingent upon such programs and services being implemented consistent with the plan on file and approved by the State Board of Education.

"To meet the mandate of Section 3323.011 and the State Board of Education standards for special education programs and services, there are many instances in which school districts cooperate with one or more other school districts. Such cooperative endeavors are especially relevant for supervisory services, visually impaired, hearing impaired, deaf, blind, multiple handicapped, severely emotionally handicapped, mobility therapists, occupational therapists and physical therapist programs. In the implementation of these multi-district services and programs there are special complications relative to the excess costs involved.

"Your opinion is respectfully requested regarding the excess costs not covered by the state for the support of multi-district special education programs and services.

- "1. May a board of education which has entered into a plan to provide special education service or program with other school districts in compliance with 3323.011 pay a share of the current operating costs which exceed state support of that special education service or program, although that board of education may not presently receive service or have a student enrolled in that program?
- "2. May districts which are a part of a plan for service but which do not currently receive service or have children enrolled in the special programs share in the initial start up costs for the classroom, materials, and equipment pursuant to Sections 3313.841 and 3313.92 of the Revised Code on the basis that the program or service will be available if and when needed?"

The legislature has entrusted, by statute, the entire management and supervision of the schools to boards of education and has given them virtually unlimited powers with regard to school matters and policy. Stimson v. Board of Education, 17 Ohio App. 437 (1923); State, ex rel. Fleetwood v. Board of Education, 20 Ohio App.2d 154

(1969). However, even though boards of education have been given broad discretion with regard to school policy and the protection of the public school system, such boards, like other public bodies created by the legislature, have only such powers as are expressly conferred upon them by statute together with the powers necessarily implied therefrom. Schwing v. McClure, 120 Ohio St. 335 (1929); Board of Education v. Bert, 52 Ohio St. 138 (1894); 1974 Op. Atty. Gen. No. 74-045.

Express power for a school district to contract or enter into a plan with one or more other school districts to provide special education service for children who are residents of such district is provided in R.C. 3323.011 which reads in pertinent part as follows:

"Approval of state funds for the operation of programs and services provided pursuant to Section 3323.01 of the Revised Code shall be contingent upon a comprehensive plan for special education approved by the state board of education no later than July 1, 1973. The state board of education shall not approve a school district's plan unless the plan proposed meets the educational needs of handicapped children in that school district and other school districts in the same general area.

"Each school district shall submit such a plan to the State Board of Education by December 1, 1972. Such plan shall contain:

"(A) Provision for an organization structure and necessary staffing for the identification and placement of handicapped children in appropriate programs;

"(B) Provision for an organizational structure for the necessary supervision and staffing of programs and services for handicapped children;

"(C) Provision for the necessary programs and services needed to meet the educational needs of every handicapped child in the school district in accordance with program standards and eligibility criteria established by the state board of education.

"In approving the organization of special education, the state board of education shall provide that no school district be excluded from the statewide plan. A school district having a plan providing for a cooperative arrangement with one or more other school districts to provide classes or other suitable programs of instruction or training for all physically, emotionally, or mentally handicapped children who are residents of such school district, or which contracts with another school district for such classes, and which meets the standards established by the state board of education pursuant to section 3323.02 of the Revised Code, is in compliance with this section."

In a telephone conversation subsequent to your request, you stated that since R.C. 3373.011 requires that no school district shall be excluded from the state-wide plan for special education, every school district must be prepared to handle the special edu-

cation needs of children who are residents of such district. While larger school districts may have several eligible children in any particular year, however, smaller districts may have few or none. Thus, since the costs of special education programs are considerably more than regular education programs, it is not financially feasible for a school district which has no eligible students in a particular school year to curtail an existing program only to start a new one in a subsequent year when the need again arises.

You also indicated in our conversation that many school districts circumvent this problem by entering into a plan by contracting with one or more other school districts for special education programs. The monetary arrangement may be to pay a high cost tuition per student or a portion of the continuous operation expenses and a smaller tuition per student. However, if a school district is not able to pay a share of current operating expenses since it is not presently receiving service or having a student enrolled in the program, the options available to it would be limited to starting a new program of its own as the need arises or contracting with another school district on an as needed basis, both of which would be significantly more expensive.

Accordingly, the issue raised by your first question turns on whether a board of education is abusing its discretion when it pays a share of the operating costs which exceed state support of the special education program of another school district, at a time when it does not presently have a student enrolled in the other district's program or otherwise receive service from that district.

A board of education has a fiduciary duty to the residents of its district to expend school funds in their best interest. School funds are public funds, and as such they cannot be expended unless a justifiable benefit inures to the public. See Finch v. Board of Education, 30 Ohio St. 37 (1876). But if within the sound judgment of that board, paying a share of operating expenses even though receiving no present service is the most efficient and economical method of providing special education for the school district, then it would be unreasonable to condemn such an option due to a lack of present service. The board would be obtaining a recognizable continuing interest in the program which would be available to its residents as the need arose and would be in compliance with R.C. 3323.011 which requires a special education plan for all school districts.

In 1971 Op. Atty. Gen. No. 71-026, my predecessor stated:

"The Supreme Court has held that the authority conferred upon a board of education to adopt rules and regulations to carry out its statutory functions vest in the board a wide discretion, Greco v. Roper, 145 Ohio St. 243, 249 (1945); provided, of course, that specific statutory limitations on the board's authority are not exceeded, Verberg v. Board of Education, 135 Ohio St. 246 (1939). 'The school laws must be liberally construed in order to carry out their evident policies and conserve the interests of the school youth of the state, and any doubt must be resolved in favor of the construction that will provide a practical method for keeping the schools open and in operation.' 48 O. Jur.2d 677; Rutherford v. Board of Education, 127 Ohio St. 81, 83 (1933)."

Accordingly, I find it evident that it is not a misuse of

public funds or an abuse of discretion when, in its sound judgment, a board of education chooses to enter into a plan to provide special education programs with another district and pay a share of the current operating costs which exceed state support of that special education program, even though that board of education may not presently receive service or have a student enrolled in that program.

This reasoning also extends to participation by a board of education with another school district in initial start up costs of a special education program even though such board of education may not presently receive service or have any children enrolled in that program. If this is more efficient and economical than starting its own program or paying tuition per student to another district, a board of education may, within its sound discretion, enter into such an arrangement.

It is the settled law of this state that the courts will not interfere with the discretionary power of a board of education where the exercise of such powers is reasonable, in good faith, and not an abuse of discretion. State, ex rel. Mildorf v. Board of Education, 76 Ohio St. 297 (1907); Youngstown Education Association v. Board of Education, 36 Ohio App.2d 35 (1973); 1974 Op. Atty. Gen. No. 74-063. Therefore, it is my opinion, and you are so advised that where reasonable, in good faith and absent an abuse of discretion:

1. A board of education may enter into a plan or contract with other school districts in accordance with R.C. 3323.011 and pay a share of the operating costs which exceed state support of the special education program of another school district on the basis that the program will be available if and when needed, even though such board of education may not presently have a student enrolled in the program.

2. A board of education may enter into a plan or contract with other school districts in accordance with R.C. 3323.011 and share in the initial start up costs of a special education program pursuant to R.C. 3313.841 and R.C. 3313.92 on the basis that the program will be available if and when needed, even though such board of education may not presently receive service or have a student enrolled in the program.