

OPINION NO. 88-096**Syllabus:**

1. Pursuant to R.C. 5126.05, the board of county commissioners has a mandatory duty to levy taxes and make appropriations sufficient to enable the county board of mental retardation and developmental disabilities to perform its functions and duties, which include the maintenance and operation of special education programs that are established in accordance with R.C. 3323.09(B).
2. The board of county commissioners may fund the programs of the county board of mental retardation and developmental disabilities by special levy pursuant to R.C. 5705.19(L) and/or by treating the costs of such programs as current expenses of the county payable from the general fund pursuant to R.C. 5705.05(E).
3. In the absence of special levy funds or other available local, state, or federal funds which the board of county commissioners

may appropriate to the county board of mental retardation and developmental disabilities, R.C. 5126.05 requires that the board of county commissioners provide sufficient funds to the county board of mental retardation and developmental disabilities from the county general fund.

4. The board of county commissioners is required by R.C. 5126.05 to give the funding needs of the county board of mental retardation and developmental disabilities priority over all appropriations not otherwise mandated by statute.
5. The board of county commissioners is required by R.C. 5126.05 to exercise, to the fullest extent necessary and authorized by law, its statutory authority to levy taxes for and to make or amend appropriations from the county general fund in order to provide sufficient funds to the county board of mental retardation and developmental disabilities.

To: R. David Picken, Madison County Prosecuting Attorney, London, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 27, 1988

I have before me your request for my opinion regarding the financial responsibility of the board of county commissioners for a school operated by the county board of mental retardation and developmental disabilities (hereinafter "county MR/DD board"). You have indicated in your letter that declining enrollment in the school has led to a corresponding decrease in some of the funding available to the school. As a result, the school does not anticipate sufficient revenue to cover current expenses. You wish to know if the board of county commissioners is responsible for the balance of the unpaid expenses if a special levy to provide needed funds to the county MR/DD board fails. Specifically, you ask "does the [board of] County Commissioners have any financial responsibility for operating the school beyond the introduction, collection and distribution of levy funds?" The resolution of your question requires me to examine the relationship between a number of statutes dealing with the duties of the county MR/DD boards with regard to school programs, the funding of such programs from various sources, and the authority of boards of county commissioners with regard to appropriations and levying of taxes.

County MR/DD boards are governed by R.C. Chapter 5126. Pursuant to R.C. 5126.05, county MR/DD boards are required to establish and maintain various programs and facilities for persons in the county who are mentally retarded or developmentally disabled. Your opinion request pertains to the school, which is the means by which the county MR/DD board provides special educational services to children who are mentally retarded or developmentally disabled. These educational services are included in the functions and duties of the board listed in R.C. 5126.05, which states, in part:

Subject to the rules established by the director of mental retardation and developmental disabilities pursuant to Chapter 119. of the Revised Code for programs and services offered pursuant to this chapter, and *subject to the rules established by the state board of education* pursuant to Chapter 119. of the Revised Code *for programs and services offered pursuant to Chapter 3323.* of the Revised Code, the county board of mental retardation and developmental disabilities shall:

(A) Administer and operate facilities, programs, and services as provided by Chapters 3323...

....

(F) Ensure that related services, as defined in section

3323.01¹ of the Revised Code...are available according to the plan and priorities developed under division (C) of this section;

....
(H) Provide *special education programs according to Chapter 3323* of the Revised Code.... (Emphasis and footnote added.)

The purpose of R.C. Chapter 3323 is "to assure that all handicapped children of compulsory school age in this state shall be provided with an appropriate public education."² R.C. 3323.02. *See also* R.C. 3321.01 (defining compulsory school age as between six and eighteen years). The state board of education is charged with the development, supervision, and enforcement of a state plan for provision of special educational services to compulsory school age children who are handicapped and for availability of services to pre-school children who are handicapped. R.C. 3323.06. Regarding the role of the schools operated by county boards of MR/DD in the overall state plan, R.C. 3323.09(B) states:

Each county MR/DD board *shall establish special education programs for 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 *and for preschool children* who are handicapped, developmentally delayed, or at risk of being developmentally delayed. The board annually *shall submit* to the department of education *a plan* for the provision of these programs and a request for approval of units under section 3317.05³ of the Revised Code. The superintendent of public instruction shall review the plan and approve or modify it in accordance with rules adopted by the state board of education under section 3301.07 of the Revised Code. The superintendent of public instruction shall compile the plans submitted by the county boards and shall submit a comprehensive plan to the state board of education. (Emphasis and footnote added.)

¹ R.C. 3323.01(C) defines "related services" as "transportation, and such developmental, corrective, and other supportive services as may be required to assist a handicapped child to benefit from special education" and lists examples of such services.

² R.C. 3323.01(D) defines "appropriate public education" as "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; (4) Are provided in conformity with the individualized education program required under this chapter." R.C. 3323.01(E) defines "individualized education program" as "a written statement for each handicapped child designed to meet the unique needs of a handicapped child" which must include, among other things, a list of the specific educational services to be provided the child and an annual evaluation of the child's current placement.

³ For each county board of mental retardation and developmental disabilities (county MR/DD board), the state board of education is to approve annually the number of classes of handicapped children, R.C. 3317.05(B); the number of units for physical, occupational, and speech and hearing therapy, R.C. 3317.05(C); the number of units for special education supervisors and coordinators, R.C. 3317.05(D); and the number of preschool units, R.C. 3317.05(E). The number of classes and units is calculated on the basis of formulas set out in R.C. 3317.05. *See also* 3 Ohio Admin. Code 3301-53-01; 3 Ohio Admin. Code 3301-51-06. R.C. 3317.05 also provides limits on the number of units which can be approved for county boards of MR/DD, based on the number of units approved for school districts and the amount appropriated by the General Assembly. Formulas for allocating appropriated state funds to approved units operated by county boards of MR/DD are codified at R.C. 3317.024.

R.C. 3323.04 states:

The state board [of education] *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. Prior to the placement of a handicapped child in a program operated under section 3323.09 of the Revised Code, the board of education shall consult the county board of mental retardation and developmental disabilities of the county in which the child resides. (Emphasis added.)

See also 1980 Op. Att'y Gen. No. 80-009, at 2-50 ("when a local school district proposes to place a child in a program operated by the county board, the county board may not simply veto the placement decision. Any disagreements regarding placement are to be resolved by the arbitration procedure outlined in R.C. 3323.04").

Pursuant to this statutory scheme, the county board of MR/DD is required to operate and maintain any special education programs approved by the state board of education for operation by the county board of MR/DD and which serve children properly placed there by the local school district board of education.⁴ Therefore, assuming proper placement and program approval, the school to which you refer in your question is a mandatory function of your county board of MR/DD.

A statutory scheme also exists for providing financial support to schools operated by county MR/DD boards. Pursuant to divisions (E), (N), (O)(1), (Q), and (R) of R.C. 3317.024, the county MR/DD boards receive state money from the school foundation program for classes for school-age children, for pre-school units, for various types of therapy, transportation costs, and supportive home services for pre-school children.⁵ The state board of education, pursuant to its authority under R.C. 3301.07(C), also administers federal funds for public education, some of which are available to the county MR/DD board schools. The county MR/DD board is authorized to recover some costs from local school districts pursuant to formulas set forth in R.C. 3323.142. It is clear by the manner in which these funds are calculated that they are not intended to totally cover the cost of the programs

⁴ My predecessor reached a similar conclusion when asked to analyze the obligation of the county board of MR/DD to provide special education programs in 1980. In the first syllabus paragraph of 1980 Op. Att'y Gen. No. 80-009, he states:

A county board of mental retardation must operate and maintain any special education programs authorized by the State Board of Education and established by the Chief of the Division of Mental Retardation and Developmental Disabilities of the Department of Mental Health and Mental Retardation pursuant to R.C. 3323.09 and R.C. 5126.06

The Division of MR/DD was elevated to independent departmental status in 1972, *see* 1971-1972 Ohio Laws, Part II, 1724 (Am. Sub. H.B. 494, eff. July 12, 1972). Sub. S.B. 155, 117th Gen. A. (1988) (eff. June 24, 1988, delayed effective dates for numerous sections) has removed special education programs operated by the county MR/DD boards from the dual authority of the state department of mental retardation and developmental disabilities (MR/DD) and the state board of education. Such special education programs are now approved and supervised solely by the state board of education.

⁵ Prior to the passage of Sub. S.B. 155, state subsidies for pre-school units, transportation, and supportive home services for pre-school children were administered by the state department of MR/DD. Sub. S.B. 155 shifted these items into the school foundation program budget administered by the state board of education. County MR/DD boards continue to receive state subsidies for non-Chapter 3323 programs through the state department of MR/DD. *See, e.g.*, R.C. 5126.12; R.C. 5126.13; R.C. 5126.14.

involved, but rather are intended to supplement local funding.⁶ As a county MR/DD board has no independent taxing authority, its local funding is provided by the county.

The final paragraph of R.C. 5126.05 states: "The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation and developmental disabilities to perform its functions and duties as provided by this section, and may utilize any available local, state, and federal funds for such purpose." (Emphasis added).⁷ The Ohio Supreme Court has stated that this language imposes a duty on the board of county commissioners. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 470, 423 N.E.2d 105, 113 (1981) ("[t]he board of county commissioners was required by 5126.03 [now 5126.05] to levy such taxes and make such appropriations as are sufficient to enable the county board of mental retardation and developmental disabilities to perform its functions and duties"); *Cuyahoga County Board of Mental Retardation v. Cuyahoga County Board of Commissioners*, 41 Ohio St. 2d 103, 106, 322 N.E.2d 885, 887 (1975) ("the power can be necessarily inferred from R.C. 5126.03 [now 5126.05], allowing the board of mental retardation to bring an action in mandamus to compel the board of county commissioners to perform its statutory duty [to appropriate sufficient funds]"); 1969 Op. Att'y Gen. No. 69-015, at 2-21 ("there is an express mandate upon the County Commissioners to provide the funds which are necessary for the County Board of Mental Retardation to perform its functions through appropriation"). See also *Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage"). Compare R.C. 5126.05 with R.C. 340.07 ("board of county commissioners of any county participating in a community mental health service district or joint-county district, upon receipt from the community mental health board of a resolution so requesting, may appropriate money to such board") (emphasis added); Op. No. 69-015 at 2-26 ("County Commissioners have authority to provide funds for the use of [a community mental health] board, but, in contradistinction to their duty to provide funds for the operation of the Chapter 5127 [now Chapter 5126], Revised Code, workshop, they are not required by law to do so").

The Ohio Supreme Court has not specifically considered the effect of financial hardship on the county's mandatory duty to fund county boards of MR/DD pursuant to R.C. 5126.05, as neither *Seminatore* nor *Cuyahoga*

⁶ I note, for example, that school districts are required to levy a tax of at least twenty mills for current operating expenses as a precondition of eligibility for school foundation funds. R.C. 3317.01(A). Although no similar requirement is imposed with respect to schools operated by the county boards of MR/DD, they are funded by the same formula as the school districts.

⁷ I note also that pursuant to R.C. 5126.05(C), the county MR/DD board is required to "[p]lan and set priorities based on available funds for the provision of both facilities and services...." (Emphasis added.) As my preceding discussion indicates, funds are available to the county MR/DD board from numerous sources. R.C. 5126.05(C) does not govern whether the funding from any particular source is mandatory or discretionary, how much funding any particular source must provide, or how the funding from any particular source may be used by the county MR/DD board. These characteristics are prescribed in the statutory provisions which authorize the funding. County funding pursuant to the final paragraph of R.C. 5126.05 is simply one of several sources of "available funds" which the county MR/DD board may rely upon in planning for purposes of R.C. 5126.05(C). R.C. 5126.05(C) neither defines nor modifies the nature of the county's obligation to make funds available.

County Board raised any question as to the availability of funds.⁸ In interpreting similar statutory mandates to fund non-judicial functions, the court has not regarded financial hardship on the county as excusing compliance with the duty to fund. *State ex rel. Binder v. Board of County Commissioners*, 174 Ohio St. 23, 24, 186 N.E.2d 476, 476-477 (1962) (per curiam) (interpreting R.C. 5901.11 as creating a mandatory duty to levy and appropriate funds to the Soldiers' Relief Commission [now the Veterans Service Commission] and stating: "[a]ny hardship which may be imposed on the various county departments by reason of the mandatory nature of the law can be eliminated only by the General Assembly"); *Jenkins v. State ex rel. Jackson County Agricultural Society*, 40 Ohio App. 312, 179 N.E. 421 (Jackson County 1931) (annual appropriation to county agricultural society is mandatory [provision now found at R.C. 1711.22] and takes precedence over non-mandated expenditures in appropriation measure). However, in *State ex rel. Brown v. Board of County Commissioners*, 21 Ohio St. 2d 62, 255 N.E.2d 244 (1970), the court recognized the defense of impossibility, stating in the syllabus:

in an action for a writ of mandamus under Section 5101.161, Revised Code, against a board of county commissioners commanding the members thereof to appropriate funds to provide for the deficit in the Public Assistance Fund for 1968, where the agreed statement of facts discloses that there is *not enough money available* for respondent to provide for such deficit and *to provide also for the operation of all county offices without curtailing operation of such offices to the extent that it would be impossible for them to perform their statutory duties*, thereby seeking to require respondent to perform acts which are impossible to perform because of lack of funds, the writ will be denied. (Emphasis added.)

See also *St. Thomas Hospital v. Schmidt*, 62 Ohio St. 2d 439, 406 N.E.2d 819 (1980) (per curiam) (interpreting county's duty pursuant to R.C. 5101.161 to appropriate county's share of poor relief program, the court cited to *Brown, supra*, stating that: "[t]he board has *no discretion* to refuse such funding *when the necessary funds are available*." (Emphasis added).⁹ The elements of this defense to the duty to fund are apparent in the following observation of the Summit County Court of Appeals in *Cain v. Birkel*, No. 8204 (Ct. App. Summit County Nov. 17, 1976) (unreported), at 7: "impossibility is an extraordinary affirmative defense and...defendants failed to meet their burden of proof. Not only did defendants fail to adequately explain how they would fund discretionary accounts when their mandatory accounts were underfunded, but they also failed to show that additional revenue could not be raised." Therefore, in order to determine what measures the board of county commissioners might be required to take, I must examine availability of funds in light of the board's full authority to tax and to appropriate.

⁸ In *Seminatore*, the board of county commissioners questioned the authority of the county board of MR/DD to pay for certain newspaper advertisements from public funds. In *Cuyahoga County Board of Mental Retardation*, although the voters had approved a special levy for the county board of MR/DD, the board of county commissioners and the budget commission refused to assess and levy the tax for that year. In both cases, the court required the board of county commissioners to provide the funds in question. I am aware that an appellate court in *State ex rel. Gallia County Board of Mental Retardation v. Board of Gallia County Commissioners*, No. 84CA2 (Ct. App. Gallia County Feb. 11, 1985) (unreported) reversed the grant of a peremptory writ of mandamus against the county commissioners. The court, however, did not rule on the merits of the county MR/DD board's claim. The issue in *Gallia County Board* was not the scope or nature of the county's financial responsibility to the county MR/DD board; rather it was a procedural issue of whether the county's responsibility could be determined without a hearing, i.e. peremptorily. Therefore, I do not find the court's ruling to be helpful in considering the question you have presented.

⁹ Cases regarding the duty of the county to fund judicial functions involve constitutional and separation of powers issues that make these cases

The authority of the board of county commissioners to levy taxes and to appropriate funds is limited. It is a well established principle that a board of county commissioners, being a creature of statute, may exercise only those powers expressly conferred on it by statute or necessarily implied therefrom. *See State ex rel. Shriver v. Board of Commissioners*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). Thus, any determination of the measures the board of county commissioners is required to take to fulfill its statutory duty to provide sufficient funds to the county MR/DD board,¹⁰ is dependent on the statutory constraints on the power of the board of county commissioners to levy and to appropriate. Generally, Ohio Const. art. XII, §2 and R.C. 5705.02 impose a tax limit of ten mills on all property unless a greater tax is approved by the electorate.¹¹ R.C. 5705.19(L) authorizes the board of county commissioners to propose a special levy in excess of the ten-mill limitation for the support of community mental retardation and developmental disabilities programs and services.¹² Rejection of such a special levy by the voters does not end either the duty or the ability of the board of county commissioners to fund the county MR/DD board. R.C. 5705.05 states, in pertinent part:

difficult to use as a guide in situations not involving courts. Generally such cases reflect an obligation to fund regardless of the effect on county finances, *see, e.g., State ex rel. Milligan v. Freeman*, 31 Ohio St. 2d 13, 285 N.E.2d 352 (1972), and to fund in the amount determined necessary by the court. *See, e.g., State ex rel. Rudes v. Rofkar*, 15 Ohio St. 3d 69, 472 N.E.2d (1984) (per curiam); *In re Appropriation for Juvenile and Probate Division for 1979*; *Anderson v. Kellogg*, 62 Ohio St. 2d 99, 403 N.E.2d 974 (1980) (per curiam).

¹⁰ It is clear under the facts you have presented that the funds are insufficient, as the county MR/DD board will be unable to meet its current expenses. The question of how much is sufficient to enable the county MR/DD board "to perform its functions and duties" pursuant to R.C. 5126.05 is ultimately a question of fact which cannot be determined by an opinion of the Attorney General. *See generally* 1988 Op. Att'y Gen. No. 88-008, at 2-27; 1983 Op. Att'y Gen. No. 83-057, at 22-232. For discussion of burdens and standards of proof in mandatory funding cases, *see generally, Whitman v. Magee*, No. 3938 (Ct. App. Trumbull County Dec. 18, 1987) (unreported); *State ex rel. Stacey v. Halverstadt*, No. 87-C-30 (Ct. App. Columbiana County Oct. 23, 1987) (unreported); *Whitman v. Magee*, No. 3558 (Ct. App. Trumbull County Oct. 4, 1985) (unreported). *See also* note 12, *infra*.

¹¹ Ohio Const. art. XII, §2 provides that "[n]o property...shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes...when approved by at least a majority of the electors...."

R.C. 5705.02 provides:

The aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation...except for taxes specifically authorized to be levied in excess thereof. The limitation provided by this section shall be known as the "ten-mill limitation," and wherever said term is used in the Revised Code, it refers to and includes both the limitation imposed by this section and the limitation imposed by Section 2 of Article XII, Ohio Constitution.

¹² As amended by Sub. S.B. 155, R.C. 5705.19 provides:

The taxing authority of any subdivision...may declare by resolution and certify the resolution to the board of elections...that the amount of taxes that may be raised within the ten-mill limitation will be insufficient to provide for the necessary requirements of the subdivision and that it is necessary

The purpose and intent of the general levy for current expenses is to provide *one general operating fund derived from taxation* from which *any expenditures for current expenses of any kind* may be made.... Without prejudice to the generality of the authority to levy a general tax for any current expense, such general levy *shall include*:

....
 (E) In the case of counties, the amount necessary...for the *support of mental retardation services*.... (Emphasis added.)

Pursuant to R.C. 5705.05(E), in the absence of sufficient special levy monies dedicated exclusively to support mental retardation services and programs, the amount necessary for the support of such services is a type of current expense payable from the county general fund. *See Madden v. Bower*, 20 Ohio St. 2d 135, 141, 254 N.E.2d 357, 361 (1969) (listing county MR/DD board as one of several which are "supportable in whole or in part from the general fund"); Op. No. 69-015, at 2-15 to 2-16 ("[t]his appropriation [to the county MR/DD board] may be provided from a general levy for current expenses under Section 5705.05(E)...[w]here general fund monies are appropriated to a specific use it is only necessary to establish an account within the general fund for the purpose intended").¹³ In making appropriations

to levy a tax in excess of that limitation for any of the following purposes:

....
 (L) For community mental retardation and developmental disabilities programs and services pursuant to Chapter 5126. of the Revised Code, except that the procedure for such levies shall be as provided in Section 5705.222 of the Revised Code.

Sub. S.B. 155 removed language from R.C. 5705.19(L) which gave the board of county commissioners authority to approve the county MR/DD board operating budget and/or capital expenditures. (The prior version of R.C. 5709.19(L) can be found at 1985-1986 Ohio Laws, Part I, 653, 695 (Am. Sub. S.B. 289)). New language in R.C. 5705.222(A) now provides that "[t]he county board of mental retardation and developmental disabilities, within its budget and with the approval of the board of county commissioners through annual appropriations, may use the proceeds of a levy approved under this section for any of the purposes authorized by this section." This change in language emphasizes that the county MR/DD board is autonomous from the board of county commissioners in developing and approving its budget, *see also* R.C. 5126.05(J) (the county MR/DD board shall "adopt a budget, authorize expenditures for the purposes listed in this section"), and that the board of county commissioners exercises only indirect financial control over the MR/DD board through the appropriation process. Any discretion the board of county commissioners has to determine the amount of the annual appropriation of special levy funds is still limited by its obligation, under R.C. 5126.05, to provide "sufficient funds." *See Seminatore*, 66 Ohio St. 2d at 471, 423 N.E.2d at 113 (when a function is reasonably related to the duties of a public agency, the means to accomplish it "lies in the first instance within the sound discretion of the public agency involved. Only where an abuse of discretion is shown either as to the nature...means...or the amount of money expended are the courts authorized to interfere"); *CB Transportation, Inc. v. Butler County Board of Mental Retardation*, 13 Ohio Op. 3d 382, 397 N.E.2d 781 (C.P. Butler County 1979) (county commissioners could not require county MR/DD board to accept a lower, but adequate, contract bid in contravention of MR/DD's board's determination that the higher bid was best); 1974 Op. Att'y Gen. No. 74-017 (discretionary authority of county commissioners over aggregate amount of appropriation).

¹³ R.C. 5705.09 requires the county to establish distinct funds for the receipt of various revenues. R.C. 5705.10 governs the distribution of tax revenues into these funds:

All revenue derived from the general levy for current expense within the ten-mill limitation, from any general

from the general fund, the board of county commissioners is required to give the funding needs of the county MR/DD board priority over all non-mandatory expenditures. *Jenkins, supra*; 1941 Op. Att'y Gen. No. 3681, p. 299 (syllabus, paragraph one) ([w]hen considering and passing an annual appropriation measure the county commissioners are required to make provision first for those expenditures made mandatory by statute). *See also* 1933 Op. Att'y Gen. No. 974, vol. II, p. 938 (syllabus, paragraph eight). If monies have already been appropriated from the general fund for discretionary items, the board of county commissioners has authority to reappropriate any unencumbered funds from such items. R.C. 5705.40 ("[a]ny appropriation ordinance or measure may be amended or supplemented, provided that...no appropriation for any purpose shall be reduced below an amount sufficient to cover all unliquidated and outstanding contracts or obligations certified from or against the appropriation").¹⁴ Appropriations from the general fund, whether for mandatory or discretionary purposes, may not exceed the revenue available. R.C. 5705.39 ("total appropriations from each fund shall not exceed the total of the estimated revenue available for expenditures therefrom, as certified by the budget commission"). The board of county commissioners may, however, have the capacity to increase the revenue available to the general fund. R.C. 5705.10 states:

All revenue derived from the general levy for current expense within the ten-mill limitation, from any general levy for current expense authorized by vote in excess of the ten-mill limitation, and from sources other than the general property tax, unless its use for a particular purpose is prescribed by law, shall be paid into the general fund.

Clearly the general fund receives revenue from several types of tax. I conclude that pursuant to R.C. 5126.05 the county is required to levy some or all of such taxes, as may be required to provide sufficient funds to the county MR/DD board. I note, for example, that the general levy for current expense within the ten-mill limitation, R.C. 5705.04(B), may be increased without a popular vote, if the county has any unused "inside" millage. The county also has authority to levy an emergency "piggy back" sales and use tax, R.C. 5739.021 and R.C. 5741.021, or an emergency utilities service tax, R.C. 324.02, all of which are payable into the general fund and may be levied by the commissioners without voter approval. As to those taxes payable into

levy for current expense authorized by vote in excess of the ten-mill limitation, and from sources other than the general property tax, unless its use for a particular purpose is prescribed by law, shall be paid into the general fund.

....
All revenue derived from a special levy shall be credited to a special fund for the purpose for which the levy was made.

¹⁴ I note that, pursuant to R.C. 5705.14 and R.C. 5705.15, the board of county commissioners has authority in certain circumstances to transfer monies from one fund to another. R.C. 5126.05 states that the board of county commissioners "may utilize any available local, state, and federal funds for such purpose [enabling the county MR/DD board to perform its functions and duties]." Monies in funds other than the general fund or an R.C. 5705.19(L) special levy fund, if available for transfer pursuant to R.C. 5705.14 or R.C. 5705.15, would constitute such "available local, state, and federal funds." Therefore the board of county commissioners has discretionary authority to initiate such transfers. *See Dorrian, supra* ("the word 'may' shall be construed as permissive"). To the extent the board of county commissioners makes use of discretionary funding sources, it reduces the necessity of providing necessary funds from the general fund, by the levy of additional taxes or adjustment of appropriations for other purposes. *See also* 1947 Op. Att'y Gen. No. 1815, p. 214 (when specifically appropriated funds were insufficient for a county to meet its mandatory duty to provide "sufficient" funds to child welfare board under the General Code, the county was required to use the general fund or funds available by way of transfer).

the general fund which require voter approval,¹⁵ the commissioners may be required, pursuant to R.C. 5126.05, to take the steps necessary to place the levies on the ballot.

Accordingly, it is my opinion and you are hereby advised that:

1. Pursuant to R.C. 5126.05, the board of county commissioners has a mandatory duty to levy taxes and make appropriations sufficient to enable the county board of mental retardation and developmental disabilities to perform its functions and duties, which include the maintenance and operation of special education programs that are established in accordance with R.C. 3323.09(B).
2. The board of county commissioners may fund the programs of the county board of mental retardation and developmental disabilities by special levy pursuant to R.C. 5705.19(L) and/or by treating the costs of such programs as current expenses of the county payable from the general fund pursuant to R.C. 5705.05(E).
3. In the absence of special levy funds or other available local, state, or federal funds which the board of county commissioners may appropriate to the county board of mental retardation and developmental disabilities, R.C. 5126.05 requires that the board of county commissioners provide sufficient funds to the county board of mental retardation and developmental disabilities from the county general fund.
4. The board of county commissioners is required by R.C. 5126.05 to give the funding needs of the county board of mental retardation and developmental disabilities priority over all appropriations not otherwise mandated by statute.
5. The board of county commissioners is required by R.C. 5126.05 to exercise, to the fullest extent necessary and authorized by law, its statutory authority to levy taxes for and to make or amend appropriations from the county general fund in order to provide sufficient funds to the county board of mental retardation and developmental disabilities.

¹⁵ See, e.g., R.C. 5705.19(A) (general levy for current expenses in excess of the ten-mill limitation); R.C. 5739.026(A)(3) (additional county sales tax to provide additional revenue for general fund); R.C. 5741.023 and R.C. 5741.031(B) (additional county use tax levied concurrently with additional county sales tax).