

**OPINION NO. 72-099**

**Syllabus:**

1. A board of education which does not have a kindergarten program as part of its curriculum is neither obligated nor permitted to assume the cost of tuition for a child under six years of age who resides within its district and attends a kindergarten

program in another school district.

2. If a welfare agency has placed a child in a kindergarten program outside the district of the residence of the child's parents, the parents will be responsible for the tuition if they are able to pay. If they are not able to pay, the welfare agency will be responsible for the tuition, even if the board of education of the parents' residence has made no provision for a kindergarten program.

3. A child of kindergarten age is included within the meaning of the word "child" as it is used in Section 2151.357, Revised Code.

4. If the juvenile court, pursuant to Section 2151.357, Revised Code, removes a child of kindergarten age from the home of its parents and places it under the custody of a welfare agency, and that agency then places the child in a kindergarten program in a school district other than that of the child's parents, Section 5153.16 (D), Revised Code, places the responsibility for payment of the tuition on the welfare agency.

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To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio  
By: William J. Brown, Attorney General, October 30, 1972

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

"The School and Library Audit Division of the Bureau has received inquiries relating to the authority of a board of education, who does not have a kindergarten as part of its curriculum, to pay tuition for pupils of kindergarten age living in its district but who are attending a kindergarten program in another district.

"Based upon this situation, the following questions are presented for your consideration and reply:

"1. When a school district does not have a kindergarten program as part of its curriculum, may and/or must that district pay tuition when pupils of kindergarten age who reside in its district attend a kindergarten program in another school district?

"2. If a child of kindergarten age is placed in the kindergarten program of a school district which is not the district of the child's residence by an authorized welfare agency, who must be responsible for any tuition which may be involved?

"3. Under Section 2151.357, Revised Code, it is provided that the court shall, at the time of making any order which removes a child from his own home, determine which school district shall bear the cost of educating such child. Under this section, does 'child' include only pupils in grades 1 through 12, or is a pupil of kindergarten age included?

"4. If the answer to three (3) above is yes, and if the court assigns the cost of education to the school district of residence of the child, is such school district liable for the tuition cost

if it does not include a kindergarten as part of its curriculum or who must be responsible for any tuition which may be involved?"

Whether or not the public school system within a school district shall include a kindergarten program as part of its curriculum, is a decision wholly within the discretion of the individual board of education. A board of education is in no way obligated to make such a program available to the residents of its district. Section 3313.53, Revised Code, which authorizes the creation of various programs, provides as follows:

"The board of education of any city, exempted village, or local school district may establish and maintain in connection with the public school systems:

"(A) Manual training, industrial arts, domestic science, and commercial departments;

"(B) Agricultural, industrial, vocational, and trades schools;

"(C) Kindergartens. Such board may pay from the public school funds, as other school expenses are paid, the expenses of establishing and maintaining such departments and schools and of directing, supervising and coaching the pupil activity programs in music, language, arts, speech, government, athletics, and any others directly related to the curriculum."

Furthermore, children of "kindergarten age" are not required to attend school. Section 3321.01, Revised Code.

Section 3313.64, Revised Code, which provides for a free education in the public schools of the district to all district residents, reads, in part, as follows:

"The schools of each city, exempted village, or local school district shall be free to all school residents between six and twenty-one years of age, \* \* \*. School residents shall be all youth who are children or wards of actual residents of the school district. District of school residence shall be the school district in which a school resident is entitled to attend school free. Inmates of the proper age of county, semipublic, and district children's homes shall be admitted after the manner described in section 3313.65 of the Revised Code. The board may admit the inmates of a private children's home or institution located in the district, provided any child who is an inmate of such a home or institution and previous to admission was a school resident of the school district in which such home or institution is located shall be entitled to free education; and, provided any such inmate who attends the public schools was, prior to admission to such home or institution, a school resident of another school district of the state, tuition shall be paid by such school district in the manner provided for the payment of tuition by section 3317.08 of the Revised Code. \* \* \*

"\* \* \* A child who is an inmate of a county, semipublic, or district children's home and who at

the time of placement in such home was a school resident of the district in which such home is located shall be entitled to an education at the expense of such school district; any other inmate of such home shall be educated at the expense of the school district in which he was a school resident at the time of placement. The district of school residence shall pay tuition. \* \* \*

"The board of education of a city, exempted village, or local school district may admit other persons to the public schools of its respective district, upon the payment of tuition within the limitation of law."

1. Your first question asks whether or not a school district which does not have a kindergarten program as part of its curriculum is permitted to pay the tuition for pupils who reside in its district but attend a kindergarten in another school district.

It is, of course, well recognized that a board of education is a creature of statute and, as such, possesses only those powers clearly and expressly granted to it by the legislature. Board of Education v. Board of Education, 167 Ohio St. 543, 5 Ohio Op. 2d 216 (1958); Verberg v. Board of Education, 135 Ohio St. 246 (1939). Proper disposition of the issue at hand, therefore, must depend on the relevant statutes.

Section 3327.04, Revised Code, which authorizes a board of education to contract with the board of another district for the purpose of providing educational facilities for its residents, reads, in part, as follows:

"The board of education of any city, exempted village, or local school district may contract with the board of another district for the admission or transportation, or both, of pupils into any school in such other district, on terms agreed upon by such boards. \* \* \*"

The language of this Section, taken alone, seems sufficiently broad to allow an agreement whereby one school district could assume the cost of tuition for children residing in its district and attending kindergarten in another district. When this statute is read, however, as it must be, in conjunction with closely-related statutes, such a result is clearly precluded.

Section 3327.06, Revised Code, which requires the payment of tuition, under an agreement entered into pursuant to Section 3327.04, provides as follows:

"When a pupil attends school, pursuant to section 3327.04 of the Revised Code, in a district other than the district in which he is a school resident, tuition for such attendance shall be credited and paid in the manner provided in section 3317.08 of the Revised Code.

"When the board of education of a city, exempted village, or local school district admits to the schools of its district any nonresident pupil for whose attendance tuition is not an obligation of the board of the district of the pupil's residence, such board shall collect tuition,

for the attendance of such pupil, from the parents or guardian of the pupil and the amount of tuition collected shall be not more nor less than the amount computed in the manner prescribed by section 3317.08 of the Revised Code.

" \* \* \*

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\* \* \* "

(Emphasis added.)

It is to be noted from the emphasized language of the statute, that a board of education is allowed no discretion in assuming the cost of tuition. If the board of a particular district is not obligated to pay the tuition for one of its residents attending school elsewhere, the district of attendance shall look to the nonresident pupil's parent or guardian for the payment of tuition.

It has already been settled that a board of education is not obligated to pay the tuition for children below the mandatory school age who attend a kindergarten in another district. The syllabus of Opinion No. 69-111, Opinions of the Attorney General for 1969, which deals with precisely this issue, provides the following:

"Pursuant to section 3327.06, Revised Code, a board of education which admits a non-resident kindergarten pupil under the age of six years into its system must look to the child's parents or guardian for the collection of tuition. Under this section the district of the child's residence is not liable to the district of attendance for the payment of said tuition."

In reaching such a conclusion, my predecessor reasoned that the language of Section 3313.64 implicitly requires a child under the mandatory school age to pay tuition and that Section 3327.06 makes it quite clear that the district of attendance must look to the child's parent or guardian for remuneration in the case of a non-resident pupil for whom tuition is not an obligation of the board of the district of the pupil's residence.

It may thus be concluded that a board of education which does not offer a kindergarten program as part of its curriculum is neither obligated nor permitted to assume the cost of tuition for a child under six years of age who resides within its district and attends kindergarten in another district.

2. Your next question asks who is responsible for any tuition involved when an authorized welfare agency places a child in a kindergarten program of a school district which is not the district of the child's residence.

I assume that, by "an authorized welfare agency", you refer to a county welfare department or a children services board. See Sections 5153.02, 5153.03 and 5153.07, Revised Code. I assume also that the child remains with its parents, since you refer to "the district of the child's residence."

The powers of the county children services board (similar powers are conferred on the county welfare department by Section 5153.02) appear in Section 5153.16, Revised Code. In pertinent part, that Section reads as follows:

"The county children services board, subject to the rules, regulations, and standards of the department of public welfare, has the following powers and duties on behalf of children in the county deemed by the board

or department to be in need of public care or protective services:

"(A) To make an investigation concerning any child reported to be in need of care, protection, or service;

"(B) To enter into agreements with the parent, \* \* \* with respect to the \* \* \* care, or placement of any such child, \* \* \*.

\* \* \* \* \*

"(D) To provide care of all kinds which the board deems for the best interests of any child the board finds in need of public care or service; provided that such care shall be provided by the board by its own means or through other available resources, in such child's own home, \* \* \* or in a \* \* \* school, \* \* \* within, or outside the county or state;

\* \* \* \* \*

(Emphasis added.)

If, in the exercise of its authority under this Section, the children services board deems it in the best interest of the child to place it in a kindergarten outside the district of the parents' residence, responsibility for payment of the tuition will depend upon the terms of the agreement between the parents and that board. If the parents are able to pay the tuition, they will be responsible. If they are not able to pay, the responsibility rests with the children services board under the specific provision in Section 5153.16 (D). And this is true even though the board of education of the district of the child's residence has made no provision for a kindergarten program. Such board of education has no statutory authority to assume responsibility for tuition of children who reside within its boundaries but attend kindergarten in another district. But Section 5153.16 clearly confers that authority upon the children services board.

The answer to your question would, of course, be different if the children services board, with consent of the juvenile court, were to remove the child from the custody of its parents to a children's home or to a foster home. I have already dealt with such questions in Opinion No. 72-030, Opinions of the Attorney General for 1972. Suffice it to say here that responsibility for the tuition will rest, in almost all cases, with the individual, the institution, or the board which stands in loco parentis to the child. Compare Section 3313.64, as quoted in Opinion No. 72-030, supra.

3. Section 2151.357, Revised Code, provides that the juvenile court, in removing a child from his parents' home, shall determine which school district is to bear the cost of his education. You ask whether the word "child", as used in that Section, includes a pupil of kindergarten age. Section 2151.357 provides as follows:

"The court shall at the time of making any order which removes a child from his own home determine which school district shall bear the cost of educating such child. Such determination shall be made a part of the order which provides for the child's placement or commitment.

"Whenever a child is placed in a detention

home established under section 2151.34 of the Revised Code, or a public school operated by the state, his school district as determined by the court shall pay the cost of educating said child based on the per capita cost of the educational facility within such detention home or public school. Whenever a child is placed by the court in a private institution, school, residential treatment center, or other private facility, the state shall pay to the court a subsidy to help defray the expenses of educating such child in an amount equal to the product of the daily per capita educational cost of such facility and the number of days the child resides thereat, provided that such subsidy shall not exceed five hundred dollars per year. The subsidy shall be paid quarterly to the court."

Section 2151.011, Revised Code, which defines many of the terms used in Chapter 2151, Revised Code, provides, in part, as follows:

"(B) As used in Sections 2151.01 to 2151.99, inclusive, of the Revised Code:

"(1) 'Child' means a person who is under the age of eighteen years, with the exception that any child who violates a federal or state law or municipal ordinance prior to attaining eighteen years of age shall be deemed a 'child' irrespective of his age at the time a complaint is filed or hearing had thereon."

A child of kindergarten age is, therefore, included within the meaning of the word "child" as it is used in Section 2151.357. The court's determination of the district which is to bear the cost is, of course, governed by the various statutory provisions.

4. The answer to your final question has already been indicated above in reply to the second question and in my previous Opinion No. 72-030, supra.

I assume, from the wording of your questions, that you have under consideration a case in which the juvenile court, pursuant to Section 2151.357, removes a child of kindergarten age from the home of its parents and places it under the custody of the children services board. That board, of course, then stands in loco parentis to the child; and, where it places the child in a kindergarten in a school district other than the district of the parents' residence, Section 5153.16 (D) places responsibility for payment of the tuition on the children services board, regardless of the fact that the school district of the parents' residence has made no provision for a kindergarten program. The court's determination under Section 2151.357, is controlled by the requirements of Section 5153.16 (D). The funds of the children services board are provided by the board of county commissioners through tax levies and appropriations. Section 5153.35, Revised Code.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. A board of education which does not have a kindergarten program as part of its curriculum is neither obligated nor permitted to assume the cost of tuition for a child under six years of age who resides within its district and attends a kindergarten program in another school district.

2. If a welfare agency has placed a child in a kindergarten program outside the district of the residence of the child's parents, the parents will be responsible for the tuition if they are able to pay. If they are not able to pay, the welfare agency will be responsible for the tuition, even if the board of education of the parents' residence has made no provision for a kindergarten program.

3. A child of kindergarten age is included within the meaning of the word "child" as it is used in Section 2151.357, Revised Code.

4. If the juvenile court, pursuant to Section 2151.357, Revised Code, removes a child of kindergarten age from the home of its parents and places it under the custody of a welfare agency, and that agency then places the child in a kindergarten program in a school district other than that of the child's parents, Section 5153.16 (D), Revised Code, places the responsibility for payment of the tuition on the welfare agency.