

OPINION NO. 80-009**Syllabus:**

1. 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.
2. A county board of mental retardation must comply with the provisions of R.C. Chapter 5126; R.C. Chapter 3323; the rules of the Division of Mental Retardation and Developmental Disabilities, including 7 Ohio Admin. Code Chapter 5119:3-1; and the rules of the State Board of Education, including 2 Ohio Admin. Code Chapter 3301-51.

To: Timothy B. Morlitz, M.D., Director, Department of Mental Health and Mental Retardation, Columbus, Ohio

By: William J. Brown, Attorney General, February 26, 1980

I have before me your request for my opinion regarding the education of mentally disabled children. Your question may be stated as follows:

Do county boards of mental retardation have a legally mandated responsibility to operate and maintain special public education programs for mentally handicapped children pursuant to R.C. 3323.09, R.C. 5126.06, or 7 Ohio Admin. Code Chapter 5119:3-1?

Your question must be considered in the context of the overall program for education of handicapped children in the State of Ohio. Under Ohio law, the primary responsibility for the education of mentally handicapped children lies with the local school districts. R.C. 3323.07 provides:

The state board of education shall authorize the establishment and maintenance of programs for the education of all handicapped children of compulsory school age, and may authorize such programs

for handicapped children who are not of compulsory school age. The state board shall require the boards of education of school districts, shall authorize the department of mental health and mental retardation, and may authorize any other educational agency, to establish and maintain such special educational programs in accordance with standards adopted by the state board of education. (Emphasis added.)

R.C. 3323.08 states in pertinent part:

The special education program of each school district shall be operated in accordance with a plan submitted to and approved by the state board of education. Such plan shall:

(A) Provide for an organizational structure and necessary staffing and supervision for the identification, placement, and provision of educational programs for handicapped children.

(B) Provide for the identification, location, and evaluation of all handicapped children, and for the educational placement of all identified handicapped children of compulsory school age, and may provide for the educational placement of handicapped children at least three years of age, including:

(1) Prior notice to assure that before any individual psychological evaluations are administered by a school district, the informed written consent of the parent of the child to be tested is obtained;

(2) The use of criteria defined by the state board of education for placement of handicapped children into special programs.

(C) Provide for an individualized education program for each handicapped child at the time of placement and by the first day of December of each subsequent school year and provide for annual review of the program.

(D) Provide for the necessary educational programs and related services needed to meet the educational needs of every handicapped child of compulsory school age in accordance with standards established by the state board of education. (Emphasis added.)

Thus, it is evident that the local school district has initial and primary responsibility for the education of mentally handicapped children. Complementing, but not replacing, the local school districts' functions are the programs of other public agencies, including county boards of mental retardation and the Ohio Youth Commission. See R.C. 3323.09; R.C. 3323.091.

Your question specifically addresses the programs of the county boards of mental retardation (county boards), boards which are established under R.C. Chapter 5126. County boards are under the general control and supervision of the Division of Mental Retardation and Developmental Disabilities (the Division), within the Department of Mental Health and Mental Retardation. See generally R.C. Chapter 5126; 1969 Op. Att'y Gen. No. 69-045. The Division was created by R.C. 5119.06; it is responsible for the promotion of programs and services for the mentally retarded, including programs of public education. R.C. 5119.061.

The Chief of the Division has, in addition to general promotional duties, a specific duty with respect to the education of handicapped children. R.C. 3323.09 states in pertinent part:

The chief of the division 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 in accordance with a plan submitted and approved by the chief. Such plan 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. The chief shall compile the plans submitted by county boards of mental retardation and shall submit a comprehensive plan to the state board of education. (Emphasis added.)

Although R.C. 3323.09 states that the establishment of special education programs by the Division is subject to authorization by the State Board of Education, R.C. 3323.07 mandates that the State Board authorize such programs: "The state board. . . shall authorize the department of mental health and mental retardation. . . to establish and maintain. . . special educational programs in accordance with standards adopted by the state board of education." (Emphasis added.)

The mandatory nature of the State Board of Education's obligation to authorize such programs and the mandatory nature of the requirement that the Chief of the Division establish special education programs are demonstrated by the use of the word "shall" in both cases. The Supreme Court of Ohio has held: "In 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." Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 102, 271 N.E. 2d 834, 835 (1971). See also 1979 Op. Att'y Gen. No. 79-081.

Even though a child may be placed in a special education program operated by a county board, the local school board is not thereby relieved of the responsibility of assuring that the child receives an appropriate education in the public school system. Rather, it is clear from other provisions of the Revised Code that the General Assembly intended special education programs established by the Chief of the Division under R.C. 3323.09 to be an integral part of the public education system of Ohio. For example, R.C. 3323.02 reads in part:

It 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. No educational program for handicapped children shall be operated except in accordance with procedures, standards, and guidelines adopted by the state board of education, and no school district, county board of mental retardation, or other educational agency shall receive state or federal funds for a special education program unless such program is operated in accordance with all procedures, standards, and guidelines adopted by the state board. The state board of education shall establish standards for special education and related services for all handicapped children in the state, regardless of the severity of their handicap. (Emphasis added.)

Ohio law specifically requires that mentally disabled children of compulsory school age receive an education, calculated to serve each individual's needs, which is at public expense and under public supervision. See R.C. 3323.01(B), (D), (E). As part of this mandate, R.C. 3323.04 provides that a child is to be placed in the program best suited to the child's needs, as determined by the child's local board of education. R.C. 3323.04 provides, in pertinent part:

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 of the county in which the child resides. (Emphasis added.)

R.C. 3323.04 goes on to provide:

The state board shall establish procedures and standards to assure that to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, shall be educated with children who are not handicapped. (Emphasis added.)

The requirement that handicapped children be educated with children who are not handicapped, to the maximum extent appropriate, limits the kind of child who can be properly placed in a special education program operated by a county board. Such limitation is reflected in one of the rules of the State Board of Education, 2 Ohio Admin. Code 3301-51-16(B)(3)(a), which states:

(B) Prior Notice

. . . .

(3) Placement—Within fifteen days after the request of the placement team conference report the superintendent shall notify the parent by certified mail, return receipt requested, that a change in the educational status of the child is proposed or that a requested change in placement is denied. Such notice shall:

(a) Describe the proposed educational plan, the method by which it was developed, the reasons why the proposed placement is deemed the least restrictive alternative program for the child. . . . (Emphasis added.)

As discussed above, the primary burden of educating mentally handicapped children is upon the local school districts, which must comply with all eligibility and placement requirements including the least restrictive placement requirement. However, 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.

Under this statutory scheme, then, certain special education programs for the mentally disabled must be established. The responsibility for operating and maintaining such programs in accordance with a plan submitted by the Chief of the Division falls upon the several county boards. Cf. 1973 Op. Att'y Gen. No. 73-014 (county boards of mental retardation must, pursuant to R.C. 5126.03, provide transportation to and from facilities operated by the boards). These special education programs constitute one of the options for placement available to a local school district. For the foregoing reasons, it is my opinion that county boards must provide an appropriate public education to children properly placed in the special education programs authorized by the State Board of Education and established by the Chief of the Division pursuant to R.C. 3323.09.

My conclusion that county boards must provide education to mentally disabled children who are properly placed in their programs is supported by R.C. Chapter 5126 and 7 Ohio Admin. Code Chapter 5119:3-1. The Chief of the Division is assigned numerous duties by R.C. 5126.06, which reads in pertinent part:

The chief of the division of mental retardation and developmental disabilities, with the approval of the director of mental health and mental retardation, shall establish in any county or mental health and mental retardation district a training center. . . and other programs and services for the special training of mentally retarded persons. . . . [The chief] shall decide all questions relative or incident to the establishment and operation of each training center. . . and other program or service; [and] determine what constitutes special training. . . .

Special education for handicapped children shall be provided in accordance with Chapter 3323. of the Revised Code.

R.C. 5126.03, in turn, states in part:

The county board of mental retardation, subject to the rules and standards of the chief of the division of mental retardation and developmental disabilities shall:

(A) Administer and supervise facilities, programs, and services established under section 5126.06 of the Revised Code and exercise such powers and duties as prescribed by the chief. . . .

Special education programs provided pursuant to R.C. 3323.09 are among the programs established under R.C. Chapter 5126. As such, rules promulgated by the Chief of the Division under the authority of R.C. 5126.03 complement the provisions in R.C. Chapter 3323, and govern the county boards with respect to their R.C. 3323.09 duties.

Several of the rules of the Chief of the Division outline the specific responsibilities of the county boards in providing special education. Rule 5119:3-1-03(D) requires county boards to provide education programs for the eligible school age mentally retarded residents of the county, including the provision of necessary materials and supplies. Rule 5119:3-1-04(B) defines as eligible persons who are moderately, severely, or profoundly retarded, or developmentally disabled. In addition, the rule outlines the data which must be received prior to a child's placement in the county board's school age program. Rule 5119:3-1-04 further specifies due process guidelines which must be satisfied before placement.

The details of the school age program to be run by a county board are found in rule 5119:3-1-06. Rule 5119:3-1-06(A)(1) provides: "The School Age Program includes structured instructional services that provide a comprehensive education and habilitation program for a mentally retarded and developmentally disabled child." Requirements pertaining to placement criteria and program content are also set forth in that rule. In addition, R.C. 3323.02, quoted in pertinent part above, requires that special education programs be conducted in accordance with the procedures, standards, and guidelines adopted by the State Board of Education. Rules of the State Board of Education governing education of the handicapped are found in 2 Ohio Admin. Code Chapter 3301-51.

The rules of the Division and the State Board of Education are binding on the county boards of mental retardation, since it is well settled that rules validly promulgated have the force and effect of law. The Kroger Grocery & Baking Co. v. Glander, 149 Ohio St. 120, 79 N.E. 2d 228 (1948); State ex rel. Kildow v. Industrial Commission, 128 Ohio St. 573, 192 N.E. 873 (1934). Thus, the county boards must provide and maintain public education programs for mentally disabled children of compulsory school age in accordance with applicable rules.

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

1. 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.
2. A county board of mental retardation must comply with the provisions of R.C. Chapter 5126; R.C. Chapter 3323; the rules of the Division of Mental Retardation and Developmental Disabilities, including 7 Ohio Admin. Code Chapter 5119:3-1; and the rules of the State Board of Education, including 2 Ohio Admin. Code Chapter 3301-51.