

**OPINION NO. 2003-001**

**Syllabus:**

1. A certificated school psychologist, as defined in R.C. 4732.01(H), who is engaged by one of the entities named in R.C. 4732.22(A) either to render school psychological services or to act as a school psychologist is exempt from the licensure requirements of R.C. 4732.21(B) in the performance of the duties for which he is so engaged and compensated.
2. A certificated school psychologist's employment by one of the entities named in R.C. 4732.22(A) in the capacity of a consultant is not, in itself, determinative of whether the individual's activities in the course of such employment fall within the exemption created by R.C. 4732.22(A). Rather, the specific duties performed in the course of such employment must be examined, and if they constitute the practice of school psychology, as defined in R.C. 4732.02(E), the certificated school psychologist is exempt under R.C. 4732.22(A) from the licensure requirements of R.C. 4732.21(B).

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**To: Ronald R. Ross, Ph.D., Executive Director, State Board of Psychology, Columbus, Ohio**

**By: Betty D. Montgomery, Attorney General, January 9, 2003**

You have requested an opinion concerning the licensure of individuals who are school psychologists. As set forth in your letter:

The State Board of Psychology requests a Formal Opinion regarding whether the exemption [in R.C. 4732.22(A)] applies only to individuals who are *employees* of boards of education, boards of MR/DD, or private schools as identified, or whether this may also apply to individuals who engage in school psychology work for these entities as independent contractors or consultants. Does providing school psychological work as a contractor qualify as "employment" and therefore exempt a school psychologist credentialed under the Ohio Department of Education from the licensing requirements of Revised Code Chapter 4732?

Let us begin with a brief overview of the licensing requirements established by R.C. Chapter 4732, which governs, among other things, the practice of school psychology. Pursuant to R.C. 4732.21(B), "[o]n and after December 1, 1972, no person who is not a licensed psychologist or a licensed school psychologist shall *offer or render services* as a school psychologist or *otherwise engage in the practice of school psychology* for a compensation or

other personal gain.”<sup>1</sup> (Emphasis added.) Thus, in order to offer or render services as a school psychologist or to engage in the practice of school psychology, for compensation or other personal gain, an individual must be licensed by the State Board of Psychology.

The General Assembly has established various exceptions to the licensure requirements of R.C. 4732.21(B), however. The particular exemption with which you are concerned is set forth in R.C. 4732.22, which states in pertinent part:

The following persons are exempted from the licensing requirements of this chapter:

(A) A *certificated* school psychologist, while practicing school psychology *within the scope of his employment* by a board of education or by a private school meeting the standards prescribed by the state board of education under [R.C. 3301.07(D)], or while acting as a school psychologist *within the scope of his employment* in a program for trainable mentally retarded children established under [R.C. Chapter 3323 or R.C. Chapter 5126]. A *person exempted under this division shall not offer psychological services to any other individual, organization, or group for remuneration, monetary or otherwise, unless he is licensed by the state board of psychology.* (Emphasis added.)

For purposes of R.C. 4732.22, a “certificated” school psychologist means “an individual holding a current, valid school psychologist certificate issued under [former R.C. 3319.22(M)].” R.C. 4732.01(H).<sup>2</sup>

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<sup>1</sup>As used in R.C. 4732.21(B), the “[p]ractice of school psychology” means:

rendering or offering to render to individuals, groups, organizations, or the public any of the following services:

(1) Evaluation, diagnosis, or test interpretation limited to assessment of intellectual ability, learning patterns, achievement, motivation, or personality factors directly related to learning problems in an educational setting;

(2) Counseling services for children or adults for amelioration or prevention of educationally related learning problems;

(3) Educational or vocational consultation or direct educational services. This does not include industrial consultation or counseling services to clients undergoing vocational rehabilitation.

R.C. 4732.01(E).

<sup>2</sup>Former R.C. 3319.22(M), which was repealed in 1995-1996 Ohio Laws, Part VI, 10257 (Am. Sub. S.B. 230, eff. October 29, 1996), provided for the issuance of teachers’ certificates of various types in the category of “[p]upil-personnel workers, including school psychologists, valid for the conduct of all home-school-community relations incident to the adjustment of pupils to the facilities available for their education.” 1987-1988 Ohio Laws, Part II, 3771 (Am. H.B. 439, eff. March 17, 1989).

Within Am. Sub. S.B. 230, the General Assembly enacted R.C. 3319.222, which states, in pertinent part:

(A) Notwithstanding the amendments to and repeal of statutes by the act that enacted this section, the state board of education shall do the follow-

Your initial concern is whether a certificated school psychologist who renders school psychological services or acts as a school psychologist for one of the entities named in R.C. 4732.22(A) falls within the exemption prescribed by R.C. 4732.22(A) if hired as an independent contractor, rather than as an employee. Your letter indicates that we may assume, for purposes of discussion, that the individual has been engaged to render school psychological services or to act as a school psychologist for one of the entities specified in R.C. 4732.22(A), and that the individual has received a certificate in accordance with former R.C. 3319.22(M). *See generally* note two, *supra*. For the reasons that follow, we believe the manner in which an individual is engaged by one of the entities described in R.C. 4732.22(A), whether as an employee or as an independent contractor, is not determinative of whether that individual is exempt from the licensure requirement set forth in R.C. 4732.21(B) while working as a school psychologist or practicing school psychology for the employing entity.

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ing in accordance with the former statutes in effect immediately prior to amendment or repeal by the act that enacted this section:

(1) Accept applications for new, and renewal and upgrade of, provisional and professional teachers' certificates through September 1, 1998, and issue them on the basis of the applications received by that date;

(2) Accept applications for one-time renewals or upgrades of provisional teachers' certificates after September 1, 1998, and before September 2, 2002, and issue them on the basis of the applications received during this period;

(3) Accept applications for one-time renewals or upgrades of professional teachers' certificates after September 1, 1998, and before September 2, 2006, and issue them on the basis of the applications received during this period;

(4) Accept applications for permanent teachers' certificates through September 1, 2003, and issue them on the basis of the applications received by that date.

(B) A permanent teacher's certificate issued under [R.C. 3319.22-.31] prior to the effective date of this section or issued under division (A) of this section shall be valid for teaching in the subject areas and grades for which the certificate was issued except as the certificate is limited, suspended, or revoked under [R.C. 3319.31].

(C) A teacher's certificate that is not a permanent certificate and that has been issued under [R.C. 3319.22-.31] prior to the effective date of this act or that is issued under division (A) of this section shall be valid until it expires, for teaching in the subject areas and grades for which the certificate was issued except as the certificate is limited, suspended, or revoked under [R.C. 3319.31].

(D) Nothing in this section shall be construed to prohibit a person from applying to the state board of education for an educator license issued under [R.C. 3319.22] as it exists on and after the effective date of this section.

(E) On and after the effective date of this section, any reference in the Revised Code to educator licensing is hereby deemed to refer also to teacher certification under divisions (A), (B), and (C) of this section.

In order to understand the nature and application of the exemption created by R.C. 4732.22(A), it may be useful to examine more closely the language of R.C. 4732.21(B). *See generally State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 585, 651 N.E.2d 995, 998 (1995) (“[a]ll statutes relating to the same general subject matter must be read *in pari materia*, and in construing these statutes *in pari materia*, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes”). The prohibition contained in R.C. 4732.21(B) against the unlicensed practice of school psychology has three elements: rendering or offering to render services as a school psychologist, by an individual who is not licensed under R.C. Chapter 4732, for compensation or other personal gain. *See generally* R.C. 4732.23 (limitations on the prohibition against unlicensed practice).

The exemption created by R.C. 4732.22(A) parallels the prohibition contained in R.C. 4732.21(B), addressing the elements contained in the latter statute. The first element of the prohibition contained in R.C. 4732.21(B) is addressed in R.C. 4732.22(A), which describes the authorized activity as either rendering school psychological services or acting as a school psychologist for one of the entities named in R.C. 4732.22(A). The second element of the exemption indicates to whom it applies, *i.e.*, an individual who has received a certificate under former R.C. 3319.22(M), and who, implicitly, is not licensed by the State Board of Psychology. The final element of the prohibition established by R.C. 4732.21(B), rendering the specified services for compensation or gain, is reflected in the exemption’s requirement that the services rendered be within the scope of the certificated individual’s employment. Reading this final element of the exemption *in pari materia* with the third element of the prohibition of R.C. 4732.21(B), it is clear that the activities covered by the exemption, *i.e.*, those services within the scope of employment, are those for which the certificated school psychologist is being compensated by the employing entity.

Your particular concern is whether the use of the phrase “scope of employment” in R.C. 4732.22(A) limits the exemption therein to an individual who renders the described services as an employee, as opposed to an independent contractor, of one of the entities named therein. As explained by the court in *Industrial Comm’n v. Laird*, 126 Ohio St. 617, 186 N.E. 718 (1933) (syllabus, paragraph four): “[t]he vital test, in determining whether a person employed to do a certain work is an independent contractor or a mere servant, is the right of control over the work reserved by the employer.” The difference between the two types of employment commonly arises in a variety of contexts, *e.g.*, where the acts of one

individual are attempted to be attributed to another,<sup>3</sup> or where an individual's status as an "employee" under a specific statutory provision is in question.<sup>4</sup>

Nothing in R.C. 4732.22(A), however, indicates that the manner in which a certificated individual is engaged by one of the named entities affects whether the performance of those activities in the course of such employment is exempt from the prohibition in R.C. 4732.21. Rather, the activity governed by R.C. 4732.22(A) is the rendering of school psychological services or acting as a school psychologist in the course of employment by one of the named employing entities. So long as a certificated school psychologist is engaged by one of the entities named in R.C. 4732.22(A) either to render school psychological services or to act as a school psychologist, that individual is exempt from the licensure requirements of R.C. 4732.21(B) in the performance of the duties for which he is so engaged and compensated.

We must separately address your concern whether an individual who is employed by one of the entities named in R.C. 4732.22(A), pursuant to contract, to provide school psychological work as a "consultant" falls within the exemption created by R.C. 4732.22(A). As noted in response to the first part of your question, the activity exempted by R.C. 4732.22(A) from the prohibition in R.C. 4732.21(B) is the rendering of school psychological services or acting as a school psychologist, for compensation, for one of the entities specified in R.C. 4732.22(A).<sup>5</sup>

In this regard, we note that, generally, a "consultant" acts in an advisory capacity regarding matters in his areas of professional or technical expertise. See *Webster's New World Dictionary* 305 (2d college ed. 1986) (defining "consultant," as meaning, in part, "an

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<sup>3</sup>See generally, e.g., *Master Consolidated Corp. v. BancOhio National Bank*, 61 Ohio St. 3d 570, 576-77, 575 N.E.2d 817, 822 (1991) ("in order for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: \*\*\* (1) [t]hat the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. The apparent power of an agent is to be determined by the act of the principal and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of the authority and not where the agent's own conduct has created the apparent authority. \* \* \*" (citation omitted)).

<sup>4</sup>See generally, e.g., R.C. 124.01(F) (defining "employee" for purposes of R.C. Chapter 124); R.C. 2744.01(B) (defining "employee" for purposes of political subdivision tort liability); R.C. 4101.11 (duty of employer to protect employees and frequenters); 1979 Op. Att'y Gen. No. 79-015 (syllabus, paragraph one) ("[t]eachers who are engaged under personal services contracts with the Department of Mental Health and Mental Retardation are 'employed' by the Department for purposes of R.C. Chapter 3307 [(State Teachers Retirement System)] if the Department exercises control over the mode and manner in which the teachers perform their work").

<sup>5</sup>See R.C. 4732.01(D) (defining "school psychologist" as meaning "any person who holds self out to the public by any title or description of services incorporating the words 'school psychologist' or 'school psychology,' or who holds self out to be trained, experienced, or an expert in the practice of school psychology"); note one, *supra* (definition of practice of school psychology).

expert who is called on for professional or technical advice or opinions”).<sup>6</sup> For purposes of R.C. 4732.21 and R.C. 4732.22, R.C. 4732.01(E)(3) includes within the definition of the practice of school psychology “[e]ducational or vocational *consultation*” (emphasis added). Thus, a certificated school psychologist’s employment in the capacity of a consultant does not, in itself, preclude that individual’s activities in the course of such employment from being exempted by R.C. 4732.22(A).<sup>7</sup> Rather, the specific duties performed in the course of such employment must be examined, and if they constitute the practice of school psychology, the certificated school psychologist is exempt under R.C. 4732.22(A) from the licensure requirements of R.C. 4732.21(B).

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. A certificated school psychologist, as defined in R.C. 4732.01(H), who is engaged by one of the entities named in R.C. 4732.22(A) either to render school psychological services or to act as a school psychologist is exempt from the licensure requirements of R.C. 4732.21(B) in the performance of the duties for which he is so engaged and compensated.
2. A certificated school psychologist’s employment by one of the entities named in R.C. 4732.22(A) in the capacity of a consultant is not, in itself, determinative of whether the individual’s activities in the course of such employment fall within the exemption created by R.C. 4732.22(A). Rather, the specific duties performed in the course of such employment must be examined, and if they constitute the practice of school psychology, as defined in R.C. 4732.02(E), the certificated school psychologist is exempt under R.C. 4732.22(A) from the licensure requirements of R.C. 4732.21(B).

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<sup>6</sup>In contrasting the rendering of medical, psychiatric, or psychological services with the activity of consulting with respect to those matters, 1983 Op. Att’y Gen. No. 83-013 explained at 2-56, as follows:

I find it significant that the contracts designate each of the individuals in question as Medical or Psychological Consultant, for it seems that the basic nature of the services rendered under those contracts is that of consulting, rather than of undertaking medical, psychiatric, or psychological activity. *See generally* Op. No. 80-067. The individuals in question do not see patients and do not provide medical or psychological treatment. Their functions are to serve as consultants, providing advice in their areas of expertise, and to act as liaisons.

<sup>7</sup>Whether particular consulting activities fall within the practice of school psychology depends on the nature of the particular activities. It is beyond the scope of an opinion of the Attorney General, however, to make such factual determinations. 1990 Op. Att’y Gen. No. 90-111 at 2-502.