

OPINION NO. 69-040

Syllabus:

1. It is mandatory for a local board of education to provide training and/or educational facilities and services for children with an intelligence quotient of 50 or below unless such children have been determined to be incapable of profiting substantially by further instruction as provided by Section 3321.05, Revised Code.

2. A local board of education is entitled to receive tuition from other local boards of education in those instances specifically provided for by statute.

3. There is no intelligence quotient below which a local board of education is without authority to provide classes for children.

4. Unless and until a determination that a child with an intelligence quotient below 50 is incapable of profiting substantially by further instruction, the age limits to be considered in determining the necessity for providing classes to such children are the same age limits which must be considered for providing classes for all children. Until such a determination is made, therefore, the only age limits which have any application to providing classes for children are the compulsory school age limits contained in Section 3321.01, Revised Code, which provides that a child between six and eighteen years of age is of compulsory school age.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: Paul W. Brown, Attorney General, May 2, 1969

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

"1. Is it mandatory for a local board of education to provide training and/or educational facilities and services for children with an I.Q. of 50 or below?

"2. If the answer to No. 1 is 'No,' then is it permissive for a local board of education to provide facilities and services to establish classes for children with an I.Q. of 50 or below?

"3. If the answer to No. 1 and/or No. 2 is 'Yes,' may a local board of education charge tuition of other local boards of education for the services in the absence of a contract/agreement?

"4. Is there an I.Q. level below which a local board of education is without authority, either mandatory or permissive, to provide classes for children?"

"5. Is there an age limit when considering the permissive or mandatory nature of providing classes for children with an I.Q. of 50 or below?"

School attendance is mandatory in Ohio and there is a strong public policy that free education in an appropriate school is available to every child of school age. Board of Education v. Dille, 109 Ohio App. 344 (1959). The method of excluding children of school age who are incapable of profiting substantially from education is set forth in Section 3321.05, Revised Code, as follows:

"A child of compulsory school age may be determined to be incapable of profiting substantially by further instruction.

"The state board of education may prescribe standards and examinations or tests by which such capacity may be determined, and prescribe and approve the agencies or individuals by which they shall be applied and conducted; but the capacity of a child to benefit substantially by further instruction shall be determined with reference to that available to the particular child in the public schools of the district in which he resides, and no child shall be determined to be incapable of profiting substantially by further instruction if the superintendent of public instruction, pursuant to board standards, finds that it is feasible to provide for him in such district, or elsewhere in the public school system, special classes or schools, departments of special instruction or individual instruction through or by which he might profit substantially, according to his mental capacity as so determined. In prescribing, formulating, applying, and giving such standards, examinations or tests, the state board of education may call for assistance and advice upon any other department or bureau of the state, or upon any appropriate department of any university supported wholly or partly from state appropriations.

"The result of each examination or test made with the recommendation of the agency or individual conducting the same, shall be reported to the superintendent of public instruction, who, subject to board standards, may make the determin-

ation authorized in this section. If a child is determined to be incapable of profiting substantially by further instructions, such determination shall be certified by the superintendent of public instruction to the superintendent of schools of the district in which he resides, who shall place such child under the supervision of a visiting teacher or of an attendance officer, to be exercised as long as such child is of compulsory school age. The superintendent of public instruction shall keep a record of the names of all children so determined to be incapable of profiting substantially by further instruction and a like record of all such children residing in any school district shall be kept by the superintendent of schools of such district. Upon request of the parents, guardians, or persons having the care of such child whose residence has been changed to another school district the superintendent of schools shall forward a card showing the status of such child as so determined to the superintendent of schools of the district to which the child has been moved.

"Any determination made under this section may be revoked by the state board of education for good cause shown.

"A child determined to be incapable of profiting substantially by further instruction shall not hereafter be admitted to the public schools of the state while such determination remains in force."

The predecessor to this Section, Section 7762-7, General Code, was construed in Board of Education v. State, ex rel. Goldman, 47 Ohio App. (1934). In that case, a local board of education passed a resolution excluding from school children having an intelligence quotient below 50. The father of a child excluded under this standard filed an action in mandamus. The Court considered Section 7762-7, General Code, and the other statutes governing education in the state and held that a local board of education had no authority to exclude a child from public schools under this Section. In reaching its decision, the Court found that there was a strong public policy that every child of compulsory school age be entitled to attend public schools. It also found that only the State Department of Education had authority to make the determination that a child was incapable of benefiting substantially from education. The Court stated at page 424 of its Opinion as follows:

"It is to be borne in mind, however, that not only compulsory attendance is required by our laws, but also that the right to attend our public schools belongs to the people. Education for all youth is deemed of paramount importance. It is the foundation of popular government and is considered so essential that between certain ages children must attend our schools.

"The question arises as to where the authority to exclude a child of low mentality is vested. The question in this case is whether or not this child was legally refused admission to the schools. A careful study of Section 7762-7, General Code, leads us to the conclusion that the Department of Education may prescribe the standards, and examinations or tests, and approve the agencies or individuals by which they shall be applied and conducted, but that under that Section a determination of the question must be finally made by the Department of Education, which counsel for the Board of Education concedes means the State Department of Education. In this case the State Department of Education made no final determination. Without such final approval or determination by the Department of Education, we think that this child was not excluded in accordance with the provisions of the statute, and that the Court below was right in granting a peremptory writ of mandamus."

Each child of compulsory school age is to be afforded the opportunity to attend a proper public school unless and until the board of education makes a determination that the child is incapable of profiting substantially from such education. Until the board makes such a determination, every child of compulsory school age is entitled to the same educational opportunities. Section 3321.05, provides for an individual determination in each case. In fact, in making the determination, a capacity of the child to benefit shall be determined with reference to the education available to the particular child in the public schools of the district in which he resides.

A school board or school district is not empowered to make tuition payments, except in those instances specifically provided for by statute. Opinion No. 65-16, Opinions of the Attorney General for 1965. Some of those instances are as follows: Section 3313.64, Revised Code, provides that children who are admitted to a private or public children's home or institution but who were, prior to admission, school residents of a school district other than that in which the home or institution is located may attend school in the school district in which such home or institution is located. In situations such as this, tuition is payable by the school district in which the child resided prior to admission to such home or institution. Section 3317.08, Revised Code, provides that the political subdivision owning a tax exempt territory shall pay the tuition costs for the children residing within such tax exempt territory. Section 3323.10, Revised Code, provides that if a child who is a school resident of one school district attends special instruction classes in another district, which special instruction is needed by the child because of his handicap, then the Board of education of the district in which the class is located may require the payment of tuition by the board of education of the district in which such child is a school resident. Section 3323.01, Revised Code, provides the authority for establishing classes of special instruction for, among others, physically, emotionally, or mentally handicapped persons over the age of five. Section 3327.04, Revised Code, provides that a school district may contract with the board of another school district for admission or transportation or both of pupils into any school in such other district on terms to be agreed upon by the school boards involved.

Unless and until a determination that a child with an intelligence quotient below 50 is incapable of profiting substantially by further instruction, the age limits to be considered in determining the necessity for providing classes to such children are the same age limits which must be considered for providing classes for all children. Until such a determination is made, therefore, the only age limits which have any application to providing classes for children are the compulsory school age limits contained in Section 3321.01, Revised Code, which provides that a child between six and eighteen years of age is of compulsory school age.

In conclusion, it is my opinion and you are hereby advised:

1. It is mandatory for a local board of education to provide training and/or educational facilities and services for children with an intelligence quotient of 50 or below unless such children have been determined to be incapable of profiting substantially by further instruction as provided by Section 3321.05, Revised Code.
2. A local board of education is entitled to receive tuition from other local boards of education in those instances specifically provided for by statute.
3. There is no intelligence quotient below which a local board of education is without authority to provide classes for children.
4. Unless and until a determination that a child with an intelligence quotient below 50 is incapable of profiting substantially by further instruction, the age limits to be considered in determining the necessity for providing classes to such children are the same age limits which must be considered for providing classes for all children. Until such a determination is made, therefore, the only age limits which have any application to providing classes for children are the compulsory school age limits contained in Section 3321.01, Revised Code, which provides that a child between six and eighteen years of age is of compulsory school age.