

**OPINION NO. 86-040****Syllabus:**

Pursuant to R.C. 3317.05, the State Board of Education may approve units operated by a county board of mental retardation and developmental disabilities (county MR/DD board), regardless of whether such units are provided directly by the county MR/DD board or are provided pursuant to contract under R.C. 5126.05 by other entities, public or private, profit making or nonprofit. Pursuant to R.C. 3317.024 and Section 37 (uncodified) of Am. Sub. H.B. 238, 116th Gen. A. (1985) (eff. July 1, 1985), the State Board of Education may make distributions of funds to county MR/DD boards for such approved units.

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To: Franklin B. Walter, Superintendent of Public Instruction, Department of Education, Columbus, Ohio  
 By: Anthony J. Celebrezze, Jr., Attorney General, June 25, 1986

I have before me your request for an opinion on the following question: "May the Ohio Department of Education approve units and flow state monies to a County Board of Mental Retardation and Developmental Disabilities when such County Board contracts with a non-public, profit or non-profit, agency to provide such unit services?" Your question has arisen in connection with Am. Sub. H.B. 238, 116th Gen. A. (1985) (eff. July 1, 1985), which gave the Department of Education the authority to fund programs operated by county boards of mental retardation and developmental disabilities (county MR/DD boards) that had previously been funded through the Department of Mental Retardation and Developmental Disabilities. See 1983-1984 Ohio Laws, Part II, 4763-66 (Sub. H.B. 794, eff., in part, July 6, 1984) (prior versions of R.C. 5126.12 and 5126.13). See generally 1981 Op. Att'y Gen. No. 81-054. In particular, Section 37 (uncodified) of Am. Sub. H.B. 238 states, in part:

County MR/DD Boards - Special Education

The foregoing appropriation item 200-549, County MR/DD Boards-Special Education shall be distributed by the Department of Education to county boards of mental retardation and developmental disabilities for special education units approved by the State Board of Education pursuant to section 3317.05 of the Revised Code.

R.C. 3317.05 sets forth standards for determining the number of units to be used in calculating the payments made to various local bodies. R.C. 3317.05 states, in part:

For the purpose of calculating payments under sections 3317.024, 3317.11, and 3317.16 of the Revised Code the state board of education shall determine the following by the last day of January of each year for each school district based upon the information certified under division (A) of section 3317.03 of the Revised Code and, with respect to divisions (B), (C), and (D) of this section, for each institution eligible for payment under section 3323.091 of the Revised Code and for each county MR/DD board:

...  
 (B) The number of classes operated by a school district or institution for handicapped children, or fraction thereof, including in the case of a district that is a funding agent, classes taught by a certificated teacher employed by that district under section 3313.841 of the Revised Code, approved annually by the state board of education on the basis of standards and rules adopted by the board;

(C) The number of units for gifted children, child study, and occupational, physical, and speech and hearing therapy or fraction thereof approved annually by the state board of education on the basis of standards and rules adopted by the board;

(D) The number of units for special education supervisors and special education coordinators approved annually by the state board of education on the basis of standards and rules adopted by the board.

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In the case of classes and units operated by county MR/DD boards, the state board shall approve only classes and units for persons who are under age twenty-two on the first day of the academic year, but not less than six years of age on the thirtieth day of September of that year, except that such a class or unit may include one or more children who are under six years of age on the thirtieth day of September if such children have been admitted to the class or unit pursuant to rules of the state board of education. The number of classroom units for county MR/DD boards approved by the state board shall not exceed the number that can be funded with appropriations made for such purpose by the general assembly or approved by the controlling board.

No unit shall be approved under divisions (B) to (D) of this section unless a plan has been submitted and approved under Chapter 3323. of the Revised Code. (Emphasis added.)

The standards set forth in R.C. 3317.05 are relevant to payments made under R.C. 3317.024, R.C. 3317.11, and R.C. 3317.16. R.C. 3317.11 provides for payments from the State Board of Education to county boards of education, and R.C. 3317.16 provides for payments to joint vocational school districts. R.C. 3317.024 provides for payments to county MR/DD boards, as follows:

In addition to the moneys paid to eligible school districts and county school districts pursuant to section 3317.02 or 3317.11 of the Revised Code, moneys appropriated for the education programs in divisions (A) to (P) of this section shall be distributed to school districts meeting the requirements of section 3317.01 of the Revised Code and to county school districts as provided in section 3317.11 of the Revised Code...and in the case of divisions (N) and (O) of this section, to county MR/DD boards and to institutions providing special education programs under section 3323.091 of the Revised Code that are under the supervision of the division of special education of the department and meet such standards and rules for such programs as are established by the state board of education including certification of all professional staff involved in such programs. The following shall be distributed monthly, quarterly, or annually as may be determined by the state board of education:

....  
 (N)(1) An amount for each approved unit for a deaf, blind, emotionally disturbed, crippled, neurologically handicapped, or educable mentally retarded class in the district or in the institution. The amount shall be the greater of:

(a) The sum of the unit's teacher's minimum salary calculated on the basis of the teacher's training level and years of experience pursuant to section 3317.13 of the Revised Code, plus fifteen per cent of the allowance, plus seven thousand four hundred dollars;

(b) One hundred five per cent of the amount per pupil paid during the current fiscal year under section 3317.022 and divisions (A), (C), (D), (E), and (F) of section 3317.023 of the Revised Code times the

number of full-time equivalent pupils enrolled in such classes.

(2) If a school district has had additional units approved for the year under division (D)(2) of section 3317.03 of the Revised Code, the district shall receive an additional amount during the last half of the fiscal year equal to the difference between the following amounts:

(a) Fifty per cent of the amount computed for the unit in the manner prescribed by division (N)(1) of this section;

(b) Fifty per cent of the per pupil payment required to be paid to the district for the year under section 3317.022, divisions (C) to (F) of section 3317.023, and sections 3317.025 to 3317.028 of the Revised Code for each child included in the district's ADM that was used to compute the amount of such payments.

(c) An amount for each approved unit for the gifted, child study, occupational or physical therapy, speech and hearing, special education supervisors, and special education coordinators. The amount shall be the sum of the unit's teacher's minimum salary calculated on the basis of the teacher's training level and years of experience pursuant to section 3317.13 of the Revised Code, plus fifteen per cent of such allowance, plus one thousand five hundred twenty-five dollars. (Emphasis added.)

R.C. 3317.03, referenced in R.C. 3317.05, sets forth the method by which average daily membership figures are to be determined for various classes and educational units. R.C. 3317.03(E)(2) states:

The superintendent of each county MR/DD board that maintains special education classes or units approved by the state board of education pursuant to section 3317.05 of the Revised Code shall, in accordance with divisions (A), (C), and (D)(1) of this section, certify to the state board the average daily membership in such classes and units for each school district that has placed children in the classes or units. (Emphasis added.)

Thus, a county MR/DD board which maintains special education classes or units that are approved by the State Board of Education under R.C. 3317.05 must certify to the State Board of Education the average daily membership in such classes and units for each school district that has placed children in the classes or units.

Section 37 of Am. Sub. H.B. 238 authorizes the distribution of the appropriated funds referenced therein to county MR/DD boards "for special education units approved by the State Board of Education pursuant to [R.C. 3317.05]." R.C. 3317.05 restricts the approval of classes and units operated by county MR/DD boards to those which meet certain age requirements, may be funded by available appropriations, and are provided pursuant to a plan approved under R.C. Chapter 3323. R.C. 3317.05 does not, however, indicate that classes and units provided by a county MR/DD board may not be approved if they are provided pursuant to contract with a nonpublic, profit or nonprofit, agency, rather than being provided directly by the county MR/DD board.

R.C. 3317.05 uses the words "operated by county MR/DD boards" in describing those classes and units of county MR/DD boards which may be approved by the State Board of Education. The word "operated" is also used in R.C. 3323.09, which provides the authority under which county MR/DD boards provide special education programs for handicapped children. R.C. 3323.09 states, in part:

The director 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 and developmental disabilities in accordance with a plan submitted to and approved by the director. (Emphasis added.)

See also R.C. 3323.07 ("[t]he state board [of education]...shall authorize...the department of mental retardation and developmental disabilities...to establish and maintain...special educational programs in accordance with standards adopted by the state board of education"); 1980 Op. Att'y Gen. No. 80-009.

R.C. 5126.05 uses the word "operate" in connection with the provision of programs by a county MR/DD board under R.C. Chapter 3323, as follows:

Subject to the rules established by the director of mental retardation and developmental disabilities pursuant to Chapter 119. 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. and 5126. of the Revised Code;

...  
 (C) Subject to the approval of the director of mental retardation and developmental disabilities, plan and set priorities based on available funds for the provision of both facilities and services to meet the needs of county residents with mental retardation or developmental disabilities and of former residents of the county presently residing in state institutions or placed under purchase of service agreements according to section 5123.18 of the Revised Code;

...  
 (F) Ensure that related services, as defined in section 3323.01 of the Revised Code and comprehensive evaluation services and residential services 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;  
 ....

R.C. Chapter 5126 contains express authority for a county MR/DD board to contract with other county MR/DD boards or with other public or private agencies or organizations, whether profit making or nonprofit, to provide the facilities, programs and services which the county MR/DD board is authorized or required to provide. The relevant paragraph of R.C. 5126.05 states:

Any county board may enter into contracts with other such boards and with public or private, nonprofit or profit making agencies or organizations of the same or another county, to provide the facilities, programs, and services authorized or required, upon such terms as may be agreeable, and in accordance with Chapters 3323. and 5126. of the Revised Code and rules adopted thereunder.

Pursuant to this provision, a county MR/DD board is authorized to provide facilities, programs, and services by means of contract, rather than by direct performance. See, e.g., 1984 Op. Att'y Gen. No. 84-064; 1984 Op. Att'y Gen. No. 84-019. The statutory scheme makes no distinction between activities and programs which a county MR/DD board carries out itself and those for which it contracts. It appears, therefore, that programs which a county MR/DD board provides pursuant to R.C. 5126.05, whether by contract or by its own performance, may, if they satisfy applicable requirements, be considered to be "operated" by the board for purposes of R.C. 3317.05 and R.C. 3323.09, and, thus, to be eligible for approval under R.C. 3317.05 and for funding under Section 37 of Am. Sub. H.B. 238.

A similar conclusion was reached by my predecessor in 1970 Op. Att'y Gen. No. 70-169. Op. No. 70-169 involved a situation in which a school district contracted to have a vocational education program provided by a state-licensed private school.<sup>1</sup> Op. No. 70-169 states, at 2-338:

School districts are required to provide vocational education; they may do so by contracting with licensed schools, and the number of students enrolled in vocational training is used as one of the factors to determine the amount of foundation

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<sup>1</sup> Statutory language governing the provision of vocational educational programs by contract and the funding of such programs under R.C. Chapter 3317 now appear in, inter alia, R.C. 3313.90-.91, R.C. 3317.024(M), R.C. 3317.03(A), and R.C. 3317.05(A). R.C. 3317.024(M)(2) states, in part:

For pupils enrolled in approved vocational classes in licensed proprietary schools pursuant to sections 3313.90, 3313.91, and 3317.03 of the Revised Code, a payment shall be made to each eligible school district for each full-time equivalent pupil in an amount equal to the average payment for all full-time equivalent pupils in the state for the previous year as determined by the superintendent of public instruction.

R.C. 3317.03(A) states, in part:

The average daily membership of pupils enrolled in approved vocational classes in licensed proprietary schools may be counted, pursuant to section 3313.90 of the Revised Code, only where standards as to facilities and staffing are comparable, as determined by the superintendent of public instruction, to those established by the state board of education for public schools.

payments. In view of the foregoing facts, it is my opinion, and you are hereby advised, that although a public school may not be specifically reimbursed for expenditures in contracting with a state agency licensed school pursuant to Section 3313.90, Revised Code, the attendance in such a contracted school would be utilized in arriving at the Section 3317.03, Revised Code, daily membership figures. Such attendance would then increase the amount of payments under the school foundation program and thus provide financial support to the contracting school district indirectly rather than by direct reimbursement.

The analogy is clear: county MR/DD boards may provide educational programs by contracting with qualified entities; the number of students enrolled in such programs is one of the factors used in determining the amounts of payments under R.C. Chapter 3317; therefore, the attendance in such contracted programs may be utilized in arriving at membership figures and in calculating the amounts of payments to such boards.

It is my understanding that questions have been raised concerning the conclusion reached in this opinion because, as your letter of request states, "[i]t has been the practice of the Department of Education to fund units to school districts only when the teachers in such units were employees of the school district even though such teachers might perform unit services in other than a public school building." Since you have not inquired about the propriety of this practice, I shall not discuss it in detail, but shall note simply that it appears to be founded in the firmly-established principle that, absent statutory authority, a school district must perform its educational responsibilities through its own employees, rather than pursuant to contract with outside entities. See 1981 Op. Att'y Gen. No. 81-002. Cf. Op. No. 70-169 (concerning express statutory authority of a school district to provide a vocational education program by means of contract). See generally 1984 Op. Att'y Gen. No. 84-030. Unlike county MR/DD boards, see R.C. 5126.05, school districts do not have general authority to contract with outside entities for the provision of programs or services which the districts are authorized or required to provide. See Op. No. 81-002 at 2-7 ("[t]he fact that the General Assembly has seen fit to enact statutes which expressly authorize boards of education, in certain circumstances, to enter into contracts with private organizations for the provision of educational instruction further supports the conclusion" that such authority is not to be implied from language authorizing a board of education to organize, establish, or operate a particular type of program). See generally Milford Exempt Village School District, [1979-80 Decisions] Educ. for the Handicapped L. Rep. (CRR) 501:345 (Ohio State Bd. of Educ. March 9, 1979). The differences in statutory authority between county MR/DD boards and school districts may affect the operation of the provisions of R.C. Chapter 3317. See generally 1972 Op. Att'y Gen. No. 72-049 (concluding that a joint vocational school district is not considered a "school district" under R.C. Chapter 3317 and is, therefore, entitled under that chapter to only such benefits as are granted to joint vocational school districts).

I note that some additional concerns may arise in connection with the distribution of state moneys to county MR/DD boards for services that are rendered by private entities. R.C. 3317.024, which provides the formula for

determining the amounts to be distributed to county MR/DD boards, sets forth that formula in terms of "the unit's teacher's minimum salary calculated on the basis of the teacher's training level and years of experience pursuant to [R.C. 3317.13]." R.C. 3317.024(N)(1)(a); R.C. 3317.024(O). R.C. 3317.13<sup>2</sup> sets forth a minimum salary schedule for teachers employed by school district boards of education, and includes as "[y]ears of service" time spent teaching in any public or chartered school or institution. R.C. 5126.051,<sup>3</sup>

2 R.C. 3317.13 states, in part:

(A) As used in this section:

(1) "Years of service" includes the following:

(a) All years of teaching service in the same school district, regardless of training level, with each year consisting of at least one hundred twenty days under a teacher's contract;

(b) All years of teaching service in a chartered, nonpublic school located in Ohio as a teacher certified pursuant to section 3319.22 of the Revised Code or in another public school, regardless of training level, with each year consisting of at least one hundred twenty days under a teacher's contract;

(c) All years of teaching service in a chartered school or institution or a school or institution that subsequently became chartered or a chartered special education program or a special education program that subsequently became chartered operated by the state or by a subdivision or other local governmental unit of this state as a teacher certified pursuant to section 3319.22 of the Revised Code, regardless of training level, with each year consisting of at least one hundred twenty days; and

(d) All years of active military service in the armed forces of the United States, as defined in section 3307.02 of the Revised Code, to a maximum of five years. For purposes of this calculation, a partial year of active military service of eight continuous months or more in the armed forces shall be counted as a full year.

(2) "Teacher" means all teachers employed by school district boards of education.

(B) No teacher shall be paid a salary less than that provided in the schedule set forth in division (C) of this section. In calculating the minimum salary any teacher shall be paid pursuant to this section, years of service shall include the sum of all years of the teacher's teaching service included in divisions (A)(1)(a), (b), (c), and (d) of this section; except that any school district employing a teacher new to the district shall grant such a teacher a total of not more than ten years of service pursuant to divisions (A)(1), (b), (c), and (d) of this section.

3 R.C. 5126.051 states, in part:

(A) As used in this section:



as enacted by Am. Sub. H.B. 238, provides for a county MR/DD board to adopt a salary schedule for teachers, and sets forth minimums based upon R.C. 3317.13. There is no provision of statute or rule which governs the salary to be paid to teachers who are employed by a private entity with which a county MR/DD board contracts.

It might be argued that the fact that a teacher employed by a contract agency of a county MR/DD board is not employed by the board itself somehow makes the teaching unit ineligible for funding under R.C. 3317.024. I cannot accept that argument. Under R.C. 3317.024(N) and (O), funding is to be based upon the unit's teacher's salary calculated, under R.C. 3317.13, on the basis of training and experience. It is not to be based upon actual salary or salary required under other provisions of law. See, e.g., R.C. 3317.14 (adoption of teachers' salary schedule by board of education); R.C. 5126.051. A calculation may be made under R.C. 3317.13 for any individual who serves as the teacher of a unit, regardless of whether that individual is employed by a school district, a county MR/DD board, or some other entity. Thus, the application of R.C. 3317.024 to instances in which educational programs are provided pursuant to contract is not as problematic as it might appear. Payments under R.C. 3317.024(N) and (O) will, of course, be made to the county MR/DD board, rather than to the contract entity itself. See generally Op. No. 70-169. Standards relating to staffing qualifications may be imposed by rule or contract provision. See, e.g., R.C. 5126.05; 9 Ohio Admin. Code 5123:2-1-04 and -05; 1982 Op. Att'y Gen. No. 82-100.

I am aware that Ohio Const. art. VI, §2, states:

The general assembly shall make such provisions, by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the

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(1) "Certificate" means a teachers' certificate issued by the state board of education under section 3319.22 of the Revised Code or a qualified mental retardation professional certificate issued by the department of mental retardation and developmental disabilities.

(2) "Teacher" means a person employed by a county board of mental retardation and developmental disabilities in a position that requires a certificate.

....  
 (4) "Years of service" includes all service described in division (A) of section 3317.13 of the Revised Code.

(B) Subject to rules established by the director of mental retardation and developmental disabilities pursuant to Chapter 119. of the Revised Code, each county board of mental retardation and developmental disabilities shall annually adopt separate salary schedules for teachers and nonteaching employees.

(C) The teachers' salary schedule shall provide for increments based on training and

state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

One of my predecessors considered this provision in 1933 Op. Att'y Gen. No. 1409, vol. II, p. 1290, and concluded, in paragraph four of the syllabus: "No authority exists in law for the diversion or use of the school funds of the state for the promotion or maintenance of private schools or for any purpose other than the establishment and maintenance of common or public schools." It has been suggested that the distribution of state funds to county MR/DD boards under R.C. Chapter 3317 for the funding of educational programs procured from private entities may somehow run afoul of this principle. I am not persuaded by such a suggestion. The provisions adopted by the General Assembly set forth a clear statutory scheme, and that scheme is entitled to a presumption of constitutionality. See R.C. 1.47(A); Board of Education of v. Walter, 58 Ohio St. 2d 368, 376, 390 N.E.2d 813, 819 (1979), cert. denied, 444 U.S. 1015 (1980). Further, I find no indication that the Ohio Constitution would inhibit the operation of a statutory arrangement that permits a county MR/DD board to contract for the purchase of authorized or required services from a private entity. See generally 1984 Op. Att'y Gen. No. 84-080.

Based upon the foregoing, it is my opinion, and you are hereby advised, that, pursuant to R.C. 3317.05, the State Board of Education may approve units operated by a county board of mental retardation and developmental disabilities (county MR/DD board), regardless of whether such units are provided directly by the county MR/DD board or are provided pursuant to contract under R.C. 5126.05 by other entities, public or private, profit making or nonprofit. Pursuant to R.C. 3317.024 and Section 37 (uncodified) of Am. Sub. H.B. 238, 116th Gen. A. (1985) (eff. July 1, 1985), the State Board of Education may make distributions of funds to county MR/DD boards for such approved units.

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years of service. The board may establish its own service requirements provided no teacher receives less than the salary he would be paid under section 3317.13 of the Revised Code if he were employed by a school district board of education and provided full credit for a minimum of five years of actual teaching and military experience as defined in division (A) of such section is given to each teacher.

Each teacher who has completed training that would qualify him for a higher salary bracket pursuant to this section shall file by the fifteenth day of September with the fiscal officer of the board, satisfactory evidence of the completion of such additional training. The fiscal officer shall then immediately place the teacher, pursuant to this section, in the proper salary bracket in accordance with training and years of service. No teacher shall be paid less than the salary to which he would be entitled under section 3317.13 of the Revised Code if he were employed by a school district board of education.