

**OPINION NO. 87-026****Syllabus:**

1. A child may attend a special education program outside the school district in which he lives, provided that pursuant to R.C. 3319.01, the school district of residence, as determined under R.C. 3323.01(I), approves of the plan, and that the child's special education program is created in compliance with R.C. Chapter 3323.
2. If, pursuant to R.C. 3323.13, a handicapped child attends a school outside the school district in which he lives, the school district of residence, as determined under R.C. 3323.01(I), may be required to pay the child's tuition pursuant to R.C. 3323.13 if the state board of education or the school board of the school district providing the education requires it.
3. R.C. 3323.08 requires each school district to provide its handicapped children with the education programs and related services required to meet the children's educational needs. R.C. 3323.01(C) provides that "related services" includes the transportation necessary to assist a handicapped child to benefit from special education. When, pursuant to R.C. Chapter 3323., a handicapped child attends a school outside the school district in which he lives, the child's school district of residence, as determined by R.C. 3323.01(I), must provide, either directly or indirectly, for the child's transportation to that school.

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**To: David L. Landefeld, Fairfield County Prosecuting Attorney, Lancaster, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, May 21, 1987**

I have before me your opinion request in which you ask whether a child may be assigned to a special education program in a school district other than the one in which she lives.

As I understand the facts, the child's mother, her only known parent, is dead. The child now lives with a family pursuant to the approval of the county children services board and her guardian. She is currently attending special education classes in a school district outside the district in which she lives. Tuition is being paid by a third school district--the district in which the child and her mother were living at the time of the mother's death. The mother had custody of the child; the location of the child's father (the mother's ex-husband) is unknown. The child is paying transportation costs herself, presumably through a guardianship created at the time of her mother's death. Based upon these facts, I have rephrased your questions as follows:

1. May a child take part in a special education program in a school district other than the school district in which she lives?
2. If a child may take part in a special education program outside the school district in which she lives, what school district is responsible for her tuition?
3. If a child may take part in a special education program outside the school district in which she lives, who is responsible for her transportation costs?

You first ask whether a child may take part in a special education program in a school district other than the school district in which she lives. R.C. 3313.64 provides guidelines for determining which school district a child may attend; division (B) establishes which school district the child is entitled to attend. Subsection (B)(1) establishes which district's schools a child may attend tuition-free, and provides: "[a] child shall be admitted to the schools of the school district in which his parent resides." The general rule operates to prevent students from "shopping" for school districts by requiring most students to attend school in the school district in which their parents reside. See R.C. 3313.64(B)(1), State ex rel. Henry v. Board of Education, 20 Ohio App. 3d 185, 485 N.E.2d 732 (Madison County 1984). R.C. 3313.64(B)(2) does, however, create exceptions to this general rule, providing that a child who does not reside in the district where his parent<sup>1</sup> resides shall attend school in the district in which he resides if any of the following apply:

- (a) He is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent;
- (b) He resides in a home;
- (c) He requires special education.

Although the child about whom you ask may qualify under R.C. 3313.64(B)(2) to attend school in the district in which she resides, you ask whether she may attend school in a district other than that in which she resides. In this regard, I note that R.C. 3313.64 also provides that: "[d]ivision (B) of this section does not prohibit the board of education of a school district from placing a handicapped child who resides in the district in a special education program outside of the district or its schools in compliance with Chapter 3323. of the Revised Code." R.C. 3313.64(H) correspondingly states that pursuant to, inter alia, R.C. 3319.01 and R.C. 3323.04, "a child may attend school or participate in a special education program in a school district other than in the district where he is entitled to attend school under division (B) of this section." Thus, under R.C. 3313.64 a handicapped child may take part in a special education program outside the school district

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<sup>1</sup> Because "parent" is defined in R.C. 3313.64(A)(1) as "custodial parent" when parents have been divorced, the present location of the child's father in this case is irrelevant. The child's mother was the custodial parent until she died. R.C. 3109.06 provides that the death of the custodial parent does not automatically award custody to the surviving parent. See also Gordon v. Gordon, 33 Ohio App. 2d 257, 294 N.E.2d 239 (Hardin County 1973).

in which he lives, provided that the placement complies with R.C. Chapter 3323. See also 1983 Op. Att'y Gen. No. 83-041 (a handicapped child may be placed in a special education program outside of the district in compliance with R.C. Chapter 3323.).

R.C. Chapter 3323. requires local boards of education to place handicapped children in "appropriate" special education programs. 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 in accordance with section 3319.01 of the Revised Code, which may include instruction in regular classes, a special education program, or any combination thereof.

See also R.C. 3323.02, R.C. 3323.03.

The superintendent of a school district, however, has the authority to assign students to that district's schools. R.C. 3319.01 provides in pertinent part:

Except as otherwise provided in this section for local school districts, [the superintendent] shall...assign the pupils of the schools under his supervision to the proper schools and grades, provided that the assignment of a pupil to a school outside of his district of residence is approved by the board of the district of residence of such pupil....

Thus, pursuant to R.C. 3319.01, the superintendent of the school district the child wishes to attend has the power to assign the child to a special education program in that school district. Of course, the board of the child's school district of residence must approve the assignment. In addition, it is presumed that the superintendent will make the assignment based on the child's needs as determined under R.C. 3323.04, which provides in pertinent part:

The state board of education, in consultation with the department of mental health and the department of mental retardation and developmental disabilities, shall establish procedures and standards for the placement of handicapped children in appropriate educational programs.

....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 and developmental disabilities of the county in which the child resides. The board of education shall evaluate the educational placement of each handicapped child at least once each year.

Because the child about whom you ask is currently enrolled in a special education program, I assume that her placement is in compliance with R.C. Chapter 3323. and that she is a "handicapped child" as defined in R.C. 3323.01(A). Thus, she is entitled to placement pursuant to R.C. 3323.04 and R.C. 3319.01.

Accordingly, in answer to your first question, the child about whom you ask may attend a special education program

outside the school district in which she lives. However, the superintendent of the school district she wishes to attend must assign her to that school with the approval of the board of her school district of residence<sup>2</sup> in accordance with R.C. 3319.01. In addition, the assignment must be made in accordance with R.C. Chapter 3323.

In your second question you ask what school district is responsible for the payment of tuition for a child who takes part in a special education program outside the school district in which she lives. R.C. 3313.64(C) provides that if a school district admits a child pursuant to subsection (B)(2) of R.C. 3313.64, tuition shall be paid to the school district admitting the child in accordance with division (C). R.C. 3313.64(C)(1) provides guidelines for determining which school district shall pay a handicapped child's tuition:

If the child receives special education in accordance with Chapter 3323. of the Revised Code, tuition shall be paid in accordance with section 3323.13, 3323.14, or 3323.141 of the Revised Code regardless of who has custody of the child or whether he resides in a home.

R.C. 3323.13 applies to the situation raised in your questions.<sup>3</sup> That section provides that the "school district of residence" shall pay tuition as follows:

If a child who is a school resident of one school district receives special education from another district, the board [of] education of the district providing the education may require the payment by the board of education of the district of residence of a sum not to exceed the [tuition of] the district providing the education for a child of normal needs of the same school grade...Upon direction of the state board of education, the board of the district of residence shall pay for his...[tuition].

Thus, under R.C. 3323.13, the school district providing the child's education "may require" the school board of the child's school district of residence to pay the child's tuition. The Ohio Supreme Court has held that when construing a statute, "the word 'may' shall be construed as permissive...unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage." Dorrian v. Scioto Conservancy District 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971)(syllabus, paragraph one). Accordingly, the school district of residence must pay the child's tuition pursuant to R.C. 3323.13 if the school board providing the special education charges tuition for the child, or if the state board of education directs the school district of residence to pay. The answer to your second question thus depends upon determining which district is the "school district of residence."

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<sup>2</sup> See discussion of determination of school district of residence, infra.

<sup>3</sup> R.C. 3323.14 provides for the payment of tuition costs in excess of those provided for in R.C. 3323.13 by the school board of the school district of residence; R.C. 3323.141 governs residents of certain facilities who are not school residents of this state.

R.C. 3323.01(I) defines "school district of residence" for purposes of R.C. 3323.13 as:

(1) The school district in which the child's parents reside, or if not so determined;

(2) The last school district in which the child's parents are known to have resided if the parents' whereabouts are unknown, or if not so determined;

(3) The school district determined by the court under section 2151.357 of the Revised Code, or if no district has been so determined the school district as determined by the probate court of the county in which the child resides....

(4) Notwithstanding divisions (I)(1) to (3) of this section, if a school district is required by section 3313.65 of the Revised Code to pay tuition for a child, that district shall be the child's school district of residence.

R.C. 3323.01(I)(3) applies to the situation about which you ask. Division I(1) is inapplicable because the child's mother--her "parent"<sup>4</sup>--is not currently residing in any school district; division I(2) is inapplicable because the location of the child's mother is not "unknown"; division I(4) does not apply because R.C. 3313.65, mentioned in the division, governs admission and tuition for children of institutionalized or incarcerated parents, and thus is not relevant here. R.C. 2151.357, mentioned in R.C. 3323.01(I)(3), is not relevant to the situation about which you ask because it governs situations in which the court makes an order "that removes a child from his own home." That did not occur here. Therefore, according to R.C. 3323.01(I)(3), the probate court must determine the school district of residence. I am aware of no legislation that gives the probate court specific guidelines for determining the school district of residence. See also 3 Ohio Admin. Code 3301-51-01(WW)(definition of "school district of residence"). Because the legislature has specifically left the determination of school district of residence to the courts, I will not decide which school district is the school district of residence.<sup>5</sup>

Therefore, in answer to your second question, pursuant to R.C. 3323.13, where a child who resides in one school district receives special education from another district, the school district of residence, as determined under R.C. 3323.01(I), may be required to pay the child's tuition if either the school board of the school district providing the education or the state board of education requires it.

In your last question, you ask who is responsible for the transportation costs of a child who takes part in a special education program outside the school district in which she

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<sup>4</sup> Like R.C. 3313.64(A)(1), R.C. 3323.01(H) defines "parent" for purposes of R.C. Chapter 3323. as "custodial parent" when parents have been divorced. Thus, the child's father's residence and the fact that his location is unknown are irrelevant. See also footnote one, supra.

<sup>5</sup> It is inappropriate for me to use the opinion-rendering function to make findings of fact or otherwise usurp the functions of the judiciary. See generally 1986 Op. Att'y Gen. No. 86-076, 1986 Op. Att'y Gen. No. 86-039, 1983 Op. Att'y Gen. No. 83-057.

resides. R.C. 3323.02 provides in pertinent part: "[i]t 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." R.C. 3323.01(D)(1) provides that "[a]ppropriate public education" means "special education and related services" that "[a]re provided at public expense and under public supervision...." "Related services" includes transportation. R.C. 3323.01(C) provides that "[r]elated services," means transportation...as may be required to assist a handicapped child to benefit from special education."

Funding for these "related services," and hence, for transportation, is provided for in R.C. 3323.08:

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:

....  
(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.

....  
(F) ....  
Upon approval of a school district's plan, the district shall immediately apply for state funds under Chapter 3317. of the Revised Code to implement and maintain such plan. (emphasis added.)

See also 3 Ohio Admin. Code 3301-51-10; which provides guidelines for reimbursement of funds spent on transportation of handicapped children.

Thus, R.C. 3323.08(D) requires each school district to provide for transportation for each handicapped child within its district. No statute specifies how the transportation must be provided; the district of residence may provide either directly or indirectly for a child's transportation. R.C. 3323.13 addresses the question of transportation as follows:

If a child who is a school resident of one school district receives special education from another district...[t]he board of the district of residence may contract with the board of another district for the transportation of such child into any school in such other district, on terms agreed upon by such boards. Upon direction of the state board of education, the board of the district of residence shall pay for his transportation....

Thus, under R.C. 3323.13, the state board of education may direct the district of residence to pay for transportation for its handicapped child attending school in another district. Further, the section permits the district of residence to contract with the district providing the education program to provide the transportation as well. This language also suggests that the district of residence is authorized to provide the transportation itself, without the mandate of the state board of education. In addition, the district may arrange for private transportation; 3 Ohio Admin. Code 3301-51-10 provides for total or partial reimbursement for transportation on privately owned vehicles, as well as on board owned and operated vehicles and on public transportation. The

rule does not distinguish between programs within and without the child's school district of residence. To be eligible, the child must fit the state board's definition of "physically handicapped," which includes a child with learning disabilities. It appears that the district of residence may choose any reasonable means of transporting the child to the special education program.

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

1. A child may attend a special education program outside the school district in which he lives, provided that pursuant to R.C. 3319.01, the school district of residence, as determined under R.C. 3323.01(I), approves of the plan, and that the child's special education program is created in compliance with R.C. Chapter 3323.
2. If, pursuant to R.C. 3323.13, a handicapped child attends a school outside the school district in which he lives, the school district of residence, as determined under R.C. 3323.01(I), may be required to pay the child's tuition pursuant to R.C. 3323.13 if the state board of education or the school board of the school district providing the education requires it.
3. R.C. 3323.08 requires each school district to provide its handicapped children with the education programs and related services required to meet the children's educational needs. R.C. 3323.01(C) provides that "related services" includes the transportation necessary to assist a handicapped child to benefit from special education. When, pursuant to R.C. Chapter 3323., a handicapped child attends a school outside the school district in which he lives, the child's school district of residence, as determined by R.C. 3323.01(I), must provide, either directly or indirectly, for the child's transportation to that school.