

OPINION NO. 92-082**Syllabus:**

1. Under Ohio law, no child abuse of a school child occurs when reasonable corporal punishment that is reasonably necessary to preserve discipline is inflicted in accordance with R.C. 3319.41(A), or reasonable and necessary force and restraint is used in accordance with R.C. 3319.41(B), and there is no violation of R.C. 2919.22.
2. When a public children services agency receives a report of the spanking of a student by a school administrator, the agency must assign the report a priority rating in accordance with 9 Ohio

Admin. Code 5101:2-34-08. A report that is rated Priority I, II, or III must be investigated as required by R.C. 2151.421, in accordance with the procedures prescribed in 9 Ohio Admin. Code 5101:2-34-32, -33, and -34. A report that is rated Priority IV may be resolved by termination pursuant to 9 Ohio Admin. Code 5101:2-34-08 if it is determined that the report alleges only action that is permitted under R.C. 3319.41 and 2919.22, for then the report does not constitute an allegation of abuse or neglect.

3. Notwithstanding the provisions of R.C. 5123.62(A), (G), and (O), the responsibility of a public children services agency to investigate alleged child abuse of a school child by a school official applies to an incident involving a child with developmental disabilities in the same manner in which it applies to an incident involving a child without developmental disabilities. The question whether corporal punishment, force, or restraint used against a child is reasonable may, however, be affected by characteristics of the particular child, including any developmental disabilities.

To: James Conrad, Director, Department of Human Services, Columbus, Ohio
By: Lee Fisher, Attorney General, December 30, 1992

Your predecessor requested an opinion concerning the responsibility of a public children services agency ("PCSA") to investigate as alleged child abuse an incident in which a student with developmental disabilities has been spanked by a school administrator on a school bus. The term "public children services agency" refers to children services boards and county departments of human services that have assumed the administration of the children services function prescribed by R.C. Chapter 5153. See R.C. 2151.011(B)(26); 9 Ohio Admin. Code 5101:2-34-01(QQQQ); 1991 Op. Att'y Gen. No. 91-003. This opinion addresses instances in which a PCSA receives a report of alleged child abuse by a school administrator.

Duty of PCSA to Investigate Reports of Alleged Child Abuse

R.C. 2151.421 provides for reports of alleged child abuse or neglect, or threats of child abuse or neglect, to be made to the PCSA of a county and requires that the PCSA investigate each such report, within twenty-four hours, "to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible." R.C. 2151.421(F). The investigation must be made in cooperation with the appropriate law enforcement agency and in accordance with the county's plan of cooperation. See R.C. 2151.421(F), (J). The PCSA must submit a report of its investigation, in writing, to the law enforcement agency, and must also report each case to a central registry maintained by the Ohio Department of Human Services. R.C. 2151.421(F).

R.C. 2151.421 sets forth a comprehensive scheme for the reporting of allegations of child abuse and neglect and for the investigation of those reports. A PCSA is authorized to investigate alleged child abuse or neglect at any location within the county, unless there is some provision of law restricting its general authority. In particular, a PCSA is authorized to investigate reports of alleged abuse at public and private schools. See 9 Ohio Admin. Code 5101:2-34-33; 1989 Op. Att'y Gen. No. 89-108. It is consistent with the PCSA's general investigatory authority for the PCSA to investigate a report of an incident of alleged abuse by a school administrator on a school bus.

Determination as to when Punishment or Discipline Constitutes Abuse

The concern raised by your predecessor's letter reflects the fact that, under Ohio law, the use of physical force against school students is permissible in certain circumstances. Unless a rule of a board of education or of the governing body of a private school provides otherwise, a teacher, principal, or administrator in a public or private school "may inflict or cause to be inflicted, reasonable corporal punishment upon a pupil attending such school whenever such punishment is reasonably necessary in order to preserve discipline while such person is subject to school authority." R.C. 3319.41(A). In addition, a teacher, principal, or administrator of a public or private school, or a noncertificated school employee or school bus driver, may:

within the scope of [that person's] employment, use and apply such amount of force and restraint as is reasonable and necessary to quell a disturbance threatening physical injury to others, to obtain possession of weapons or other dangerous objects upon the person or within the control of the pupil, for the purpose of self-defense, or for the protection of persons or property.

R.C. 3319.41(B). R.C. 3313.20(B) permits a board of education to adopt a rule prohibiting the use of corporal punishment as a means of discipline in the schools of the district. Such a rule may not, however, prohibit the use of force or restraint in accordance with R.C. 3319.41(B). It is assumed, for purposes of this opinion, that the school district in question has not adopted a rule prohibiting the use of corporal punishment.

The facts that have been presented do not indicate the circumstances in which the school administrator spanked the child or why the spanking occurred on the school bus. It is, however, possible that the spanking constituted reasonable corporal punishment that was reasonably necessary to preserve discipline while the child was subject to school authority, pursuant to R.C. 3319.41(A), or that it constituted reasonable and necessary force and restraint, as authorized by R.C. 3319.41(B). Whether a particular spanking is permitted under R.C. 3319.41 requires determinations of fact that cannot be made by means of an opinion of the Attorney General.

The term "child abuse" is not defined for purposes of R.C. 2151.421. R.C. Chapter 2151 does, however, contain a definition of "abused child" that includes a child who:

(A) Is the victim of "sexual activity" as defined under [R.C. Chapter 2907], where such activity would constitute an offense under that chapter, except that the court need not find that any person has been convicted of the offense in order to find that the child is an abused child;

(B) Is endangered as defined in [R.C. 2919.22], except that the court need not find that any person has been convicted under that section in order to find that the child is an abused child;

(C) *Exhibits evidence of any physical or mental injury or death, inflicted other than by accidental means, or an injury or death which is at variance with the history given of it. Except as provided in division (D) of this section, a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis of a child is not an abused child under this division if the measure is not prohibited under [R.C. 2919.22].*

(D) Because of the acts of his parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child's health or welfare.

(E) Is subjected to out-of-home care child abuse.

R.C. 2151.031 (emphasis added). A similar definition appears in 9 Ohio Admin. Code 5101:2-34-01(A).

R.C. 2919.22 contains criminal provisions prohibiting the endangering of children. R.C. 2919.22(B) provides that no person shall do any of the following to a child under age eighteen or a mentally or physically handicapped child under age twenty-one:

- (1) Abuse the child;
- (2) Torture or cruelly abuse the child;
- (3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk¹ of serious physical harm to the child;
- (4) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development.... (Footnote added.)

Ohio courts have held that the standards for determining whether corporal punishment inflicted under R.C. 3319.41 is reasonable and reasonably necessary to preserve discipline are those set forth in R.C. 2919.22(B) – that the punishment not be administered in a cruel manner or for a prolonged period, that it not be excessive under the circumstances, and that it not create a substantial risk of serious physical harm to the child. *See State v. Hoover*, 5 Ohio App. 3d 207, 450 N.E.2d 710 (Ottawa County 1982); *State v. Albert*, 8 Ohio Misc. 2d 13, 456 N.E.2d 594 (Belmont County Ct. 1983). When R.C. 3319.41, R.C. 2151.031, and R.C. 2919.22 are read *in pari materia*, *see generally State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), it becomes apparent that no child abuse occurs when a school administrator inflicts reasonable corporal punishment that is reasonably necessary to preserve discipline, or uses reasonable and necessary force and restraint, in accordance with R.C. 3319.41 and in a manner that does not violate R.C. 2919.22.

PCSA Investigation of Spankings by School Officials

The opinion request asks specifically for guidance on advising a PCSA as to when it is required to investigate spankings of school children by school officials. The request asks, further, whether a PCSA must proceed with investigatory procedures set forth in 9 Ohio Admin. Code Chapter 5101:2-34 once it has determined that the spanking is not prohibited by R.C. 2919.22.

R.C. 2151.421 requires generally that, when alleged child abuse is reported, an investigation must be undertaken and reports must be made to the law enforcement agency and to a central registry maintained by the Ohio Department of Human Services. *See R.C. 2151.421(F)(1)*. Rules specifying the procedures to be

¹ R.C. 2901.01(H) defines "substantial risk" to mean "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."

followed appear in 9 Ohio Admin. Code Chapter 5101:2-34.² A PCSA must accept a report as constituting an allegation of child abuse or neglect whenever it is reported that a child under age eighteen or a handicapped child under age twenty-one has been allegedly abused or neglected or is at risk of being abused or neglected. 9 Ohio Admin. Code 5101:2-34-06(A). When the PCSA receives a report, it must attempt to obtain from the reporter information that will enable it to determine various relevant matters, including when and where the alleged abuse or neglect occurred, the type and extent of the alleged abuse or neglect, and the child's condition. 9 Ohio Admin. Code 5101:2-34-07.

Rule 5101:2-34-08 provides for reports of alleged child abuse or neglect to be given priority ratings and for investigative activities to begin within specified time periods. A report is designated as Priority I when it is determined that a child is threatened or alleged to be abused or neglected to an extent that there is imminent risk to the child's life, physical or mental health, or safety. Investigative activities on a Priority I report must begin within an hour of receipt of the report. A report is designated as Priority II if it does not contain sufficient information to determine the imminence or threat of harm to the child, and as Priority III if there is sufficient information to determine that imminent risk does not exist and efforts have been made to insure the safety of the child. Investigative activities on a Priority II or Priority III report must begin within twenty-four hours of receipt of the report. 9 Ohio Admin. Code 5101:2-34-08(A) to -08(D).

A report is given a Priority IV rating if the reporter is unable to provide the PCSA with adequate information to identify and locate the child, or if the reporter is unsure of his information and further clarification is being sought to identify indicators of abuse or neglect. A Priority IV report must be resolved within three working days, or within an authorized time extension, either: (1) by gathering necessary information to identify and locate the child and reassigning the report to a rating of Priority I, II, or III, to be investigated accordingly; or (2) by failing to gather necessary information or determining that the report does not constitute an allegation of abuse or neglect and preparing the report for termination. In order to terminate such a report, the case record or an attachment to the report must contain justification for termination and written approval by the director or his designee, or the executive secretary or his designee. 9 Ohio Admin. Code 5101:2-34-08(E).

Since, as noted above, no child abuse occurs when corporal punishment is inflicted or force and restraint is used in accordance with R.C. 3319.41 and in a manner that does not violate R.C. 2919.22, it is appropriate for a PCSA, in receiving a report of alleged child abuse in a school setting, to ascertain whether there is an allegation of action in violation of R.C. 2919.22. If the reporter is sure of his information and the report alleges action in violation of R.C. 2919.22, the report must be designated as Priority I, II, or III and investigated accordingly, provided that

² Under Ohio law, "reasonable rules promulgated by an administrative body under a valid grant from the Legislature have the force and effect of law." *State ex rel. Kildow v. Industrial Comm'n*, 128 Ohio St. 573, 580, 192 N.E. 873, 876 (1934); accord *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St. 3d 46, 554 N.E.2d 97 (1990) (syllabus, paragraph 1). The rules discussed in this opinion have been promulgated by the Ohio Department of Human Services pursuant to rule-making authority granted by R.C. 2151.421. The rules may be changed by the Department, through appropriate proceedings, if the Department determines that a different regulatory scheme would better serve its purposes. Any regulatory scheme so adopted must, of course, be consistent with the powers and duties established by statute. See generally, e.g., 1991 Op. Att'y Gen. No. 91-073.

the child can be identified and located. If, however, the reporter describes action that appears to be authorized by R.C. 3319.41 and not to violate R.C. 2919.22, it may be appropriate to assign the matter a rating of Priority IV until it can be determined whether there is any allegation of abuse.

Reports that are rated Priority I, II, or III are investigated as provided in 9 Ohio Admin. Code 5101:2-34-32. Investigations generally must include face-to-face contact with the alleged child victim, the alleged child victim's caretaker, the alleged perpetrator, and any other child residing in the home. 9 Ohio Admin. Code 5101:2-34-32(G), (J). There may also be interviews with witnesses or collateral sources, medical or radiological examinations, psychological diagnosis or treatment, and photographs. 9 Ohio Admin. Code 5101:2-34-32; *see, e.g., Brodie v. Summit County Children Services Board*, 51 Ohio St. 3d 112, 119, 554 N.E.2d 1301, 1308 (1990) ("a children services board and its agents have a duty to investigate and report their findings as required by R.C. 2151.421 when a specific child is identified as abused or neglected..."). In carrying out an investigation under rule 5101:2-34-32, the PCSA "shall complete a case evaluation in order to make a case disposition." 9 Ohio Admin. Code 5101:2-34-32(N). Case evaluations are based upon investigative findings and include statements that support case dispositions of "unsubstantiated," "indicated," or "substantiated." 9 Ohio Admin. Code 5101:2-34-32(N), (O). The PCSA must make a case disposition as soon as possible, but always within thirty days from the receipt of the report, unless there is a need to wait for additional information. 9 Ohio Admin. Code 5101:2-34-32(O). When the case disposition has been made, the PCSA must notify the parents, guardian, or custodian of the case disposition, appropriate community resources, and the PCSA's plan to provide supportive services, if applicable. 9 Ohio Admin. Code 5101:2-34-32(Q).

When a report of alleged child abuse involves a school, the investigation must comply with rule 5101:2-34-33, in addition to rule 5101:2-34-32. Rule 5101:2-34-33 requires that the administrator of the school be contacted, unless that person is named as the alleged perpetrator, and that certain matters be discussed with the administrator. If an out-of-home care report requires third-party investigation, the PCSA must also follow the procedures set forth in rule 5101:2-34-34. 9 Ohio Admin. Code 5101:2-34-33.

Existing rules thus provide two procedures for terminating the investigation of a report of alleged child abuse. If it is determined that a Priority IV report does not constitute an allegation of abuse or neglect, or if the child cannot be identified and located, the report may be terminated as provided in rule 5101:2-34-08. Any report that is rated as Priority I, II, or III must be investigated as provided in rule 5101:2-34-32 and must be the subject of an appropriate case evaluation and case disposition. If it is determined in such a case that no abuse or neglect has occurred, the case may be disposed of as "unsubstantiated." *See* 9 Ohio Admin. Code 5101:2-34-01(P) ("Unsubstantiated report - no evidence" is a report of child abuse or neglect sent to the central registry by the PCSA in which the investigation determined no occurrence of child abuse or neglect"). A priority rating that is assigned pursuant to rule 5101:2-34-08 may be upgraded, but it may not be downgraded without the "written approval of the director or his designee, or the executive secretary or his designee." 9 Ohio Admin. Code 5101:2-34-08(F); *see* R.C. 5153.10 (the executive secretary is now designated as the "executive director").

Duty of PCSA to Proceed with Investigatory Procedures after Determining that a Spanking Was Permitted under R.C. 3319.41 and 2919.22

The opinion request asks whether a PCSA must proceed with investigatory procedures once the PCSA has determined that a particular spanking was not prohibited by R.C. 2919.22. The answer to that question, under existing rules, *see* note 2, *supra*, depends upon the nature of the report and the procedures that were followed. In the case of a report that was initially rated Priority IV, or that was

downgraded to a Priority IV rating in accordance with rule 5101:2-34-08(F),³ if it is determined that the spanking did not constitute abuse under R.C. 3319.41 and 2919.22, the report may be terminated pursuant to rule 5101:2-34-08. The case record or an attachment to the report must contain justification for termination, and appropriate approval is required. There is, however, no need for further investigation. This procedure would, accordingly, be appropriate in a Priority IV case in which it is alleged that punishment or force occurred, but the punishment or force was clearly authorized by R.C. 3319.41 and there is no allegation of any violation of R.C. 2919.22. In that case the report does not constitute an allegation of abuse or neglect.

If, however, the report is assigned a rating of Priority I, II, or III, then rule 5101:2-34-32 requires that an investigation of the incident be completed, that a case evaluation be prepared, and that the case be disposed of in accordance with the rule. There is no authority for a PCSA simply to terminate an investigation under rule 5101:2-34-32 if it determines that an incident of alleged abuse was in fact permitted by R.C. 3319.41 and 2919.22. In contrast, rule 5101:2-34-32 does permit the PCSA to cease an investigation of a report that is limited to living conditions or lack of food when certain basic steps have been taken and it is determined that the allegation contained in the report is clearly unsubstantiated. Even in those circumstances, however, the PCSA is required to complete a case evaluation and make a case disposition. 9 Ohio Admin. Code 5101:2-34-32(I). If the Ohio Department of Human Services determines that an abbreviated investigatory procedure is appropriate for Priority I, II, or III cases involving punishment or force that is determined to have been permitted by R.C. 3319.41 and 2919.22, such a procedure could be adopted by administrative rule. *See note 2, supra.*

Bill of Rights for Persons with Mental Retardation and Developmental Disabilities

The opinion request asks whether the rights granted by R.C. 5123.62 affect the PCSA's investigatory responsibility when a child with developmental disabilities is spanked by a school official. R.C. 5123.62, known as the Bill of Rights for Persons with Mental Retardation and Developmental Disabilities, states that the rights of mentally retarded persons and of developmentally disabled persons include, but are not limited to:

(A) The right to be treated at all times with courtesy and respect and with full recognition of their dignity and individuality;

...

(G) The right to receive appropriate care and treatment in the least intrusive manner;

...

(O) The right to be free from emotional, psychological, and physical abuse....

The apparent concern is that the right of a mentally retarded or developmentally disabled child to be free from abuse may impose a different standard for those children than for other school children. The General Assembly, in enacting R.C. 3319.41, 2919.22, and 2151.031, has, however, expressed its determination that acts that come within R.C. 3319.41 and do not violate R.C. 2919.22 do not constitute child abuse under Ohio law. Thus, when a child is spanked

³ Such downgrading may occur only if the report has the characteristics of a Priority IV report: that is, either (1) the child cannot be identified and located; or (2) the reporter is unsure of his information and further clarification is being sought to identify indicators of abuse or neglect.

by a school official in accordance with those provisions, the child is not the subject of abuse and no violation of R.C. 5123.62 has occurred. *See, e.g., State v. Albert*, 8 Ohio Misc. 2d at 17, 456 N.E.2d at 599 ("by accepting the concept of corporal punishment on school children, the Ohio General Assembly has, by definition, accepted an end result of infliction of pain and temporary disfigurement in the form of welts, to a certain degree"). R.C. 5123.62(N) states expressly that mentally retarded persons and developmentally disabled persons have the right to be treated equally as citizens under the law. It follows that R.C. 3319.41, 2919.22, and 2151.031 apply to mentally retarded persons and developmentally disabled persons in the same manner in which they apply to other persons.

It should, however, be noted that the determination as to whether corporal punishment imposed under R.C. 3319.41(A) is reasonable and reasonably necessary to preserve discipline, or whether force and restraint used under R.C. 3319.41(B) is reasonable and necessary, may be affected by facts relating to the child who is the subject of the action. In determining what is reasonable, it is appropriate to consider the decision to administer corporal punishment, the method of punishment undertaken, and the results of the punishment as applied to the particular child. The child's age, size, physical characteristics, any developmental disabilities, and other factors may be relevant to a determination of reasonableness. *See State v. Albert*. Thus, in particular circumstances it might be found unreasonable to discipline a developmentally disabled child in the same manner as a child who does not suffer from the same disabilities.

Conclusion

It is, therefore, my opinion, and you are advised, as follows:

1. Under Ohio law, no child abuse of a school child occurs when reasonable corporal punishment that is reasonably necessary to preserve discipline is inflicted in accordance with R.C. 3319.41(A), or reasonable and necessary force and restraint is used in accordance with R.C. 3319.41(B), and there is no violation of R.C. 2919.22.
2. When a public children services agency receives a report of the spanking of a student by a school administrator, the agency must assign the report a priority rating in accordance with 9 Ohio Admin. Code 5101:2-34-08. A report that is rated Priority I, II, or III must be investigated as required by R.C. 2151.421, in accordance with the procedures prescribed in 9 Ohio Admin. Code 5101:2-34-32, -33, and -34. A report that is rated Priority IV may be resolved by termination pursuant to 9 Ohio Admin. Code 5101:2-34-08 if it is determined that the report alleges only action that is permitted under R.C. 3319.41 and 2919.22, for then the report does not constitute an allegation of abuse or neglect.
3. Notwithstanding the provisions of R.C. 5123.62(A), (G), and (O), the responsibility of a public children services agency to investigate alleged child abuse of a school child by a school official applies to an incident involving a child with developmental disabilities in the same manner in which it applies to an incident involving a child without developmental disabilities. The question whether corporal punishment, force, or restraint used against a child is reasonable may, however, be affected by characteristics of the particular child, including any developmental disabilities.