

May 1, 2014

The Honorable Stephen J. Pronai
Madison County Prosecuting Attorney
59 North Main Street
London, Ohio 43140

SYLLABUS:

2014-018

For purposes of 5A Ohio Admin. Code 3301-83-19(C) (2013-2014 Supp.), the term “alternative schools” includes those schools that are established as alternative schools pursuant to a resolution adopted by a city, local, or exempted village school district board of education in accordance with R.C. 3313.533, schools that constitute alternative schools for purposes of open enrollment under R.C. 3313.97, and schools that constitute alternative schools for purposes of the pilot project scholarship program under R.C. 3313.974-.979.



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OPINION NO. 2014-018

The Honorable Stephen J. Pronai
Madison County Prosecuting Attorney
59 North Main Street
London, Ohio 43140

Dear Prosecutor Pronai:

You have requested an opinion concerning the meaning of “alternative schools” in 5A Ohio Admin. Code 3301-83-19(C) (2013-2014 Supp.). Specifically, you ask whether a chartered or non-chartered nonpublic school¹ that is not part of the pilot project scholarship program² is an alternative school for purposes of rule 3301-83-19(C).³

¹ R.C. 3301.16 requires the State Board of Education to “classify and charter school districts and individual schools within each district” in accordance with standards set forth in R.C. 3301.07(D). This requirement applies to public as well as nonpublic schools, except that a charter shall not “be granted to a nonpublic school unless the school complies with [R.C. 3301.0711(K)(1)(a)], if applicable, and [R.C. 3313.612].” R.C. 3301.16. An individual school that has been classified and chartered by the State Board of Education is different than a community school created pursuant to R.C. Chapter 3314, which is commonly referred to as a “charter school.”

² Your letter asks about alternative schools that are not part of the “special education pilot scholarship program.” In a telephone conversation, you clarified that the phrase is intended to refer to the pilot project scholarship program established by R.C. 3313.974-.979. Under the pilot project scholarship program, a specified number of students residing in “school districts that are or ever have been under federal court order requiring supervision and operational management ... by the state superintendent” are awarded tutorial assistance grants while attending public schools in the district or are awarded scholarships to attend alternative schools. R.C. 3313.975(A).

³ 5A Ohio Admin. Code 3301-83-19(C) (2013-2014 Supp.) states:

Vehicles originally designed and constructed at the factory for nine or fewer passengers, not including the driver, to be used when school bus transportation cannot be reasonably provided. [*sic*] shall not be routinely used for service to and from regularly scheduled school sessions except for preschool children, special needs

School Transportation Generally

We begin with an examination of a city, local or exempted village school district board of education's duty to provide school transportation to students residing in the district. R.C. Chapter 3327 governs, *inter alia*, school transportation. For students in kindergarten through eighth grade who live more than two miles away from the school they are assigned by their residence school district board of education to attend or the nonpublic or community school they attend, all city, local, and exempted village school districts are required to provide transportation to and from that school.⁴ R.C. 3327.01. This requirement applies to students attending any school "for which the state board of education prescribes minimum standards pursuant to [R.C. 3301.07(D)]," unless the school district board of education has passed a resolution that declares that transporting the student is impractical based on the factors delineated in R.C. 3327.02(A). R.C. 3327.01. When a resolution declaring transportation impractical has been passed by a school district board of education, the school district board of education must offer to provide payment to the parents of the affected students instead of providing transportation. R.C. 3327.02(C).⁵

A city, local, or exempted village school district board of education has discretion to provide transportation to students in grades nine through twelve who attend the high school to which they are assigned by the school district board of education of their residence or the nonpublic or community school they attend. R.C. 3327.01. However, in a city, local or exempted village school district where student transportation

is required under a career-technical plan approved by the state board of education under [R.C. 3313.90], for any student attending a career-technical program operated by another school district, including a joint vocational school district, as prescribed under that section, the board of education of the student's district of residence shall provide transportation from the public high school operated by that district to which the student is assigned to the career-technical program.

Id.

If transportation of elementary or high school students attending a nonpublic or community school requires more than thirty minutes of direct travel time "measured by school bus from the public school building to which the pupils would be assigned if attending the public school designated by the

children, homeless children, children inaccessible to school buses, or students placed in alternative schools.

⁴ R.C. 3327.01, R.C. 3327.011, R.C. 3327.012, and R.C. 3327.02 do not apply to joint vocational and cooperative education school districts. R.C. 3327.01.

⁵ A new version of R.C. 3327.02(D) will become effective on July 1, 2014. Am. Sub. H.B. 59, 130th Gen. A. (2013) (eff. July 1, 2014).

district of residence[,]” the school district board of education shall not be required to provide the transportation. *Id.*

A city, local, or exempted village school district board of education may enter into a contract with another district’s board of education to provide transportation for the district’s students who attend school in the other district, upon terms agreed to by the two districts. R.C. 3327.04(A). “The contract shall delineate the transportation responsibilities of each district.” R.C. 3327.04(B). Nevertheless, no board of education of any school district shall provide transportation to any student who is a resident of another district unless the student is enrolled in an adjacent district or other district pursuant to R.C. 3313.98,⁶ the school district board of education has provided written consent authorizing the transportation, or unless division (B) of R.C. 3327.05 applies.⁷ R.C. 3327.05(A). Division (B) of R.C. 3327.05⁸ gives a school district board of education discretionary authority to provide transportation to students attending a nonpublic school if both of the following apply:

- (1) The parent, guardian, or other person in charge of the pupil agrees to pay the board for all costs incurred in providing the transportation that are not reimbursed pursuant to [R.C. Chapter 3317];
- (2) The pupil’s school district of residence does not provide transportation for public school pupils of the same grade as the pupil being transported under this division, or that district is not required under [R.C. 3327.01] to transport the pupil to and from the nonpublic school because the direct travel time to the nonpublic school is more than thirty minutes.

A city, local, or exempted village school district board of education is required to provide transportation “for all children who are so disabled that they are unable to walk to and from the school for which the state board of education prescribes minimum standards pursuant to [R.C. 3301.07(D)] and which they attend.” R.C. 3327.01. “In all city, exempted village, and local school districts, the board shall provide transportation to and from school or special education classes for mentally disabled children in accordance with standards adopted by the state board of education.” *Id.*

A city, local, or exempted village school district board of education’s duty to provide transportation under R.C. 3327.01 applies to students attending public and nonpublic schools for which the State Board of Education prescribes minimum standards under R.C. 3301.07(D). 1980 Op. Att’y Gen. No. 80-012, at 2-60. However, the nonpublic school need not be chartered under R.C. 3301.16 to trigger the board of education’s duty to provide transportation. *Id.* at 2-60 to 2-61.

⁶ See note 13, *infra*, for a description of R.C. 3313.98.

⁷ A new version of R.C. 3327.05(B) will become effective on July 1, 2014. Am. Sub. H.B. 59, 130th Gen. A. (2013) (eff. July 1, 2014).

⁸ R.C. 3327.05(B) does not apply to a joint vocational or cooperative education school district. R.C. 3327.05(B).

Rules concerning the construction, design, and equipment of school buses that are publicly and privately owned in Ohio shall be adopted and enforced by “[t]he department of public safety, by and with the advice of the superintendent of public instruction[.]” R.C. 4511.76(A). “The department of education, by and with the advice of the director of public safety, shall adopt and enforce rules relating to the operation of all vehicles used for pupil transportation.” R.C. 4511.76(B). For purposes of R.C. 4511.76, a “‘vehicle used for pupil transportation’ means any vehicle that is identified as such by the department of education by rule and that is subject to [5A Ohio Admin. Code Chapter 3301-83].” R.C. 4511.76(E).

Meaning of “Alternative Schools” for Purposes of 5A Ohio Admin. Code 3301-83-19(C) (2013-2014 Supp.)

Rule 3301-83-19 identifies the types of vehicles that are authorized to transport pupils to and from school and school-related events. These vehicles include school buses, public transit vehicles, vehicles other than school buses, commercial carriers, and taxicabs. *Id.* Division (C) of rule 3301-83-19 addresses the use of vehicles other than school buses and states, in pertinent part:

Vehicles originally designed and constructed at the factory for nine or fewer passengers, not including the driver, to be used when school bus transportation cannot be reasonably provided. [*sic*] shall not be routinely used for service to and from regularly scheduled school sessions except for preschool children, special needs children, homeless children, children inaccessible to school buses, or students placed in alternative schools.

This means that vehicles that carry nine or fewer passengers, that are used when school bus transportation cannot be reasonably provided, may be routinely used to provide transportation to regularly scheduled school sessions for preschool children, special needs children, homeless children, children inaccessible to school buses, or students placed in alternative schools. *Id.*

“Alternative schools” is not defined in the Ohio Administrative Code for purposes of rule 3301-83-19(C). An administrative rule is construed “in the same manner as statutes.” *State v. Moore*, 4th Dist. No. 12CA26, 2013-Ohio-5506, at ¶9 (citing *McFee v. Nursing Care Mgmt. of America, Inc.*, 126 Ohio St. 3d 183, 2010-Ohio-2744, 931 N.E.2d 1069, at ¶27). “The primary goal in construing an administrative rule is to ascertain and give effect to the intent of the rule-making authority.” *State v. Moore* at ¶9 (citing *State v. Hairston*, 101 Ohio St. 3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶11). Moreover, “[a]n Ohio Administrative Code section is a further arm, extension, or explanation of statutory intent implementing a statute passed by the General Assembly.” *State ex rel. Meyer v. Ohio State Lottery Comm’n*, 34 Ohio App. 3d 232, 234, 517 N.E.2d 1029 (Lucas County 1986); *accord Carroll v. Dep’t of Admin. Servs.*, 10 Ohio App. 3d 108, 110, 460 N.E.2d 704 (Franklin County 1983) (“[t]he purpose of administrative rulemaking is to facilitate the administrative agency’s placing into effect the policy declared by the General Assembly in the statutes to be administered by the agency”). Administrative rules carry “the force and effect of a statute itself.” *State ex rel. Meyer v. Ohio State Lottery Comm’n*, 34 Ohio App. 3d at 234. Thus, we look to the Revised Code for guidance as to which schools constitute alternative schools for purposes of rule 3301-83-19(C).

There are three types of “alternative schools” described in the Revised Code: an alternative school established and maintained by a board of education of a city, exempted village, or local school district pursuant to R.C. 3313.533; an alternative school for purposes of a city, local, or exempted village school district board of education’s intradistrict open enrollment policy adopted pursuant to R.C. 3313.97; and an alternative school for purposes of the pilot project scholarship program under R.C. 3313.974-.979. We will examine each statutory scheme individually.

R.C. 3313.533(A)⁹ authorizes a city, local, or exempted village school district board of education to “adopt a resolution to establish and maintain an alternative school in accordance with [R.C. 3313.533].” The purpose of an alternative school established under R.C. 3313.533

shall be to serve students who are on suspension, who are having truancy problems, who are experiencing academic failure, who have a history of class disruption, who are exhibiting other academic or behavioral problems specified in the resolution, or who have been discharged or released from the custody of the department of youth services under [R.C. 5139.51].

R.C. 3313.533(A)(1). This purpose must be specified in the resolution that the city, local, or exempted village school district board of education adopts when establishing an alternative school. R.C. 3313.533(A). The resolution must also specify that the alternative school shall be operated in accordance with R.C. 3313.533. R.C. 3313.533(A)(3).¹⁰

A city, local, or exempted village school district board of education may be required to establish an R.C. 3313.533 alternative school. *See* R.C. 3313.533(E); R.C. 3313.534. R.C. 3313.534 requires “each of the big eight school districts, as defined in [R.C. 3314.02],¹¹ [to] establish [by July 1,

⁹ A new version of R.C. 3313.533(B)(1) will become effective on July 1, 2014. Am. Sub. H.B. 59, 130th Gen. A. (2013) (eff. July 1, 2014).

¹⁰ R.C. 3313.533(C) authorizes a city, local, or exempted village school district board of education to “contract with a nonprofit or for profit entity” to operate an alternative school in the district. In a telephone conversation, you explained that you are not concerned with an alternative school established by a district board of education that has contracted with a nonprofit or for profit entity to operate the alternative school under R.C. 3313.533(C). Therefore, this opinion does not address alternative schools that are operated by a nonprofit or for profit entity under R.C. 3313.533(C).

¹¹ R.C. 3314.02(A)(4) provides:

“Big eight school district” means a school district that for fiscal year 1997 had both of the following:

1999] under [R.C. 3313.533] at least one alternative school to meet the educational needs of students with severe discipline problems, including, but not limited to, excessive truancy, excessive disruption in the classroom, and multiple suspensions or expulsions.” (Footnote added). After July 1, 1999, any other school district that has a “significantly substandard graduation rate, as defined by the department of education shall also establish such an alternative school under [R.C. 3313.533].” R.C. 3313.534. An alternative school that is established under R.C. 3313.533, whether by election of the district board of education or by operation of R.C. 3313.534, may be a joint alternative school that is formed by the joining of boards of education from one or more districts. R.C. 3313.533(E).

We will now examine the second type of “alternative school,” an alternative school for purposes of a city, local, or exempted village school district board of education’s intradistrict open enrollment policy adopted pursuant to R.C. 3313.97. R.C. 3313.97(B) requires a city, local, or exempted village school district board of education to “adopt an open enrollment policy allowing students entitled to attend school in the district pursuant to [R.C. 3313.64 or R.C. 3313.65] to enroll in an alternative school.”¹² An open enrollment policy adopted pursuant to R.C. 3313.97(B) is referred to as an intradistrict open enrollment program. See 5A Ohio Admin. Code 3301-48-01(A)(2).¹³ For purposes of R.C. 3313.97, “alternative school” is “a school building other than the one to which a student is assigned by the district superintendent.” R.C. 3313.97(A)(2).

We now turn to the third type of “alternative school,” an alternative school for purposes of the pilot project scholarship program under R.C. 3313.974-979. The pilot project scholarship program is established by the Superintendent of Public Instruction and includes “any school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent.” R.C. 3313.975(A). The program is commonly referred to as the school voucher program. *Golden Christian Academy v. Zelman*, 144 Ohio App. 3d 513, 515, 760 N.E.2d 889 (Franklin County 2001). Under the program, a select number of students residing in a

(a) A percentage of children residing in the district and participating in the predecessor of Ohio works first greater than thirty per cent, as reported pursuant to [R.C. 3317.10];

(b) An average daily membership greater than twelve thousand, as reported pursuant to former [R.C. 3317.03(A)].

¹² R.C. 3313.97 does not apply to a joint vocational or cooperative education school district. R.C. 3313.97.

¹³ Intradistrict open enrollment differs from interdistrict open enrollment, which is governed by R.C. 3313.98. R.C. 3313.98(B) requires a city, local, or exempted village school district board of education to adopt a policy that entirely prohibits enrollment of students from other districts, “other than students for whom tuition is paid in accordance with [R.C. 3317.08];” permits enrollment of students from any adjacent districts; or permits enrollment of students from any other district. A policy adopted in accordance with R.C. 3313.98 is referred to as an interdistrict open enrollment program. See 5A Ohio Admin. Code 3301-48-02(A)(1).

district that is under the supervision and operational management of the Superintendent of Public Instruction are provided scholarships to attend alternative schools. R.C. 3313.975(A). The same number of students receive tutorial assistance grants while attending a public school in the district. *Id.*

For purposes of R.C. 3313.975-.979, an “alternative school” is defined as “a registered private school located in a school district or a public school located in an adjacent school district.” R.C. 3313.974(G). A “registered private school” is “a school registered with the superintendent of public instruction pursuant to [R.C. 3313.976].” R.C. 3313.974(F). In order for a school to be registered by the Superintendent of Public Instruction, all eleven requirements specified in R.C. 3313.976(A) must be met. Scholarships provided to students wishing to attend an alternative school that is a registered private school are payable directly to the student’s parents; however, scholarships provided to students wishing to attend an alternative school that is a public school in an adjacent district are payable to the school district of the alternative school. R.C. 3313.979.

Nothing in rule 3301-83-19(C) limits its application to only one type of alternative school. Accordingly, we conclude that for purposes of rule 3301-83-19(C), the term “alternative schools” includes those schools that are established as alternative schools pursuant to a resolution adopted by a city, local, or exempted village school district board of education in accordance with R.C. 3313.533, schools that constitute alternative schools for purposes of open enrollment under R.C. 3313.97, or schools that constitute alternative schools for purposes of the pilot project scholarship program under R.C. 3313.974-.979. Thus, in order for a chartered or non-chartered nonpublic school to constitute an alternative school under rule 3301-83-19(C), the chartered or non-chartered nonpublic school must qualify as an alternative school under R.C. 3313.533, R.C. 3313.97, or R.C. 3313.974-.979.¹⁴

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that for purposes of 5A Ohio Admin. Code 3301-83-19(C) (2013-2014 Supp.), the term “alternative schools” includes those schools that are established as alternative schools pursuant to a resolution adopted by a city, local, or exempted village school district board of education in accordance with R.C. 3313.533, schools that constitute alternative schools for purposes of open enrollment under R.C. 3313.97, and schools that

¹⁴ Any use of a vehicle authorized to provide transportation to students under rule 3301-83-19 is subject to the statutes that determine the obligations of a city, local, or exempted village school district board of education to provide school transportation to students. *See, e.g.*, R.C. 3327.01 (duty of a city, local, or exempted village school district board of education to provide school transportation to students); R.C. 3313.97(D) (obligation of a city, local, or exempted village school district board of education to provide transportation to an R.C. 3313.97 alternative school).

The Honorable Stephen J. Pronai

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constitute alternative schools for purposes of the pilot project scholarship program under R.C. 3313.974-979.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General