

**Note from the Attorney General's Office:**

1977 Op. Att'y Gen. No. 77-069 was overruled in part by  
1991 Op. Att'y Gen. No. 91-024.

**OPINION NO. 77-069****Syllabus:**

1. R.C. 3323.091 requires that the State Department of Education pay to each institution which is operated by or under the direction of the Department of Mental Health and Mental Retardation or the Ohio Youth Commission and which has provided special education to handicapped children an amount equal to the normal tuition rate calculated by R.C. 3317.05 and 3317.08. The Department of Education must then deduct that amount from its allocation under R.C. Chapter 3317. to each local district. Only if the state funds allocated to the district are insufficient to meet the amount already paid to institutions operated by or under the direction of the Department of Mental Health and Mental Retardation or the Ohio Youth Commission may the Department of Education require additional payments from the local district.
2. The provisions of R.C. 3323.091 apply to all handicapped children under the age of twenty-two and not just those of compulsory school age.
3. Under R.C. 3323.091, all educational programs for

handicapped children placed in institutions operated by or under the direction of either the Department of Mental Health and Mental Retardation or the Ohio Youth Commission, including individual educational programs (IEP) as defined in R.C. 3323.01(E), are to be established by the departments which operate those institutions according to standards adopted by the State Board of Education.

4. The responsibility for the educational placement of handicapped children rests with the local school districts under R.C. 3323.04 despite the fact that the child may have originally been placed in an institution operated by, or under the direction of either the Department of Mental Health and Mental Retardation or the Ohio Youth Commission prior to the effective date of Am. Sub. H.B. No. 455.

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**To: Franklin B. Walter, Superintendent of Public Instruction, Department of Education, Columbus, Ohio**

**By: William J. Brown, Attorney General, November 10, 1977**

I have before me your request for an opinion regarding the construction of Am. Sub. H.B. No. 455 (eff. 8-27-76) which concerns education for handicapped children. Specifically, you have raised the following questions:

1. Does R.C. 3323.091 require tuition payments by school districts for handicapped children in special education programs operated by, or under the direction of, either the Department of Mental Health and Mental Retardation or the Ohio Youth Commission other than those conducted through special education units approved by the State Department of Education? (See also R.C. 3323.01(B), 3323.02, 3323.09, and 3323.11).
2. Does R.C. 3323.091 require tuition payments by school districts for all handicapped children under the age of twenty-two, or only those of compulsory school age, in special education programs operated by, or under the direction of, either the Department of Mental Health and Mental Retardation or the Ohio Youth Commission?
3. May school districts delegate, and either the Department of Mental Health and Mental Retardation or the Ohio Youth Commission assume, responsibility for (1) the development of Individualized Educational Programs (IEP) as defined in R.C. 3323.01, and following the procedures in R.C. 3323.01, and following the procedures in R.C. 3323.08(B); and (2) conducting the annual review of said IEP as required by Section 3323.08(C) for those handicapped children under the jurisdiction of either the Department of Mental Health and Mental Retardation or the Ohio Youth Commission?
4. What responsibility does a school district have under R.C. 3323.04, for the education placement of handicapped children who were committed to an institution or other agency operated by, or under the direction of, either the Department of Mental Health and Mental Retardation or the Ohio Youth Commission prior to the enactment of Am. Sub. H.B. 455?

From information you have supplied, it is my understanding that the special education units to which you refer in your first question are a method of funding

which the State Board of Education had established prior to the enactment of Am. Sub. H.B. No. 455. Under that funding procedure, it was necessary for a school district to meet standards promulgated by the State Board of Education before it became eligible for funds. Previously, neither the Department of Mental Health and Mental Retardation nor the Ohio Youth Commission were eligible for special unit funding. This entire funding procedure has been affected by R.C. 3323.091 which provides as follows:

The department of mental health and mental retardation and the Ohio youth commission shall establish and maintain special education programs for handicapped children in institutions under their jurisdiction according to standards adopted by the state board of education. The superintendent of each institution providing special education under this chapter may apply to the state department of education for unit funding, which shall be paid in accordance with divisions (N) and (O) of section 3317.924 [3317.02.4] of the Revised Code.

On or before the thirtieth day of June of each year, the superintendent of each institution that during the school year provided special education pursuant to this section shall prepare a statement for each handicapped child under twenty-two years of age who has received special education. The statement shall contain the child's name, the name of the school district in which the child's parents reside, or if the parents' whereabouts are unknown, the name of the school district from which placement in the institution was made. Within sixty days after receipt of such statement, the department of education shall:

(A) Pay to the institution submitting the statement an amount equal to the normal tuition rate as calculated under sections 3317.05 and 3317.08 of the Revised Code, and deduct the same from the amount of state funds, if any, allocated under Chapter 3317. of the Revised Code, to the school district in which the child's parents reside; or

(B) If the amount of state funds to be allocated is insufficient, require the school district in which the child's parents reside to pay the institution submitting the statement an amount equal to the normal tuition rate as calculated under such sections.

Your first question seems to be answered directly by this statutory provision. The use of the word "shall" in the second paragraph of this section imposes a duty upon the superintendent of each institution providing services to handicapped children to file an annual statement with the State Department of Education. The reference to the unit funding in the first paragraph merely allows the institutions operated by or under the direction of the Department of Mental Health and Mental Retardation or the Ohio Youth Commission to apply for such funding. It does not limit the rest of the statute to only those situations where unit funding has been granted. Such a narrow construction of the statute is unwarranted, particularly in light of the fact that unit funding previously was not available to those institutions. In answer to your first question, then, R.C. 3323.091 requires that the State Department of Education pay to each institution which is operated by or under the direction of the Department of Mental Health and Mental Retardation or the Ohio Youth Commission and which has provided special education to handicapped children an amount equal to the normal tuition rate calculated by R.C. 3317.05 and 3317.08. The Department of Education must then deduct that amount from its allocation under R.C. Chapter 3317 to each local district. Only if the state funds

allocated to the district are insufficient to meet the amount already paid to institutions operated by or under the direction of the Department of Mental Health and Mental Retardation or the Ohio Youth Commission may the Department of Education require additional payments from the local district.

Your second question also appears to be directly answered by R.C. 3323.091. You ask whether that section requires tuition payments from school districts for all handicapped children under the age of twenty-two, or only those of compulsory school age. R.C. 3323.01(A), in part, provides that: "Handicapped child" means a person under twenty-two years of age . . .". R.C. 3321.01 limits "compulsory school age" to children between the ages of six and eighteen. Significantly, R.C. 3323.091 requires that superintendents of institutions which provide services for handicapped children file a statement with the state board of education, ". . . for each handicapped child under twenty-two years of age. . ." In light of the statutory definition of "handicapped child" in R.C. 3323.01(A) this redundancy amounts to legislative overkill, particularly since several other provisions of Chapter 3323 specifically apply only to handicapped children of compulsory school age. See, R.C. 3323.07, 3323.04. I must therefore conclude that the provisions of R.C. 3323.091 apply to all handicapped children under the age of twenty-two and not just those of compulsory school age.

Your third question also appears to be resolved specifically by R.C. 3323.091. The problem raised is an apparent conflict between R.C. 3323.08 and R.C. 3323.091. R.C. 3323.08(B) and (C) provide as follows:

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:

...

(B) Provide for the identification, location, and evaluation of all handicapped children, and for the educational placement of all identified handicapped children of compulsory school age, and may provide for the educational placement of handicapped children at least three years of age:

(1) Prior notice to assure that before any individual psychological evaluations are administered by a school district, the informed written consent of the parent of the child to be tested is obtained;

(2) The use of criteria defined by the state board of handicapped children into special programs.

(C) Provide for an individual education program for each handicapped child at the time of placement and by the first day of December of each subsequent school year and provide for annual review of the program.

An individual education program is defined in R.C. 3323.01(E) as follows:

(E) "Individualized education program" means a written statement for each handicapped child designed to meet the unique needs of a handicapped child, . . .

The effect of R.C. 3323.08, then, is to require that local districts submit a plan to the state board of education which meets the minimum guidelines set forth therein. The problem you raise is whether local districts must follow through with that plan if the child is in an institution operated by, or under the direction of either the Department of Mental Health and Retardation or the Ohio Youth Commission.

The first sentence of R.C. 3323.091 provides as follows:

The Department of Mental Health and Mental Retardation and the Ohio Youth Commission shall establish and maintain special education programs for handicapped children in institutions under their jurisdiction according to standards adopted by the State Board of Education . . .

It would seem that this section, which specifically concerns itself with handicapped children in institutions operated by the Department of Mental Health and Mental Retardation and the Ohio Youth Commission, provides the answer to your third question. R.C. 3323.08 speaks in general terms as to handicapped children in local districts, while R.C. 3323.091 is specific and limited in its operation. One of the most elementary rules of statutory construction is that a specific statute controls over a general one, and that argument is particularly persuasive here since both sections were enacted in the same legislative act. Therefore, in answer to your third question, it is my opinion that all educational programs for handicapped children in institutions operated by the Department of Mental Health and Mental Retardation or the Ohio Youth Commission, including individual educational programs, are to be established by those departments according to the standards adopted by the State Board of Education. However, because the ultimate responsibility for educational placement of handicapped children rests with the local school boards under R.C. 3323.04, these local districts should be kept advised of the programs, and also of the progress, of each child from their district who is in that institution.

Your fourth question concerns responsibility for the educational placement of handicapped children who had been placed in an institution operated by, or under the direction of the Department of Mental Health and Mental Retardation or the Ohio Youth Commission, prior to the enactment of Am. Sub. H.B. No. 455. Under R.C. 3323.05, educational placement is to be determined by the local boards of education. That section provides, in pertinent part, as follows:

The [local] board of education shall evaluate the educational placement of each handicapped child at least once each year.

. . .

If an agency directly affected by a placement decision objects to such decision, an independent hearing officer, appointed by the school district and the objecting agency . . . , shall conduct a hearing to review the placement decision.

By establishing this quasi-judicial procedure, the General Assembly has indicated that placement is a matter of importance to the local districts, the agency in whose care the child is to be or has been placed, and the handicapped child himself. Since there is no distinction between handicapped children placed in institutions prior to the act, and those thus placed after the act, it is reasonable to assume that R.C. 3323.04 applies to both classes. Any other construction would place these children in a limbo situation not warranted by any practical or statutory purpose, and unfair to all parties concerned.

Accordingly, in answer to your questions, it is my opinion that:

1. R.C. 3323.091 requires that the State Department of Education pay to each institution which is operated by or under the direction of the Department of Mental Health and Mental Retardation or the Ohio Youth Commission and which has provided special education to handicapped children an amount equal to the normal tuition rate calculated by R.C. 3317.05 and 3317.08. The Department of Education must then deduct that amount from its allocation

under R.C. Chapter 3317. to each local district. Only if the state funds allocated to the district are insufficient to meet the amount already paid to institutions operated by or under the direction of the Department of Mental Health and Mental Retardation or the Ohio Youth Commission may the Department of Education require additional payments from the local district.

2. The provisions of R.C. 3323.091 apply to all handicapped children under the age of twenty-two and not just those of compulsory school age.

3. Under R.C. 3323.091, all educational programs for handicapped children placed in institutions operated by or under the direction of either the Department of Mental Health and Mental Retardation or the Ohio Youth Commission, including individual educational programs (IEP) as defined in R.C. 3323.01(E), are to be established by the departments which operate those institutions according to standards adopted by the State Board of Education.

4. The responsibility for the educational placement of handicapped children rests with the local school districts under R.C. 3323.04 despite the fact that the child may have originally been placed in an institution operated by, or under the direction of either the Department of Mental Health and Mental Retardation or the Ohio Youth Commission prior to the effective date of Am. Sub. H.B. No. 455.