

December 18, 2001

OPINION NO. 2001-043

The Honorable Alan R. Mayberry
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402-2431

Dear Prosecutor Mayberry:

We have received your request for an opinion on the question whether local school districts in conjunction with county educational service centers are authorized to form joint self-insurance pools pursuant to R.C. 2744.081. You have asked specifically whether there is a conflict between statutory provisions requiring that a board of education procure liability insurance from an insurance company licensed to do business in Ohio and R.C. 2744.081(E)(2), which states that “[a] joint self-insurance pool is not an insurance company.”

You have informed us that your questions have arisen because a major insurance carrier for schools has declared that, in the near future, it will stop insuring schools. Thus, the issue of how to procure liability coverage is of interest to school districts throughout the state.

Let us begin our analysis with an examination of the statutory provisions authorizing the creation of joint self-insurance pools. R.C. Chapter 2744 deals with the tort liability of political subdivisions. It provides as a general rule that a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or its employees in connection with a governmental or proprietary function. R.C. 2744.02(A)(1). However, R.C. Chapter 2744 then proceeds to define various types of situations in which a political subdivision may incur liability. R.C. 2744.02(B). These situations include the negligent operation of motor vehicles on public roads by employees who are acting within the scope of their employment and authority, the negligent performance of proprietary functions, the failure to keep public roads and grounds open, in repair, and free from nuisance, negligence in maintaining buildings or grounds used for the performance of governmental functions, and instances in which liability is expressly imposed by statute. R.C. 2744.02(B); *see also* R.C. 2744.03 (defenses or immunities).

To enable a political subdivision to deal with such potential liability, R.C. 2744.08 authorizes a political subdivision to secure liability insurance or to establish and maintain a self-insurance program. Political subdivisions that have self-insurance programs may agree to have them jointly administered. R.C. 2744.08(A)(2)(b).

Regardless of whether a political subdivision secures liability insurance or establishes a self-insurance program, the political subdivision is authorized to “join with other political subdivisions in establishing and maintaining a joint self-insurance pool to provide for the payment of judgments, settlement of claims, expense, loss, and damage that arises, or is claimed to have arisen from an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function and to indemnify or hold harmless the subdivision’s employees against such loss or damage.” R.C. 2744.081(A). A joint self-insurance pool is expressly authorized, in addition to providing self-insurance against any and all liabilities under R.C. Chapter 2744, to include self-insurance covering other liabilities of the members relating to “[i]ndividual or fleet motor vehicle or automobile liability and protection against other liability and loss associated with the ownership, maintenance, and use of motor vehicles.” R.C. 2744.081(E)(1)(b). *See generally* 1997 Op. Att’y Gen. No. 97-020. Thus, political subdivisions are authorized by R.C. 2744.081 to enter into joint self-insurance pools for purposes of securing motor vehicle liability coverage.

For purposes of R.C. Chapter 2744, including the authority to participate in a self-insurance program or a joint self-insurance pool, “[p]olitical subdivision” is defined to mean “a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state.” R.C. 2744.01(F). Certain other entities are named as political subdivisions, but educational service centers are not mentioned.

A review of R.C. Chapter 2744 thus discloses that school districts are political subdivisions that are authorized by R.C. 2744.08 to establish self-insurance programs and by R.C. 2744.081 to join in establishing and maintaining joint self-insurance pools. Whether educational service centers are similarly empowered requires further examination. Because educational service centers are not expressly mentioned in R.C. 2744.01(F), they are included as political subdivisions for purposes of R.C. Chapter 2744 only if they are bodies corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. R.C. 2744.01(F); *see, e.g.*, 1990 Op. Att’y Gen. No. 90-060; 1988 Op. Att’y Gen. No. 88-034. It appears that they come within this definition.

Educational service centers are the successors to county school districts. *See, e.g.*, 1999 Op. Att’y Gen. No. 99-023, at 2-150 n.1. They are governed by boards of elected officials that meet periodically. R.C. 3313.01; R.C. 3313.14; R.C. 3313.15; *see also* R.C. 3311.053; R.C. 3311.054. Educational service centers receive funding from the state, and certain expenses are apportioned among local school districts. *See, e.g.*, R.C. 3317.11. They may also receive revenue from the operation of educational programs. *See, e.g.*, R.C. 3317.05; R.C. 3317.11(D); 1999 Op. Att’y Gen. No. 99-023.

Educational service centers are independent entities that can properly be classified as bodies corporate and politic for purposes of R.C. Chapter 2744. *See generally Cline v. Martin*, 94 Ohio St. 420, 426, 115 N.E. 37, 38 (1916) (describing boards of education of county school districts as “agencies of the state for the organization, administration and control of the public school system of the state, separate and apart from ... other subdivisions of the state”). R.C. 3311.055 provides that educational service centers are included as school districts for purposes of provisions of Title 33 that do not expressly refer to particular types of school districts, and the governing boards of educational service centers are included as boards of education for those purposes. Among such provisions is R.C. 3313.17, which states that “[t]he board of education of each school district shall be a body politic and corporate.” Pursuant to R.C. 3311.055, therefore, the governing board of an educational service center is a body politic and corporate in accordance with R.C. 3313.17. *See generally* 1992 Op. Att’y Gen. No. 92-061.

The powers and duties of an educational service center involve governmental functions. By statute, educational service centers provide supervisory services and other educational services for local school districts within their territory. *See, e.g.*, R.C. 3301.0719 (develop plan of service); R.C. 3313.60 (prescribe required curriculum); R.C. 3313.843 (provide various services); R.C. 3313.85 (perform duties of school board that fails to act); R.C. 3317.11 (provide special education and vocational education); R.C. 3321.15 (provide attendance officers); R.C. 3327.10 (certify bus drivers); R.C. 3329.08 (adopt lists of textbooks). Pursuant to R.C. 2744.01(C)(2)(c), the provision of a system of public education is expressly included as a governmental function. Thus, an educational service center is responsible for governmental activities.

Educational service centers consist of territory outside city or exempted village school districts and may combine to include several counties. R.C. 3311.05(A); R.C. 3311.053; R.C. 3311.054. Thus, they serve geographic areas smaller than that of the state.

It is clear from the foregoing that an educational service center is a body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. Therefore, an educational service center is a political subdivision for purposes of R.C. Chapter 2744. *See* R.C. 2744.01(F). Accordingly, both school districts and educational service centers are political subdivisions as defined in R.C. 2744.01(F), and both school districts and educational service centers are authorized by R.C. 2744.08 and R.C. 2744.081 to enter into self-insurance programs or joint self-insurance pools.

Let us turn now to the question whether there is anything in the statutes governing school districts or educational service centers that prevents these entities from participating in self-insurance programs or joint self-insurance pools. The materials you have submitted refer, in particular, to R.C. 3313.201, which relates to motor vehicle liability insurance, and R.C.

3313.203, which relates to insurance for the school board, members, employees, and volunteers. Also of interest is R.C. 3327.09, which relates to insurance for school bus operation.¹

For ease of discussion, let us begin with consideration of R.C. 3313.203. That provision states that the board of education of any school district (including, pursuant to R.C. 3311.055, an educational service center) “may” purchase one or more policies of insurance insuring the board, or members of boards of education, superintendents, principals, other administrators, teachers, other employees, school support entities, or volunteer bus rider assistants against liability on account of damages or injury to persons and property resulting from any act or omission in such person’s official capacity or volunteer service. R.C. 3313.203(A). The statute goes on to state: “Any such policy shall be purchased from an insurance company licensed to do business in this state, if such a policy is available from such a company.” *Id.*

The statute governing joint self-insurance pools states expressly that “[a] joint self-insurance pool is not an insurance company. Its operation does not constitute doing an insurance business and is not subject to the insurance laws of this state.” R.C. 2744.081(E)(2). Further, the courts have held that self-insurance is not insurance. *See, e.g., Ohio Gov’t Risk Mgmt. Plan v. County Risk Sharing Auth., Inc.*, 130 Ohio App. 3d 174, 180, 719 N.E.2d 992, 996 (Fulton County 1998); *Jennings v. City of Dayton*, 114 Ohio App. 3d 144, 150, 682 N.E.2d 1070, 1074 (Montgomery County 1996) (“‘self-insurance’ is the legal equivalent of no insurance for purposes of the distribution of uninsured motorist benefits”); *Physicians Ins. Co. v. Grandview Hosp. & Med. Ctr.*, 44 Ohio App. 3d 157, 158, 542 N.E.2d 706, 707 (Montgomery County 1988) (“self-insurance is not insurance; it is the antithesis of insurance”).

Thus, participation in a self-insurance program or a joint self-insurance pool is an activity separate from the purchase of liability insurance pursuant to R.C. 3313.203. By the use of the word “may,” R.C. 3313.203 merely authorizes a board of education to purchase liability insurance and does not require it to do so. *See, e.g., Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 102, 271 N.E.2d 834, 835 (1971) (syllabus, paragraph 1) (“[i]n statutory construction, the word ‘may’ shall be construed as permissive and the word ‘shall’ shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage”). The statement that any such policy “shall” be purchased from an insurance company licensed to do business in Ohio, if available, requires that a board of education that elects to purchase insurance pursuant to R.C. 3313.203 check first with insurance companies licensed to do business in Ohio. It does not restrict a board of education from electing to participate in a self-insurance program pursuant to R.C. 2744.08 or a joint self-insurance pool pursuant to R.C. 2744.081 instead of purchasing an insurance policy pursuant to R.C. 3313.203.

¹ In addition to R.C. 3313.201, R.C. 3313.203, and R.C. 3327.09, which relate specifically to school districts, R.C. 9.83 provides general authority for political subdivisions, including school districts, to purchase policies of motor vehicle liability insurance. R.C. 9.83; *see also* R.C. 9.82(B). *See generally* 1981 Op. Att’y Gen. No. 81-012.

Let us now consider R.C. 3313.201. Division (A) of R.C. 3313.201 states that “[t]he board of education of each school district *shall procure a policy or policies of insurance* insuring officers, employees, and pupils of the school district against liability on account of damage or injury to persons and property, ... including liability on account of death or accident by wrongful act, occasioned by the operation of a motor vehicle ... owned or operated by the school district.” R.C. 3313.201(A) (emphasis added). It also permits the procurement of collision, medical payments, comprehensive, and uninsured motorists insurance. The statute proceeds to require that “[i]nsurance procured pursuant to this section *shall be from one or more recognized insurance companies* authorized to do business in this state.” *Id.* (emphasis added). This language appears to mandate the purchase of certain liability insurance and to require that it be procured from insurance companies.

However, a recent amendment to R.C. 3313.201 added division (B), which states:

This section shall not be construed to affect the ability of any school district to establish and maintain self-insurance programs under the authority conferred by any other section of the Revised Code. Such programs may be established and maintained in combination with, or as an alternative to, any policy or policies of insurance procured under division (A) of this section.

R.C. 3313.201(B); *see* Am. Sub. H.B. 94, 124th Gen. A. (2001) (eff. June 6, 2001, with portions eff. on other dates) (enacting R.C. 3313.201(B), eff. Sept. 5, 2001). This language permits the board of education of a school district (including, pursuant to R.C. 3311.055, the governing board of an educational service center) to use self-insurance as an alternative or supplemental means of procuring the coverage required by R.C. 3313.201(A). The reference to “self-insurance programs under the authority conferred by any other section of the Revised Code” appears to include both self-insurance programs under R.C. 2744.08 and joint self-insurance pools under R.C. 2744.081.

Let us turn next to R.C. 3327.09. R.C. 3327.09 contains language similar to that appearing in R.C. 3313.201(A), stating that each board of education “*shall procure* for the benefit of its employees who operate a school bus, motor van, or other vehicle used in the transportation of school children *motor vehicle liability insurance* for injuries to persons and property.” R.C. 3327.09 (emphasis added). The statute prescribes coverage in amounts not less than one hundred thousand dollars per person, three hundred thousand dollars per occurrence, fifty thousand dollars property damage, and three thousand dollars medical payments. If those amounts cannot be procured by ordinary methods from insurance companies authorized to do business in Ohio, then the mandate is to procure the next highest amounts that can reasonably be procured. The statute also permits the procurement of uninsured motorists coverage and accident insurance covering pupils and other authorized passengers. It expressly requires that “insurance procured pursuant to this section *shall be from one or more recognized insurance companies* authorized to do business in this state.” *Id.* (emphasis added). Like the language of R.C. 3313.201(A), this language appears to mandate the purchase of certain liability insurance and to require that it be procured from insurance companies.

Unlike R.C. 3313.201, R.C. 3327.09 has not been amended to specify that self-insurance may be used as an alternative or supplement to the purchase of insurance from insurance companies. Nonetheless, a review of relevant legislation indicates an intent on the part of the General Assembly to allow self-insurance programs or joint self-insurance pools in this instance as well.

It is helpful to address the question from an historical perspective. See R.C. 1.49. The provisions of R.C. 3313.201 and R.C. 3327.09 requiring the purchase of insurance were in existence prior to the enactment of R.C. Chapter 2744. See 1985-1986 Ohio Laws, Part I, 1699, 1707-24 (Am. Sub. H.B. 176, eff. Nov. 20, 1985) (enacting R.C. Chapter 2744); 1979-1980 Ohio Laws, Part I, 1498, 1504-05 (Am. Sub. H.B. 44, eff. Jan. 16, 1980) (amending R.C. 3313.201); 1975-1976 Ohio Laws, Part II, 2733, 2733-34 (Am. H.B. 607, eff. July 14, 1976) (amending R.C. 3327.09). When the procurement of insurance pursuant to these provisions was made mandatory, see 1975-1976 Ohio Laws, Part II, 2733 (Am. H.B. 607, eff. July 14, 1976); Ohio Legislative Service Comm'n, *Summary of 1976 Enactments, January – July*, 78 (1976) (Am. H.B. 607), school districts were generally considered to be immune from liability under the doctrine of sovereign immunity, except in matters involving motor vehicles, for which they were expressly authorized by statute to purchase liability insurance. School districts were generally considered to be without authority to purchase insurance to cover situations in which there was no potential liability. See 1981 Op. Att'y Gen. No. 81-012; 1971 Op. Att'y Gen. No. 71-028; 1962 Op. Att'y Gen. No. 3138, p. 538; see also 1985 Op. Att'y Gen. No. 85-060, at 2-222 n.1. Further, at that time there was no statutory authority for a school district to self-insure, so any reference to liability coverage necessarily contemplated the procurement of insurance policies from insurance companies.

The potential liability of school districts was expanded when the Ohio Supreme Court eliminated governmental immunity for public bodies and held that “[t]he defense of sovereign immunity is not available to a board of education in an action seeking damages for injuries allegedly caused by the negligence of the board’s employees.” *Carbone v. Overfield*, 6 Ohio St. 3d 212, 451 N.E.2d 1229 (1983) (syllabus);² see also, e.g., *Enghauser Mfg. Co. v. Eriksson Eng’g Ltd.*, 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983) (abrogating the doctrine of municipal immunity); *Schenkolewski v. Cleveland Metroparks Sys.*, 67 Ohio St. 2d 31, 426 N.E.2d 784 (1981) (abolishing the defense of governmental immunity for the board of commissioners of a park district engaged in a proprietary function). The General Assembly enacted R.C. Chapter 2744 to codify the circumstances in which a political subdivision could be subject to liability and included, in R.C. 2744.08, the authority to procure insurance and create self-insurance programs. See 1985-1986 Ohio Laws, Part I, 1699, 1707-24 (Am. Sub. H.B. 176, eff. Nov. 20, 1985)

² Following the decision in *Carbone v. Overfield*, 6 Ohio St. 3d 212, 451 N.E.2d 1229 (1983), R.C. 3313.203 was amended to expressly authorize the purchase of insurance policies insuring the board of education, in addition to policies insuring members and employees of the board. 1983-1984 Ohio Laws, Part I, 1068 (S.B. 288, eff. July 4, 1984). R.C. 3313.201 and R.C. 3327.09 were not similarly amended.

(enacting R.C. 2744.01-.09). In the same legislation, the General Assembly amended R.C. 3313.203 to indicate that a policy that a board of education chooses to purchase pursuant to its provisions must be purchased from an insurance company licensed to do business in this state “if such a policy is available from such a company.” *Id.* at 1724. The General Assembly did not amend R.C. 3313.201 or R.C. 3327.09.

Authority to participate in joint self-insurance pools was granted subsequent to the initial enactment of R.C. Chapter 2744. *See* 1985-1986 Ohio Laws, Part III, 6083, 6086-91 (Am. Sub. H.B. 875, eff. June 7, 1986) (enacting R.C. 2744.081). Again, the mandates of R.C. 3313.201 and R.C. 3327.09 were not modified legislatively.

By the enactment of R.C. 2744.08 in Am. Sub. H.B. 176 and the enactment of R.C. 2744.081 in Am. Sub. H.B. 875, the General Assembly expressed a clear intent that all political subdivisions be authorized to secure insurance coverage either by procuring liability insurance policies or by self-insuring, and it expressly included school districts among those political subdivisions. R.C. 2744.01(F); R.C. 2744.08; R.C. 2744.081. The statutory language is broad and general in authorizing political subdivisions to use self-insurance programs and pools to provide for potential liability, including liability relating to motor vehicles. R.C. 2744.08 states expressly: “Regardless of whether a political subdivision procures a policy or policies of liability insurance pursuant to division (A)(1) of this section or otherwise, the political subdivision may establish and maintain a self-insurance program.” R.C. 2744.08(A)(2)(a). Similarly, R.C. 2744.081 provides that, regardless of what action a political subdivision takes under R.C. 2744.08, “the political subdivision may, pursuant to a written agreement, and to the extent that it considers necessary, join with other political subdivisions in establishing and maintaining a joint self-insurance pool.” R.C. 2744.081(A).

R.C. 2744.08 states expressly that the authorizations it grants to political subdivisions to secure insurance and establish self-insurance programs “are in addition to any other authority to secure insurance or to establish and maintain self-insurance programs that is granted pursuant to the Revised Code or the constitution of this state, and they are not in derogation of any other authorization.” R.C. 2744.08(C). This language means that R.C. 2744.08 does not lessen the authority granted to a subdivision by any other provision of the Revised Code or the Ohio Constitution. Similarly, R.C. 2744.081 states that its provisions “shall not be construed to affect the ability of any political subdivision to self-insure under the authority conferred by any other section of the Revised Code.” R.C. 2744.081(G).

The evident intent of the General Assembly was to provide each political subdivision with alternatives for securing liability coverage. The Ohio Legislative Service Commission summarized the intended effect of R.C. 2744.08 as follows:

In addition to or in lieu of purchasing insurance, any political subdivision could establish and maintain a self-insurance program relative to its and its employees’ potential civil liability under the act. These authorizations are in addition to any

other statutory or constitutional authority political subdivisions may have relative to insurance procurement or self-insurance.

Ohio Legislative Service Comm'n, *Summary of Enactments, August – December 1985*, 31, 36 (1985) (Am. Sub. H.B. 176).

Similarly, the intended effect of R.C. 2744.081 was summarized in these words:

The act authorizes a political subdivision, to the extent that it considers necessary, to enter into a written agreement with other political subdivisions to establish and maintain a joint political subdivision self-insurance pool.

....

A political subdivision may become a member of a pool, regardless of whether it purchases liability insurance, establishes a self-insurance program, or enters into a joint administration agreement under existing laws.

Ohio Legislative Service Comm'n, *Summary of Enactments, April – June 1986*, 70 (1986) (Am. Sub. H.B. 875).

The provisions of R.C. Chapter 2744 were enacted subsequent to the provisions of R.C. 3313.201 and R.C. 3327.09 requiring school districts to purchase liability insurance from insurance companies. The provisions of R.C. Chapter 2744 clearly express the intent that political subdivisions, including school districts, be permitted to secure liability coverage through self-insurance programs or joint self-insurance pools rather than by purchasing insurance policies. *See* R.C. 1.49; R.C. 1.51; R.C. 1.52(A). The recent enactment of R.C. 3313.201(B) expressly recognizes that school districts may use self-insurance as an alternative or supplement to the purchase of insurance from insurance companies. However, even without this legislative acknowledgment of the availability of self-insurance, the enactment of R.C. 2744.08 and R.C. 2744.081 provides an indication of legislative intent sufficient to support the conclusion that boards of education may use self-insurance programs or joint self-insurance pools to secure liability coverage authorized or mandated by statute.

We conclude, accordingly, that R.C. 3313.201(B) codifies and clarifies the conclusion that school districts and educational service centers are permitted to procure liability coverage by means of self-insurance programs or joint self-insurance pools. We conclude, further, that R.C. 3327.09 does not preclude school districts or educational service centers from procuring liability coverage by means of self-insurance programs or joint self-insurance pools.

Even though a joint self-insurance pool is not an insurance company and participation is not an insurance policy, a joint self-insurance pool “is, in essence, a statutory insurance scheme which allows a [political subdivision] to spread the risk of its own loss among other [political subdivisions] that have all paid premiums into the fund.” *Ohio Gov’t Risk Mgmt. Plan v. County*

Risk Sharing Auth., Inc., 130 Ohio App. 3d at 180, 719 N.E.2d at 996. Self-insurance has a structure that is “analogous to insurance.” *Id.*; see also *Bd. of Comm’rs v. Springfield Township*, 107 Ohio App. 3d 780, 783 n.2, 669 N.E.2d 519, 520 n.2 (Williams County 1995) (“[i]n our view, therefore, the benefits paid [from a self-insurance pool] for [a participant’s] loss would constitute insurance benefits” for purposes of a setoff from an award under R.C. 2744.05(B)). Accordingly, self-insurance is an alternative to insurance, and it is appropriate to read R.C. 2744.08 and R.C. 2744.081 as offering school districts and educational service centers that alternative.

The bill enacting the joint self-insurance pool provisions was adopted as an emergency measure necessary for the immediate preservation of the public peace, health, and safety for the reason that “its enactment at the earliest possible time will enable many Ohio political subdivisions to obtain necessary insurance protection for the operation of their functions, which they cannot obtain, or cannot afford, in the existing insurance market.” 1985-1986 Ohio Laws, Part III, 6083, 6092 (Am. Sub. H.B. 875, eff. June 7, 1986) (section 4, uncodified). Your letter indicates that a similar situation may arise with respect to the purchase of insurance by school districts. This is another reason why it is appropriate to find R.C. 2744.081 available to school districts.

We conclude, therefore, that R.C. Chapter 2744 provides school districts and educational service centers with the alternative of providing self-insurance to cover potential liability, rather than purchasing insurance policies. Thus, existing statutes permit school districts and educational service centers to procure the liability coverage prescribed by R.C. 3313.201, R.C. 3313.203, and R.C. 3327.09 by means of self-insurance programs or joint self-insurance pools, rather than by purchasing insurance policies from insurance companies.

Therefore, it is my opinion and you are advised, as follows:

1. School districts and educational service centers are political subdivisions as defined in R.C. 2744.01(F).
2. School districts and educational service centers are authorized by R.C. 2744.08 and R.C. 2744.081 to enter into self-insurance programs or joint self-insurance pools.
3. Existing statutes permit school districts and educational service centers to procure the liability coverage prescribed by R.C. 3313.201, R.C. 3313.203, and R.C. 3327.09 by means of self-insurance programs or joint self-insurance pools, rather than by purchasing insurance policies from insurance companies.

Respectfully,

The Honorable Alan R. Mayberry

-10-

BETTY D. MONTGOMERY
Attorney General

December 18, 2001

The Honorable Alan R. Mayberry
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402-2431

SYLLABUS:

2001-043

1. School districts and educational service centers are political subdivisions as defined in R.C. 2744.01(F).
2. School districts and educational service centers are authorized by R.C. 2744.08 and R.C. 2744.081 to enter into self-insurance programs or joint self-insurance pools.
3. Existing statutes permit school districts and educational service centers to procure the liability coverage prescribed by R.C. 3313.201, R.C. 3313.203, and R.C. 3327.09 by means of self-insurance programs or joint self-insurance pools, rather than by purchasing insurance policies from insurance companies.