

OPINION NO. 93-023**Syllabus:**

A grandparent is not a "parent" for purposes of determining the school district of residence of a handicapped child pursuant to R.C. 3323.01(I), regardless of whether the grandparent is guardian or custodian of the child.

To: John W. Baker, Knox County Prosecuting Attorney, Mt. Vernon, Ohio
By: Lee Fisher, Attorney General, October 27, 1993

You have asked whether the grandparents of a particular handicapped child are "parents" for purposes of determining the school district of residence of that child. In the situation with which you are concerned, the child's parents were divorced in 1981. At the time of the divorce, the mother was given custody of the child. At a later date, as part of an agreed judgment entry effective in 1983, custody of the child was changed to the child's paternal grandparents. The mother retained rights of reasonable visitation and the obligation to pay child support, though no amount was set; there is no indication that the grandparents adopted the child. While living with the grandparents, the child was placed in a special education program through the school district in which the grandparents and the child resided, and an individualized education program ("IEP")¹ was prepared for the child by that school district. Since December of 1991, the child has been living with the child's mother in a different school district and has been enrolled in a special education program through that school district. The child's most recent IEP was prepared by the school district in which the child's mother resides and in which the child attends school. No documents issued by or filed with the court reflect any change in the custody of the child since 1983.

You have asked the following questions:

1. Under R.C. 3323.01(H), are the student's grandparents "parents" for purposes of determining which school district is the student's school district of residence?
2. If the answer to the first question is yes, is the school district in which the grandparents reside responsible for the student's educational expenses pursuant to R.C. 3323.13?

Public School Attendance

In general, a school-aged child is entitled to attend the public schools of the school district in which the child's "parent" resides. R.C. 3313.64(B). For purposes of R.C. 3313.64 and 3313.65, when a child's parents are divorced, "parent" means the parent who is the

¹ Both federal and state law provide for the development of an individualized education program ("IEP") for each handicapped child. See 20 U.S.C.A. §§ 1412, 1414 (West 1990 & Supp. 1993) (now using the term "child with a disability"); R.C. 3323.01(E), .08(A)(3); 1991 Op. Att'y Gen. No. 91-024. The IEP is developed by a representative of the local educational agency or an intermediate educational unit. See 20 U.S.C.A. §1401(a)(20) (West Supp. 1993). Under Ohio law, the board of education of each school district is responsible for providing an IEP and appropriate educational placement for each handicapped child three to twenty-one years of age residing in the district. R.C. 3323.04, .08; Op. No. 91-024.

residential parent and legal custodian of the child. R.C. 3313.64(A)(1). If the child is in the legal custody of a person other than his natural or adoptive parent, "parent" means "the parent with residual parental rights, privileges, and responsibilities." R.C. 3313.64(A)(1).² Pursuant to R.C. 3313.64(J), "[i]n the event of a disagreement, the superintendent of public instruction shall determine the school district in which the parent resides."

A child who does not reside in the district where his parent resides is entitled to attend the schools of the district in which the child resides if the child is in the legal or permanent custody³ of a person other than his natural or adoptive parent, if the child requires special education, or in certain other circumstances. R.C. 3313.64(B)(2), (3); *see, e.g.*, 1983 Op. Att'y Gen. No. 83-041. Statutory language provides that, for good cause and with the consent of the affected school districts, a child who is in the custody of a parent but resides with a grandparent and does not require special education may attend the schools of the district in which the grandparent resides. R.C. 3313.64(F)(11).

A person under age twenty-two who requires special education for any of a variety of reasons is, by definition, a "handicapped child." R.C. 3323.01(A). A handicapped child three to twenty-one years of age must be placed in an appropriate education program by the board of education of the school district in which the child resides. R.C. 3323.04. A handicapped child may, in compliance with R.C. Chapter 3323, be placed in a special education program outside the district. R.C. 3313.64(B); *see, e.g.*, 1987 Op. Att'y Gen. No. 87-026; Op. No. 83-041.

School District of Residence

It is important to note that the "school district of residence" is not necessarily the district in which the child actually lives or the district in which the child is entitled to attend school.

² For purposes of R.C. 3313.64 and 3313.65, "legal custody" and "residual parental rights, privileges, and responsibilities" have the same meanings as in R.C. 2151.011. R.C. 3313.64(A)(2). "Legal custody" means a legal status that gives the custodian "the right to have physical care and control of the child and to determine where and with whom he shall live, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities." R.C. 2151.011(B)(9). "Residual parental rights, privileges, and responsibilities" are those remaining with the natural parent after the transfer of legal custody of the child, including the privilege of reasonable visitation, consent to adoption, determination of religious affiliation, and responsibility for support. R.C. 2151.011(B)(10). *See generally*, *e.g.*, 1983 Op. Att'y Gen. No. 83-041.

³ For purposes of R.C. 3313.64 and 3313.65, "permanent custody" has the same meaning as in R.C. 2151.011. R.C. 3313.64(A)(2). "Permanent custody" means:

a legal status which vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights and obligations.

R.C. 2151.011(B)(11).

Rather, "school district of residence" is a term defined by statute, *see* R.C. 3323.01(I), that is used to determine, in various circumstances, the financial obligations of school districts for the education of particular children. *See, e.g.,* R.C. 3323.09, .091, .13, .14; Op. No. 87-026. When a child who does not reside in the district in which the child's parent resides is admitted to the public schools pursuant to R.C. 3313.64(B)(2) and receives special education in accordance with R.C. Chapter 3323, "tuition shall be paid in accordance with [R.C. 3323.091, 3323.13, 3323.14, or 3323.141] regardless of who has custody of the child or whether he resides in a home." R.C. 3313.64(C)(1). R.C. 3323.091, 3323.13, and 3323.14 provide, in general, for payment of tuition and excess costs by the school district of residence. *See, e.g.,* 1991 Op. Att'y Gen. No. 91-024.

"Parents" Under R.C. 3323.01(H)

R.C. Chapter 3323 governs the special education of handicapped children. Your letter references R.C. 3323.01(H). In general, the definitions contained in R.C. 3323.01 apply to R.C. Chapters 3321 and 3323, which govern school attendance and education of handicapped children. R.C. 3323.01(H) states:

"Parents" means either parent. If the parents are separated or divorced, "parent" means the parent who is the residential parent and legal custodian of the handicapped child. Except as used in division (I) of this section and in [R.C. 3323.09 and 3323.141], "parents" includes a child's guardian or custodian. This definition does not apply to [R.C. Chapter 3321].

Pursuant to this definition, when the parents are divorced, "parent" means the parent who is both the residential parent and the legal custodian of a handicapped child. The term "parent" includes a non-parent who is the child's guardian or custodian - except for purposes of R.C. 3323.01(I), R.C. 3323.09, or R.C. 3323.141. This definition does not apply to the general school attendance provisions that appear in R.C. Chapter 3321. R.C. 3323.01(H); *see* R.C. 3321.01(A).

R.C. 3323.01(I) contains the definition of "school district of residence" that is applicable to certain provisions governing the education of handicapped children. R.C. 3323.01(I) states:

As used in [R.C. 3323.09, 3323.091, 3323.13, and 3323.14], "school district of residence" means:

- (1) The school district in which the child's parents reside;
- (2) If the school district specified in division (I)(1) of this section cannot be determined, the last school district in which the child's parents are known to have resided if the parents' whereabouts are unknown;
- (3) If the school district specified in division (I)(2) of this section cannot be determined, the school district determined by the court under [R.C. 2151.357],⁴ or if no district has been so determined, the school district as determined by the probate court of the county in which the child resides. The

⁴ R.C. 2151.357 provides, *inter alia*, that, when a court makes "any order that removes a child from his own home or that vests legal or permanent custody of the child in a person or government agency other than his parent," the court shall determine the school district that is to bear the cost of educating the child. The determination is to be made in the manner prescribed by R.C. 3313.64(C)(2).

school district of residence that had been established under this section on December 12, 1983, shall remain the child's school district of residence unless a district of residence can be determined under division (I)(1) or (2) of this section.

(4) Notwithstanding division (I)(1) to (3) of this section, if a school district is required by [R.C. 3313.65]⁵ to pay tuition for a child, that district shall be the child's school district of residence. (Footnotes added.)

In general, then, the school district of residence of a handicapped child is determined on the basis of the residence or prior residence of one or both of the child's parents or by action of a court. *See generally Christman v. Washington Court House School District*, 30 Ohio App.3d 228, 507 N.E.2d 384 (Fayette County 1986); 1989 Op. Att'y Gen. No. 89-092; Op. No. 87-026.

Pursuant to R.C. 3323.01(H), guardians and custodians are generally included as "parents" for purposes of R.C. Chapter 3323. There is, however, an express exception for use of the term in R.C. 3323.01(I). Thus, for purposes of R.C. 3323.01(I), "parent" does not include a child's guardian or custodian. It follows that a grandparent is not a "parent" for purposes of R.C. 3323.01(I), even if the grandparent is guardian or custodian of the child.

Residence of Grandparents

In the situation that you have described, there may be factual questions concerning the actual residence of the child or the legal custody of the child. *See generally* R.C. 3313.672(B); Op. No. 83-041. It is inappropriate to attempt to make determinations of fact as part of a formal opinion and, in any event, it is unnecessary to make such determinations in order to answer your question. As discussed above, the school district of residence of a handicapped child is, pursuant to R.C. 3323.01(H) and (I), determined on the basis of the residence of one or both of the child's parents or by action of a court. Even when the grandparents are guardians or custodians of a handicapped child, the grandparents cannot be considered "parents" of the child for purposes of R.C. 3323.01(H) and (I).

The answer to your first question is, therefore, that the student's grandparents are not "parents" for purposes of determining the student's school district of residence.⁶ Your second question is conditioned upon an affirmative answer to your first question. Because your first question is answered in the negative, it is unnecessary to address the second question.

Conclusion

It is, therefore, my opinion, and you are advised, that a grandparent is not a "parent" for purposes of determining the school district of residence of a handicapped child pursuant to R.C. 3323.01(I), regardless of whether the grandparent is guardian or custodian of the child.

⁵ R.C. 3313.65 governs the payment of tuition in certain instances in which "at least one of the child's parents is in a residential or correctional facility or a juvenile residential placement and the other parent, if living and not in such a facility or placement, is not known to reside in this state." R.C. 3313.65(C).

⁶ This conclusion is not determinative of which school district is the school district of residence of the child. That determination must be made pursuant to R.C. 3323.01(I) in light of all relevant facts. *See generally* 1987 Op. Att'y Gen. No. 87-026.