

OPINION NO. 82-106**Syllabus:**

1. The board of education of a school district that provides special education to a child whose mother is an inmate at the Ohio Reformatory for Women at Marysville may require the Marysville Exempted Village School District to pay the cost of the child's tuition pursuant to R.C. 3323.01(H), (I)(1), R.C. 3323.13 and R.C. 3323.14 unless the child's parents are separated or divorced, and the father has legal custody of the child.
2. If a child receiving regular education is in the legal or permanent custody of a government agency or a person other than the child's natural or adoptive parent, and the mother retains residual parental rights, privileges and responsibilities, or was divested of such rights, and the mother resided as an inmate of the Ohio Reformatory for Women at the time the child was removed from his home, or at the time the court vested custody in such agency or person, whichever event occurred first, then the Marysville Exempted Village School District may be required to pay the child's tuition to the school district in which he is being educated.
3. If a child receiving regular education is not in the permanent or legal custody of a government agency or a person other than his natural or adoptive parent and he resides in a home, within the meaning of R.C. 3313.64(A)(4), and the child's mother qualifies as a parent by virtue of R.C. 3313.64(A)(1) and resides as an inmate at the Ohio Reformatory for Women, the Marysville Exempted Village School District may be required to pay the cost of the child's tuition to the district in which he is being educated.

To: R. Larry Schnelder, Union County Prosecuting Attorney, Marysville, Ohio
By: William J. Brown, Attorney General, December 23, 1982

I have before me your request for an opinion concerning the payment of school tuition for children whose mothers are inmates at the Ohio Reformatory for Women, located within the geographical limits of the Marysville Exempted Village

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School District. I have restated your questions in the following manner:

1. Must the board of education of the Marysville Exempted Village School District pay the tuition for a child receiving special education in another school district when the child's mother is an inmate at the Ohio Reformatory for Women, regardless of whether a Juvenile Court has exercised jurisdiction pursuant to R.C. 2151.357?
2. Must the Marysville Exempted Village School District pay the tuition for a child receiving regular education in another school district when the child's mother is an inmate at the Ohio Reformatory for Women?

The statutes that establish liability for the payment of regular and special education tuition for a child receiving education in a school district different from that in which his parents reside are set forth under R.C. Chapters 3313 and 3323. Pursuant to R.C. 3313.64(B)(2) a child may be admitted to the schools of a district other than that in which his parent resides under the following circumstances:

A child who does not reside in the district where his parent resides shall be admitted to the schools of the district in which he resides if any of the following apply:

- (a) He is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent;
- (b) He resides in a home;
- (c) He requires special education.

If a child is admitted to a school district under this provision, and receives special education, tuition must be paid in accordance with R.C. 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. 3323.13 provides for these tuition payments, in pertinent part, as follows:

If a child who is a school resident of one school district receives special education from another district, the board [of] education of the district providing the education may require the payment by the board of education of the district of residence of a sum not to exceed the tuition the district providing the education for a child of normal needs of the same school grade. . . . Upon direction of the state board of education, the board of the district of residence shall pay. . .the tuition. (Emphasis added.)

The term "school district of residence" is defined in the following manner:

As used in sections 3323.09, 3323.091 [3323.09.1], 3323.13, and 3323.14 of the Revised Code, "school district of residence" means:

(1) The school district in which the child's parents reside, whether in a public or private dwelling or institution, or if not so determined;

(2) The last school district in which the child's parents are known to have resided if the parents' whereabouts are unknown, or if not so determined;

(3) The school district determined by the court under section 2151.357 [2151.35.7] of the Revised Code, 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 school district of residence

¹R.C. 3323.14 provides for the payment of the excess costs of a child's special education in another district. R.C. 3323.141 provides for the payment of special education tuition for a child who is a resident of a home, not in the legal or permanent custody of an Ohio resident, and whose parents are not known to have been Ohio residents subsequent to the child's birth.

established under this section or former section 3323.01 of the Revised Code shall remain the child's school district of residence unless a district of residence can be determined under division (1)(1) or (2) of this section. (Emphasis added.)

R.C. 3323.01(I). For the purposes of R.C. Chapter 3323, "[p]arents' means either parent. If the parents are separated or divorced, 'parent' means the parent with legal custody of the handicapped child." R.C. 3323.01(H). Thus, the board of education of the school district in which the custodial parent resides may be required to make this payment if the child's parents are separated or divorced. Apart from this circumstance, however, the pertinent statutes establish no priority for the identification of the parent whose residence determines the school district responsible for payment.

Your first question raises the issue of responsibility for payment of the special education tuition for a child whose mother is an inmate of the Ohio Reformatory for Women at Marysville. The statutes authorize the board of education of the school district providing the education to require payment from the district in which either parent resides "whether in a public or private dwelling or institution." R.C. 3323.01(H), (I)(1), R.C. 3323.13. "[R]esidence simply requires bodily presence as an inhabitant in a given place." Fuller v. Hofferbert, 204 F.2d 592, 597 (6th Cir. 1953). Clearly, the Ohio Reformatory for Women is a public institution. See R.C. 5143.21 (establishes "an institution to be known as the reformatory for women"). Thus, if a child's parent, within the meaning of R.C. 3323.01(H), resides as an inmate in an institution, the board of education of the school district in which that institution is located may be required to pay the child's special education tuition to the board of education of the school district that provides the education.

While a Juvenile Court must determine which school district will bear the cost of a child's tuition whenever the court removes a child from his home or vests custody of the child in a government agency or a person other than his parent, or places a child in a home, R.C. 3323.01(I)(3) expressly provides that a district determined in that manner will be responsible for the child's special education tuition only until an appropriate district can be established under R.C. 3323.01(I)(1) or (2). Thus, if a child's mother qualifies as a parent for purposes of R.C. Chapter 3323, and she resides as an inmate at a public institution, the school district in which that institution is located may be required to pay the child's special education tuition. Once a district is determined under R.C. 3323.01(I)(1), any prior judicial determination by a probate court, or by a Juvenile Court under R.C. 2151.357, will be preempted.

Accordingly, I must conclude that the board of education of a school district that provides special education to a child whose mother is an inmate at the Ohio Reformatory for Women may require the board of education of the Marysville Exempted Village School District, as the school district of residence, to pay the cost of the child's tuition pursuant to R.C. 3323.01(H), (I)(1), R.C. 3323.13, and R.C. 3323.14³ unless the child's parents are separated or divorced, and the father

²As used in R.C. Chapter 3323, the term "parents" may also include a child's guardian or custodian, but not for purposes of determining the school district of residence that may be required to pay the cost of a child's special education tuition. R.C. 3323.01(H), (I), R.C. 3323.13, R.C. 3323.14.

³The pertinent statutes do not expressly provide for the situations in which a child's parents are not separated or divorced, or are separated or divorced, but neither has custody of the child. Since either parent may qualify as the appropriate "parent," for purposes of tuition payments, under the first sentence of R.C. 3323.01(H), I must conclude that the school district in which either the mother or the father resides, may be required to pay the cost of the child's special education tuition. While the statutes do not address the matter of contribution, it is reasonable to conclude that, under such circumstances, the child's special education tuition costs may be apportioned between the districts in which the parents reside.

has legal custody of the child.⁴

Your second question concerns regular education tuition payments for a child whose mother is an inmate at the Ohio Reformatory for Women. The statutes that establish responsibility for such payments are set forth in R.C. Chapter 3313. As indicated in response to your first question, a child who does not require special education, and who does not reside in the school district in which his parent resides, may be admitted to the schools of the district in which he resides if he resides in a home, or is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent.⁵ R.C. 3313.64(B)(2). If a child is admitted to a school under those circumstances, R.C. 3313.64(C) provides, in pertinent part, for the payment of the child's tuition in the following manner:

If the district admits a child under division (B)(2) of this section, tuition shall be paid to the district that admits the child as follows:

. . . .

(2) If the child is in the permanent or legal custody of a government agency or person other than the child's parent, tuition shall be paid by:

(a) The district in which the child's parent resided at the time the court removed the child from his home or at the time the court vested legal or permanent custody of the child in the person or government agency, whichever occurred first; or

(b) If the parent's residence at the time the court removed the child from his home or placed him in the legal or permanent custody of the person or government agency is unknown, tuition shall be paid by the district in which the child resided at the time he was removed from his home or placed in legal or permanent custody, whichever occurred first; or

(c) If a school district cannot be established under division (C)(2)(a) or (b) of this section, tuition shall be paid by the district determined as required by section 2151.357 [2151.35.7] of the Revised Code by the court at the time it vests custody of the child in the person or government agency.

⁴If the father has custody of a child whose mother is an inmate at the Reformatory, R.C. 3323.01(H), (I)(1) and (2) provide that the school district of residence which may be required to pay the child's tuition is the district in which such father resides or was last known to have resided if his whereabouts are unknown.

⁵For purposes of R.C. 3313.64, the terms "legal custody" and "permanent custody" are defined under R.C. 2151.01(10), (12); "home" is defined as follows:

Except as used in division (C)(2) of this section, "home" means a home, institution, foster home, group home, or other residential facility in this state that receives and cares for children, to which any of the following apply:

(a) The home is licensed, certified, or approved for such purpose by the state;

(b) The home is operated by a person who is licensed, certified, or approved by the state to operate the home for such purpose;

(c) The home accepted the child through a placement by a person licensed, certified, or approved to place a child in such a home by the state;

(d) The home is a children's home created under section 5153.21 or 5153.36 of the Revised Code.

- (3) If the child is not in the permanent custody of a government agency or person other than his parent and he resides in a home, tuition shall be paid by:
- (a) The school district in which the child's parent resides; or
 - (b) If the child's parent is not a resident of this state, the home in which the child resides. (Emphasis added.)

Thus, a child's regular education tuition must be paid by the district in which the child's parent resided at the relevant time, provided such a school district can be determined. An individual resides at a location, within the meaning of R.C. 3313.64 if he is "physically present and living there. . . during significant parts of each day and for important purposes consistent with residence." Board of Education of City School District of Oakwood v. Dille, 109 Ohio App.2d 344, 349, 165 N.E.2d 807, 811 (Ct. App. Montgomery County 1979). Accordingly, an inmate who is physically present and living at an institution during significant parts of each day resides at such institution.

The dispositive issue, therefore, is the identification of the child's parent.⁷ For purposes of R.C. 3313.64, that term is defined in the following manner:

"Parent" means either parent, unless the parents are separated or divorced or their marriage has been dissolved or annulled, in which case "parent" means the custodial parent. When a child is in the legal custody of a government agency or a person other than his natural or adoptive parent, "parent" means the parent with residual parental rights, privileges, and responsibilities. When a child is in the permanent custody of a government agency or a person other than his natural or adoptive parent, "parent" means the parent who was divested of custody and residual parental rights, privileges, and responsibilities.

R.C. 3313.64(A)(1).

⁶The court also stated, however, that an individual may have more than one residence, whereas he may have only a single domicile. Bd. of Educ. of City School Dist. of Oakwood v. Dille, 109 Ohio App. at 348, 165 N.E.2d at 811. While often used interchangeably, the terms are not necessarily synonymous. "Different meanings attach to these terms by reason of the distinctions necessary in applying statutory provisions in relation to varied subject matter and the objects and purpose of the statute." State v. Ward, 4 Ohio Op. 120, 121 (C.P. Wood County 1935). See also Horton v. Horner, 16 Ohio 145, 148 (1847) (Residence, "having a general and a more limited signification may be enlarged or limited so as to meet the general object of the law.") For purposes of voting and divorce laws, courts have construed the term synonymously with "domicile," which requires not only a place of habitation, but also an intention to remain there. See Sturgeon v. Korte, 34 Ohio St. 525, 534 (1878); Bowers v. Baughman, 29 Ohio App. 2d 277, 278-79, 281 N.E.2d 201, 202 (Ct. App. Allen County 1972). While the courts in Sturgeon and Bowers suggest, in dicta, that one imprisoned for a crime is incapable of forming the necessary intent to change domicile, such intent is not a necessary element of the term "residence." Compare Newton v. Bd. Comm'rs, 100 U.S. 548, 562 (1879) ("Domicile is acquired by residence and the *animus manendi*, the intent to remain."), with Horton v. Horner, 16 Ohio 145, 148 (1847) (Residence "[s]ometimes. . . implies the place where a man temporarily resides.") and Comm'r of Internal Revenue v. Swent, 155 F.2d 513, 515 (1946) (" 'Residence' simply requires bodily presence as an inhabitant in a given place, while 'domicile' requires bodily presence in that place and also an intention to make it one's domicile."). Nevertheless, the court in Dille determined that, for purposes of R.C. 3313.64, the term "residence" is to be liberally construed. 109 Ohio App. at 349, 165 N.E.2d at 811.

⁷Although the definitions of a "parent" for purposes of regular and special education are among the statutes recently amended under the same bill, the term is given a different interpretation for each purpose. Compare, R.C. 3313.64(A)(1), R.C. 3323.01(H).

Your concern is whether an inmate residing at the Ohio Reformatory for Women may meet the definition of a "parent" and thereby obligate the Marysville Exempted Village School District for the regular education tuition costs of her child who is being educated in another school district. Based upon the foregoing definition, if an inmate-mother is separated or divorced, or her marriage has been dissolved or annulled, and the father has custody of the child, then he is the "parent" as that term is used in R.C. 3313.64. In this situation, the child must be admitted to the district in which his father resides.⁸ R.C. 3313.64(B)(1). Clearly, under these circumstances, the district in which the mother resides is irrelevant since she does not meet the definition of a "parent" for purpose of tuition payments.

A child may, however, be in the permanent or legal custody of a government agency or a person other than his natural or adoptive parent. In such situation, the parent with residual rights, privileges and responsibilities, as defined under R.C. 2151.011(11), or the individual who was divested of such rights,⁹ qualifies as the "parent" for purposes of regular education tuition payments. If the mother qualifies as a "parent" on this basis, and was an inmate residing at the Ohio Reformatory for Women at the time the court removed the child from his home or vested custody in a government agency or a person other than the child's natural or adoptive parent, whichever occurred first, then I must conclude that the Marysville Exempted Village School District may be required to pay the cost of the child's tuition by virtue of R.C. 3313.64(A)(1), (B)(2), and (C)(2)(a). If the mother retains residual parental rights, privileges and responsibilities, or was divested of such rights, but her residence at the time that the child was removed or custody vested in another is unknown, then R.C. 3313.64(C)(2)(b) provides that the district in which the child resided at the time one of those events first occurred must pay the cost of the child's regular education tuition for the district in which he is being educated.

If the mother or father retains parental rights, privileges, and responsibilities, or is the natural or adoptive parent who was divested of such rights, but a school district cannot be determined under R.C. 3313.64(C)(2)(a) or (b), then the child's tuition must be paid by the district determined, pursuant to R.C. 2151.357, at the time that the court removed the child from his home or vested custody in a government agency or a person other than his natural or adoptive parent. R.C. 3313.64(C)(2)(c).

Lastly, the statute provides for tuition payments for a child who is not in the custody of a government agency or person other than his natural or adoptive

⁸ Alternatively, it will be the father's residence that will determine which school district must pay the cost if the child is educated in a district other than that in which his father resides.

⁹ If the child is in the legal custody of a government agency or a person other than his natural or adoptive parent, and the father retains the residual parental rights, privileges and responsibilities, then the father is the child's parent for purposes of R.C. 3315.04. Thus, the child must be admitted to the school district in which his father resides. Alternatively, tuition shall be paid by the district in which the father resided at the time the child was removed from his home or legal custody was vested in a government agency or person other than the child's parent, whichever first occurred, or, if the father's residence at such time was unknown, the district in which the child resided at such time. However, there may be situations in which, for example, parents shared joint custody of a child, and both parents retain residual parental rights, privileges, and responsibilities, or were both divested of such rights. The pertinent statutes do not provide a method for selection of the appropriate "parent" for tuition purposes in such circumstances. While the law does not expressly provide for apportionment of the tuition costs between two districts, I must conclude that the district in which either parent resides, or both districts jointly, may be required to pay the cost of the child's regular education tuition to the school district in which the child is being educated.

parent, and who resides in a home within the meaning of R.C. 3313.64(A)(4). If the mother qualifies as the child's parent, as defined under R.C. 3313.64(A)(1), and she resides as an inmate at the Ohio Reformatory for Women, the law requires the Marysville Exempted Village School District to pay the child's tuition to the school district in which he is being educated. R.C. 3313.64(C)(3)(a). But see note 9.

In summary, it is, therefore, my opinion, and you are advised, that:

1. The board of education of a school district that provides special education to a child whose mother is an inmate at the Ohio Reformatory for Women at Marysville may require the Marysville Exempted Village School District to pay the cost of the child's tuition pursuant to R.C. 3323.01(H), (I)(1), R.C. 3323.13 and R.C. 3323.14 unless the child's parents are separated or divorced, and the father has legal custody of the child.
2. If a child receiving regular education is in the legal or permanent custody of a government agency or a person other than the child's natural or adoptive parent, and the mother retains residual parental rights, privileges and responsibilities, or was divested of such rights, and the mother resided as an inmate of the Ohio Reformatory for Women at the time the child was removed from his home, or at the time the court vested custody in such agency or person, whichever event occurred first, then the Marysville Exempted Village School District may be required to pay the child's tuition to the school district in which he is being educated.
3. If a child receiving regular education is not in the permanent or legal custody of a government agency or a person other than his natural or adoptive parent and he resides in a home, within the meaning of R.C. 3313.64(A)(4), and the child's mother qualifies as a parent by virtue of R.C. 3313.64(A)(1) and resides as an inmate at the Ohio Reformatory for Women, the Marysville Exempted Village School District may be required to pay the cost of the child's tuition to the district in which he is being educated.