

2-471

2006 Opinions

OAG 2006-050

OPINION NO. 2006-050

Syllabus:

1. The phrase “for the primary benefit of individuals or the public and

not for the primary benefit of a governmental entity or the employees of a governmental entity,” as used in R.C. 9.231(A), refers to those services provided directly to either an individual or to those particular members of the public served by the governmental entity procuring the services.

2. In each instance in which a school district procures services, the district must determine whether the services in that instance are provided directly to a child or children for whose education the school district is responsible. If so, the services are “for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity” for purposes of R.C. 9.231(A).
3. The phrase “[e]ducational services provided by a school to children eligible to attend that school,” as used in R.C. 9.231(B)(2)(d), includes only those services by which an elementary or secondary school provides formal instruction or supervised practice to students eligible to attend that school in the subjects or courses of study provided by elementary and secondary schools.
4. If, in a particular situation, a school district’s procurement of a service is subject to R.C. 9.231(A), and if that service provides formal instruction or supervised practice to one or more students eligible to attend a school in that district, the procurement of the service is exempted by R.C. 9.231(B)(2)(d) from the requirements of R.C. 9.231(A).

To: Betty Montgomery, Auditor of State, Columbus, Ohio
By: Jim Petro, Attorney General, December 19, 2006

You have requested an opinion concerning the meaning of certain terms used in R.C. 9.23-239, as recently enacted in Am. Sub. H.B. 66, 126th Gen. A. (2005) (eff., in pertinent part, Sept. 29, 2005), and as applied to services procured by school districts. You specifically ask the following questions:

5. What does the following phrase in R.C. 9.231 mean—“for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity”?
6. Are the following types of contracts “for the primary benefit of individuals or the public” or “for the primary benefit of” a school district?
 - a. food services (to provide meals or access to vending machines to students and staff)
 - b. transportation services

- c. special education services (such as occupational therapy, physical therapy, sign language interpretation, speech language pathology, behavioral therapy, etc.)
 - d. services provided under an IEP
 - e. janitorial services
 - f. tutoring services
 - g. mentoring services
 - h. professional services (legal, financial consulting, etc.)
 - i. construction management services
 - j. architectural services
 - k. health care services
 - l. 504 plan services
 - m. maintenance services (to maintain school buildings and the equipment found therein).
7. What does “educational services provided by a school to children eligible to attend that school” encompass?
8. Finally, are any of the types of contracts listed in (2)(a-m) above “educational services” contracts?

Before answering your specific questions about the meaning of certain terms used in R.C. 9.23 and related statutes, it would be useful to examine the statutory framework in which those terms appear.

General Requirements of R.C. 9.231

Am. Sub. H.B. 66, 126th Gen. A. (2005) (eff., in pertinent part, Sept. 29, 2005), enacted a number of new statutes that address the disbursement of funds by governmental entities when procuring certain services. One of the fundamental features of this newly-established statutory scheme is set forth in R.C. 9.231(A)(1), which states, in pertinent part:

Subject to divisions (A)(2) and (3) of this section,¹ a governmental entity shall not disburse money totaling twenty-five thousand dollars or more to any person *for the provision of services for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity*, unless the contracting authority of the governmental entity first enters into a written contract

¹ R.C. 9.231(A)(2) addresses situations in which money is disbursed by or through more than one state agency for services to the same population. R.C. 9.231(A)(3) establishes four categories of contracts to which specific portions of R.C. 9.232-.236 do not apply.

with the person that is signed by the person or by an officer or agent of the person authorized to legally bind the person and that embodies all of the requirements and conditions set forth in [R.C. 9.23-.236]. (Emphasis and footnote added.)

Thus, R.C. 9.231(A)(1), with certain exceptions, prohibits a governmental entity from disbursing moneys to persons in amounts of twenty-five thousand dollars or more if such moneys are for the procurement of certain services, which are described as “services for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity,” unless such payments are made pursuant to a written contract that complies with the terms of R.C. 9.23-.236.²

In addition to the exceptions prescribed by divisions (A)(2) and (A)(3), *see* note one, *supra*, R.C. 9.231(B) creates additional exceptions from the requirements of R.C. 9.231(A) for situations in which moneys are disbursed to a person pursuant to a contract with the United States or a governmental entity under specific circumstances.³

² *See, e.g.*, R.C. 9.232 (specific terms that must be included in each contract); R.C. 9.234 (record-keeping, audit, and financial review requirements); R.C. 9.235 (inspection of records of those with whom governmental entities contract and those of subcontractors); R.C. 9.236 (repayment of governmental entity for payments made in excess of payments earned under a contract).

³ R.C. 9.231(B) states:

(B) Division (A) of this section does not apply if the money is disbursed to a person pursuant to a contract with the United States or a governmental entity under any of the following circumstances:

(1) The person receives the money directly or indirectly from the United States, and no governmental entity exercises any oversight or control over the use of the money.

(2) The *person receives the money solely in return for the performance* of one or more of the following types of services:

(a) Medical, therapeutic, or other health-related services provided by a person if the amount received is a set fee for each time the person provides the services, is determined in accordance with a fixed rate per unit of time, or is a capitated rate, and the fee or rate is reasonable and customary in the person’s trade or profession;

(b) Medicaid-funded services, including administrative and management services, provided pursuant to a contract or medicaid provider agreement that meets the requirements of the medicaid program established under Chapter 5111. of the Revised Code.

Services “for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity”

With this general framework in mind, let us now consider your first question, which asks us to explain the meaning of the following phrase, as used in R.C. 9.231(A): “for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity.” This language is used in R.C. 9.231(A) to describe the types of services to which its limitations on the disbursement of funds by a governmental entity apply. This particular phrase is not defined by statute.

In the absence of a statutory definition of the phrase “for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity,” we must look to the plain meaning of those words. *See* R.C. 1.42 (unless words or phrases used in a statute have acquired a technical meaning, they are to be “read in context and construed according to the rules of grammar and common usage”). *Merriam-Webster’s Collegiate Dictionary* 986 (11th ed. 2005), defines the adjective “primary” as meaning, in

(c) Services, other than administrative or management services or any of the services described in division (B)(2)(a) or (b) of this section, that are commonly purchased by the public at an hourly rate or at a set fee for each time the services are provided, unless the services are performed for the benefit of children, persons who are eligible for the services by reason of advanced age, medical condition, or financial need, or persons who are confined in a detention facility as defined in section 2921.01 of the Revised Code, and the services are intended to help promote the health, safety, or welfare of those children or persons;

(d) *Educational services provided by a school to children eligible to attend that school.* For purposes of division (B)(2)(d) of this section, “school” means any school operated by a school district board of education, any community school established under Chapter 3314. of the Revised Code, or any nonpublic school for which the state board of education prescribes minimum education standards under section 3301.07 of the Revised Code.

(e) Services provided by a foster home as defined in section 5103.02 of the Revised Code;

(f) “Routine business services other than administrative or management services,” as that term is defined by the attorney general by rule adopted in accordance with Chapter 119. of the Revised Code;

(g) Services to protect the environment or promote environmental education that are provided by a nonprofit entity or services to protect the environment that are funded with federal grants or revolving loan funds and administered in accordance with federal law. (Emphasis added.)

part, “of first rank, importance, or value.” *See also id.* (defining “primarily” as meaning, in part, “for the most part: CHIEFLY”). Accordingly, the first portion of the description of the services subject to R.C. 9.231(A) refers to services that are most importantly or chiefly for the benefit of an individual or the public. At the same time, the second portion of the phrase you describe requires that, in order to be a service subject to R.C. 9.231(A), the services are *not* most importantly or chiefly for the benefit of the governmental entity procuring the services or its employees.

In attempting to discern the legislative intent in establishing these two characteristics of the services encompassed by R.C. 9.231(A), it is useful to bear in mind the fundamental principle that public moneys may be expended for only those things that serve a “public purpose.” *Kohler v. Powell*, 115 Ohio St. 418, 425, 154 N.E. 340 (1926) (“[p]ublic money may be used only for public purposes and never for private gain. The methods employed to direct public money from public channels into private channels are sometimes very ingenious, but they do not affect the fundamental principle involved”). Thus, in a sense, all expenditures by governmental entities are for the benefit of the public generally, *i.e.*, the people of the state or a political subdivision. *See generally, e.g., Bazell v. City of Cincinnati*, 13 Ohio St. 2d 63, 233 N.E.2d 864 (1968) (finding that the expenditure of public funds for the construction of a stadium which is designed to accommodate large crowds at athletic and other exhibitions serves a public purpose); *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 151, 128 N.E.2d 59 (1955) (an appropriation of funds to certain veterans organizations for the purpose of “the rehabilitation of war veterans and for the promotion of patriotism” serves a public purpose). *See also generally Merriam-Webster’s Collegiate Dictionary* at 1005 (defining “public,” as meaning, in part, “2 : the people as a whole : POPULACE”).

In order to give meaning to the term “public,” as used in the phrase “for the primary benefit of individuals or the public,” R.C. 9.231(A)(1), we must assume that the General Assembly intended to establish a requirement that is narrower than the requirement that public moneys may be expended only for a “public purpose,” a broader and more amorphous concept of promoting the greater good of the public served by a governmental entity. *See generally Humphrys v. Winous Co.*, 165 Ohio St. 45, 49, 133 N.E.2d 780 (1956) (“[t]he primary duty of a court in construing a statute is to give effect to the intention of the Legislature enacting it. In determining that intention, a court should consider the language used and the apparent purpose to be accomplished, and then such a construction should be adopted which permits the statute and its various parts to be construed as a whole and gives effect to the paramount object to be attained”).

It is also useful to recall the rule of statutory construction described in *Myers v. Seaberger*, 45 Ohio St. 232, 236, 12 N.E. 796 (1887) that, “in accordance with the maxim *noscitur a sociis*, the meaning of a word may be ascertained by reference to the meaning of words associated with it; and again, according to a similar rule, the coupling of words together shows that they are to be understood in the same sense.” In the phrase “for the primary benefit of individuals or the public,” R.C. 9.231(A)(1), the word “public” is coupled with the word “individuals.” Ac-

According to *Merriam-Webster's Collegiate Dictionary* at 635, the word "individual" means, in part, "a particular being or thing as distinguished from a class, species, or collection: as (1) : a single human being as contrasted with a social group or institution <a teacher who works with ~s." At the same time, one meaning of the word "public" is "3 : a group of people having common interests or characteristics; *specif* : the group at which a particular activity or enterprise aims." *Merriam-Webster's Collegiate Dictionary* at 1005. Reading these two words together indicates the legislative intent that the individuals or public for whose primary benefit a governmental entity provides services for purposes of R.C. 9.231(A)(1) are individuals or members of the public who are served by the particular governmental entity.

In interpreting the phrase "for the primary benefit of individuals or the public," as used in R.C. 9.231(A)(1), we must also bear in mind that most governmental entities are creatures of statute with only those powers that are granted by statute.⁴ As a general rule, a governmental entity possesses authority to perform its functions or to provide its services to the public only within a limited geographical area, *e.g.*, school districts, or to perform its functions or provide its services statewide, *e.g.*, Ohio Department of Transportation. With these considerations in mind, we believe that effect may be given to the word "public," as used in R.C. 9.231, by reading it as referring only to those members of the public who are eligible to receive services from the particular governmental entity. Thus, the phrase "for the primary benefit of individuals or the public" refers to services that are for the primary benefit of an individual or the specific members of the public who are within the area served by the governmental entity.

We must also consider the legislative intent behind the inclusion of two separate characteristics, *i.e.*, "for the primary benefit of individuals or the public" and "not for the primary benefit of a governmental entity or the employees of a governmental entity" (emphasis added), of those services that are subject to R.C. 9.231. While services that are provided directly to a governmental entity or its employees ultimately benefit the public by assisting the governmental entity in carrying out its functions, such services are not necessarily for the primary benefit of an individual or individuals eligible to receive services from that entity. For example, a school district may procure the services of individuals to perform accounting services for the district. While accounting services benefit the public served by the

⁴ See generally, *e.g.*, *Geauga County Bd. of Comm'rs v. Munn Road Sand & Gravel*, 67 Ohio St. 3d 579, 582, 621 N.E.2d 696 (1993) ("[c]ounties ... may exercise only those powers affirmatively granted by the General Assembly"); *Steward v. Evatt*, 143 Ohio St. 547, 56 N.E.2d 159 (1944) (syllabus, paragraph one) ("[t]he Board of Tax Appeals is a creature of statute and is limited to the powers with which it is thereby invested"); *CADO Business Systems of Ohio, Inc. v. Board of Educ.*, 8 Ohio App. 3d 385, 457 N.E.2d 939 (Cuyahoga County 1983) (syllabus, paragraph one) ("Ohio boards of education are creations of statute and their authority is derived from and strictly limited to powers that are expressly granted by statute or clearly implied therefrom").

school district in the broad sense that they enable the school district to carry out its ultimate mission of educating the district's students, such services are not provided directly to an individual student or group of students, but are provided directly to the school district. In such circumstances, the procurement of accounting services does not possess the characteristic of being "for the primary benefit of individuals or the public," and also does not possess the second characteristic of being "not for the primary benefit of a governmental entity or the employees of a governmental entity" (emphasis added). In that instance, such services are not services "for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity" for purposes of R.C. 9.231(A).

On the other hand, if a school district procures the services of a physical therapist to provide therapy for one or more of the district's students, such therapy is provided directly to the individual or individuals for whom the district has procured those services. In that instance, such services provide a direct benefit to the individual or individuals receiving those services, rather than directly benefiting the school district that procures those services for the individual student or students.

In answer to your first question, we conclude, therefore, that the phrase "for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity," as used in R.C. 9.231(A), refers to those services provided directly to either an individual or to those particular members of the public served by the governmental entity procuring the services.

School Districts as Political Subdivisions for Purposes of R.C. 9.231

Your second question asks about the application of R.C. 9.231 to particular services provided by school districts. The terms of R.C. 9.231 apply to any "governmental entity." For purposes of R.C. 9.231, the term "governmental entity" includes both state agencies⁵ and political subdivisions, R.C. 9.23(D)(1), and the term "political subdivision" includes a county, township, municipal corporation, or any other "body corporate and politic that is responsible for government activities in a geographic area smaller than that of the state," R.C. 9.23(F). We must, therefore, determine whether school districts fall within the definition of "governmental entity" for purposes of R.C. 9.231.

Pursuant to R.C. 3311.01, there are various types of school districts within the state, *i.e.*, city school districts, local school districts, exempted village school districts, cooperative education school districts, and joint vocational school districts. Each such district is administered by a board of education. *Powell v. Young*, 148 Ohio St. 342, 359, 74 N.E.2d 261 (1947) ("boards of education are composed of members elected by the people to administer the affairs of the schools"); *Cline v. Martin*, 94 Ohio St. 420, 426, 115 N.E. 37 (1916) ("the administration and control

⁵ See generally R.C. 9.23(H) (for purposes of R.C. 9.23-.239, "state agency" means "any organized body, office, agency, institution, or other entity established by the laws of the state for the exercise of any function of state government").

of schools is . . . vested . . . in a board of education for each school district”). *See generally* R.C. 3313.47 (stating, in part, “[e]ach city, exempted village, or local board of education shall have the management and control of all of the public schools of whatever name or character that it operates in its respective district”).

As described in R.C. 3313.17:

The board of education of each school district shall be a *body politic and corporate*, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property. (Emphasis added.)

Thus, a board of education of a school district, as a body politic and corporate, meets the first prong of the definition of a “political subdivision,” as that term is defined in R.C. 9.23(F). As described in R.C. Chapter 3311, no school district is responsible for performing its functions statewide. Rather, each school district encompasses an area smaller than that of the state. The purpose served by a school district is to provide education to those children eligible to attend its schools, which is a government activity. *See generally, e.g., Miller v. Korns*, 107 Ohio St. 287, 297-98, 140 N.E. 773 (1923) (“the sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools, but a system thorough and efficient throughout the state”). Thus, school districts and their boards of education also meet the second prong of the definition of a “political subdivision,” as defined in R.C. 9.23(F). We conclude, therefore, that school districts and their boards of education constitute “political subdivisions,” as that term is defined in R.C. 9.23(F), and are, therefore, governmental entities subject to the terms of R.C. 9.231.

In applying R.C. 9.231 to services provided by school districts, we must also bear in mind that, as a general rule, the public who are served by a school district are the children eligible to attend the schools in that district.⁶ *See generally Powell v. Young*, 148 Ohio St. at 359 (“a school system is instituted primarily for

⁶ *See generally, e.g.,* R.C. 3311.29(A) (stating, in part, and with certain exceptions, “no school district shall be created and no school district shall exist which does not maintain within such district public schools consisting of grades kindergarten through twelve and any such existing school district not maintaining such schools shall be dissolved”); R.C. 3313.64(B) (stating, in part, “[e]xcept as otherwise provided in [R.C. 3321.01] for admittance to kindergarten and first grade, a child who is at least five but under twenty-two years of age and any handicapped preschool child shall be admitted to school as provided in this division”); R.C. 3321.01(A)(1) (with certain exceptions, a child between six and eighteen years of age is “of compulsory school age”); R.C. 3323.07 (stating, in part, “[t]he state board [of education] shall require the boards of education of school districts, shall authorize the department of mental health and the department of mental retardation

the benefit of the youth who are therein enrolled. Their welfare and training for future citizenship in a free government are the paramount purposes of the public schools.’’). Thus, if a school district procures services that are provided directly to a child or children for whose education the school district is responsible, *see generally* R.C. 3313.64 (free schooling; tuition for nonresidents), those services are “for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity” for purposes of R.C. 9.231(A).

You specifically question whether a school district’s provision of the following types of services are subject to R.C. 9.231:

- a. food services (to provide meals or access to vending machines to students and staff)
- b. transportation services
- c. special education services (such as occupational therapy, physical therapy, sign language interpretation, speech language pathology, behavioral therapy, etc.)
- d. services provided under an IEP
- e. janitorial services
- f. tutoring services
- g. mentoring services
- h. professional services (legal, financial consulting, etc.)
- i. construction management services
- j. architectural services
- k. health care services
- l. 504 plan services
- m. maintenance services (to maintain school buildings and the equipment found therein).

We begin this discussion by noting that the circumstances and manner in which a school district provides the categories of services you describe are governed, in many instances, by various state and federal laws or both. For example a school district’s duty to provide transportation is governed generally by R.C. 3327.01, which states, in pertinent part:

In all city, local, and exempted village school districts where resident school pupils in grades kindergarten through eight live more than two miles from the school for which the state board of education

and developmental disabilities, and may authorize any other educational agency, to establish and maintain such special educational programs in accordance with standards adopted by the state board of education’’).

prescribes minimum standards pursuant to [R.C. 3301.07(D)] and to which they are assigned by the board of education of the district of residence or to and from the nonpublic or community school which they attend the board of education shall provide transportation for such pupils to and from such school except as provided in [R.C. 3327.02].

....

Where it is impractical to transport a pupil by school conveyance, a board of education may offer payment, in lieu of providing such transportation in accordance with [R.C. 3327.02].

In all city, local, and exempted village school districts the board shall provide transportation for all children who are so crippled 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 . . . In all city, exempted village, and local school districts the board shall provide transportation to and from school or special education classes for educable mentally retarded children in accordance with standards adopted by the state board of education.

The broad duties imposed upon school districts by R.C. 3327.01, however, are modified by various other statutes addressing specific transportation issues. *See, e.g.,* R.C. 3323.08 (each school district's special education program must, among other things, "[p]rovide for the necessary educational programs and related services [which include transportation] needed to meet the educational needs of every handicapped child three to twenty-one years of age in accordance with standards established by the state board of education"); R.C. 3327.012 (stating, in part, "[t]he superintendent of public instruction, subject to the approval of the state board of education, may contract with any firm, person, or board of education to provide pupil transportation services authorized by this section"); R.C. 3327.02(F)(1) (stating, in part, "[i]f the department determines that a school district board has failed or is failing to provide transportation as required by division (E)(2) of this section or as ordered by the state board under division (E)(1)(b) of this section, the department shall order the school district board to pay to the pupil's parent, guardian, or other person in charge of the pupil, an amount equal to the state average daily cost of transportation as determined by the state board of education for the previous year. The school district board shall make payments on a schedule ordered by the department"); R.C. 3327.04(A) (stating, in part, "[t]he board of education of any city, exempted village, or local school district may contract with the board of another district for the admission or transportation, or both, of pupils into any school in such other district, on terms agreed upon by such boards"). Because school districts have a variety of duties with respect to the transportation of their students, it is not possible to place all circumstances in which a school district provides transportation to its students in a single category for purposes of R.C. 9.231. Rather, each instance in which a school district procures transportation services, as well as the other services listed in your second question, must be examined to determine whether, in that particular instance, the school district's procurement of such services is "for

the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity,” R.C. 9.231(A).

Admittedly, it is not readily apparent that a school district would have occasion to provide certain of the services you mention, *e.g.*, construction management services, legal services, janitorial services, directly to a student. Ordinarily, a school district procures services such as these in order to assist the school district in carrying out the overall objectives of the school district, with only an indirect benefit to a particular student or group of students. Again, however, as with the procurement of any other services, a school district must look at the situation in which it is procuring the services to determine whether the services are to be provided directly to a student or group of students. If so, the services are “for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity,” for purposes of R.C. 9.231.

In answer to your second question, we conclude that, in each instance in which a school district procures services, the district must determine whether the services in that instance are provided directly to a child or children for whose education the school district is responsible. If so, the services are “for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity” for purposes of R.C. 9.231(A).

Exception in R.C. 9.231(B)(2)(d) for “Educational Services”

You [*sic*] third question asks: “What does ‘educational services provided by a school to children eligible to attend that school’ encompass?” In order to answer this question, we must examine R.C. 9.231(B)(2)(d), which establishes an exception from the provisions of R.C. 9.231(A) “if the money is disbursed to a person pursuant to a contract with the United States or a governmental entity” for:

Educational services provided by a school to children eligible to attend that school. For purposes of division (B)(2)(d) of this section, “school” means any school operated by a school district board of education, any community school established under [R.C. Chapter 3314],⁷ or any nonpublic school for which the state board of education prescribes minimum education standards under [R.C. 3301.07].⁸ (Emphasis and footnotes added.)

Although the General Assembly has defined the word “school,” as used in R.C. 9.231(B)(2)(d), it has provided no statutory definition of the term “[e]ducational services provided by a school to children eligible to attend that school.”

⁷ R.C. 3314.01(A)(1) authorizes a board of education to permit one or more of its schools to become a community school. Pursuant to R.C. 3314.01(B), “[a] community school created under this chapter is a public school, independent of any school district, and is part of the state’s program of education.”

⁸ R.C. 3301.07(D) authorizes the State Department of Education to “[f]ormulate and prescribe minimum standards to be applied to all elementary and secondary schools in this state for the purpose of requiring a general education of high quality.”

As explained above, school districts have authority to procure a variety of services, some of which are provided directly to students, while others provide only an indirect benefit to the students. Only the former are subject to the restrictions and requirements of R.C. 9.231(A). As concluded in answer to your first question, the types of services procured by a school district that are subject to R.C. 9.231(A) are those services that are provided directly to a child or children for whose education the school district is responsible. From these services, R.C. 9.231(B)(2)(d) excepts “[e]ducational services provided by a school to children eligible to attend that school.” The question then arises whether R.C. 9.231(B)(2)(d) encompasses all or only a portion of those services procured by a school district that are subject to R.C. 9.231(A).

Schools provide their students a broad array of services in addition to instruction, including such things as transportation,⁹ food service,¹⁰ and, in certain instances, a school nurse.¹¹ Thus, in addition to providing its students an education, a school provides additional services that contribute to the educational objectives of the school. If the term “[e]ducational services provided by a school to children eligible to attend that school” were read broadly, it would encompass any and all services that further the purpose of educating a school’s students. However, as stated in *State ex rel. Keller v. Forney*, 108 Ohio St 463, 467, 141 N.E. 16 (1923): “The rule is well and wisely settled that exceptions to a general law must be strictly construed. They are not favored in law, and the presumption is that what is not clearly excluded from the operation of the law is clearly included in the operation of

⁹ See, e.g., R.C. 3327.01 (stating, in part, “[i]n all city, local, and exempted village school districts where resident school pupils in grades kindergarten through eight live more than two miles from the school for which the state board of education prescribes minimum standards pursuant to [R.C. 3301.07(D)] and to which they are assigned by the board of education of the district of residence or to and from the nonpublic or community school which they attend the board of education shall provide transportation for such pupils to and from such school except as provided in [R.C. 3327.02]”).

¹⁰ See, e.g., R.C. 3313.81 (stating, in part, “[t]he board of education of any city, exempted village, or local school district may establish food service, provide facilities and equipment, and pay operating costs in the schools under its control for the preparation and serving of lunches, and other meals or refreshments to the pupils, employees of the board of education employed therein, and to other persons taking part in or patronizing any activity in connection with the schools”); R.C. 3313.813(C) (stating, in part, “[t]he state board of education shall require the board of education of each school district to establish and maintain a school breakfast, lunch, and summer food service program pursuant to the ‘National School Lunch Act’ and the ‘Child Nutrition Act of 1966,’ as described in divisions (C)(1) to (4) of this section”).

¹¹ See generally, e.g., R.C. 3313.72 (authorizing a board of education to enter into a contract with a health district for providing the services of, among others, a school nurse).

the law.” Thus, the exception created by R.C. 9.231(B)(2)(d) must be narrowly construed.

Let us, therefore, examine the common meaning of the word “educational.” According to *Merriam-Webster’s Collegiate Dictionary* at 396, the verb “educate” means, in part: “**1a**: to provide schooling for . . . **b**: to train by formal instruction and supervised practice esp. in a skill, trade, or profession.” Accordingly, the adjective “educational” generally refers to those things relating to one’s schooling or formal instruction and supervised practice. Because the “[e]ducational services” mentioned in R.C. 9.231(B)(2)(d) are those provided by a “school,” as defined therein, *see generally* notes seven and eight, *supra*, such “[e]ducational services” appear to include only those services by which an elementary or secondary school provides formal instruction or supervised practice in the subjects or courses of study provided by elementary and secondary schools. Thus, if, for example, a school district provides tutoring services directly to a student or particular students, the provision of those services would be subject to the requirements of R.C. 9.231(A), but for the exception in R.C. 9.231(B)(2)(d) for “[e]ducational services.”

In answer to your third question, we conclude that, the phrase “[e]ducational services provided by a school to children eligible to attend that school,” as used in R.C. 9.231(B)(2)(d), includes only those services by which an elementary or secondary school provides formal instruction or supervised practice to students eligible to attend that school in the subjects or courses of study provided by elementary and secondary schools.

Your fourth question asks whether any of the services listed in your second question fall within the category of “[e]ducational services provided by a school to children eligible to attend that school” for purposes of R.C. 9.231(B)(2)(d). In answering this question, it is useful to reiterate that the types of services procured by a school district that are subject to R.C. 9.231(A) are those services that are provided directly to a child or children for whose education the school district is responsible. From the services subject to R.C. 9.231(A), R.C. 9.231(B)(2)(d) excepts “[e]ducational services provided by a school to children eligible to attend that school,” *i.e.* those services by which an elementary or secondary school provides formal instruction or supervised practice to students eligible to attend that school in the subjects or courses of study provided by elementary and secondary schools.

In order to determine whether particular services fall within the exception created by R.C. 9.231(B)(2)(d), it must first be determined whether a school district’s procurement of the particular services is subject to R.C. 9.231(A), *i.e.*, whether the services are provided directly to an individual student or to students served by the school district procuring the services. Of those services provided directly to a student or students, only those services by which an elementary or secondary school provides formal instruction or supervised practice to students eligible to attend that school in the subjects or courses of study provided by elementary and secondary schools are exempted by R.C. 9.231(B)(2)(d) from the requirements of R.C. 9.231(A).

As concluded in answer to your second question, it is not possible to determine that, in every instance, a school district's procurement of the categories of services you mention are or are not subject to R.C. 9.231(A). Only in those instances in which a service procured by a school district is provided directly to a student or students, regardless of the nature of the service, is the procurement of that service subject to R.C. 9.231(A). If, in a particular situation, the procurement of a service is subject to R.C. 9.231(A), and if that service provides formal instruction or supervised practice to one or more students eligible to attend a school in that district, the service is exempted by R.C. 9.231(B)(2)(d) from the requirements of R.C. 9.231(A).

In answer to your fourth question, we conclude that, if, in a particular situation, a school district's procurement of a service is subject to R.C. 9.231(A), and if that service provides formal instruction or supervised practice to one or more students eligible to attend a school in that district, the procurement of the service is exempted by R.C. 9.231(B)(2)(d) from the requirements of R.C. 9.231(A).

Conclusions

Based upon the foregoing, it is my opinion, and you are hereby advised, that:

1. The phrase "for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity," as used in R.C. 9.231(A), refers to those services provided directly to either an individual or to those particular members of the public served by the governmental entity procuring the services.
2. In each instance in which a school district procures services, the district must determine whether the services in that instance are provided directly to a child or children for whose education the school district is responsible. If so, the services are "for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity or the employees of a governmental entity" for purposes of R.C. 9.231(A).
3. The phrase "[e]ducational services provided by a school to children eligible to attend that school," as used in R.C. 9.231(B)(2)(d), includes only those services by which an elementary or secondary school provides formal instruction or supervised practice to students eligible to attend that school in the subjects or courses of study provided by elementary and secondary schools.
4. If, in a particular situation, a school district's procurement of a service is subject to R.C. 9.231(A), and if that service provides formal instruction or supervised practice to one or more students eligible to attend a school in that district, the procurement of the service is exempted by R.C. 9.231(B)(2)(d) from the requirements of R.C. 9.231(A).