

January 23, 2017

The Honorable Joseph A. Flautt
Perry County Prosecuting Attorney
111 North High Street
P.O. Box 569
New Lexington, Ohio 43764

SYLLABUS:

2017-003

A board of education of a local or exempted village school district may expend public moneys of the school district to establish and operate an early reading program that provides one book each month to participating children from birth to age five years who reside in the school district but who are not enrolled in a school of the district so long as the board of education, in accordance with R.C. 3313.646(A), determines that the program provides a service to preschool-age children residing in the school district and the board demonstrates a need for the program.



MIKE DEWINE

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OPINION NO. 2017-003

The Honorable Joseph A. Flautt
Perry County Prosecuting Attorney
111 North High Street
P.O. Box 569
New Lexington, Ohio 43764

Dear Prosecutor Flautt:

You have requested an opinion about a school district board of education's authority to expend public moneys of the school district on an early reading program.¹ You have explained that the early reading program provides one book to each child residing in the district who participates in the program every month from the child's birth for sixty months. At the time that the children receive the books, they are not enrolled in any of the schools of the district. The cost to the school district is approximately \$25 per participating child. Your letter further explains that the school district board of education would like to support the reading program to enhance children's literacy and readiness for kindergarten. You ask whether the early reading program constitutes a public purpose for which public moneys of a school district may be expended when the ages of the children participating in the program are birth to five years and the children are not enrolled in a school in the district.

¹ Your letter asks about a "public school district." There are six types of school districts in Ohio: city school districts, local school districts, exempted village school districts, cooperative education school districts, joint vocational school districts, and educational service centers. R.C. 3311.01; R.C. 3311.05; R.C. 3311.055. A county prosecuting attorney is statutory legal counsel for local school districts, exempted village school districts, and educational service centers in the prosecuting attorney's county. R.C. 3313.35. For a joint vocational or cooperative education school district, the county prosecuting attorney for "the most populous county containing a school district which is a member of the joint vocational or cooperative education school district" is the legal adviser. *Id.* Your letter does not specify the type of school district with which you are concerned and does not indicate that you are legal counsel for a joint vocational, cooperative education school district, or an educational service center. Therefore, this opinion addresses your question with respect to a local school district and an exempted village school district. Thus, for the purpose of this opinion "a board of education" refers to the board of education of a local school district or an exempted village school district.

The board of education of a local or exempted village school district is a creature of statute and has only those powers expressly provided by statute or necessarily implied therein. *Hall v. Lakeview Local Sch. Dist. Bd. of Ed.*, 63 Ohio St. 3d 380, 383, 588 N.E.2d 785 (1992); 2012 Op. Att’y Gen. No. 2012-037, at 2-326. Thus, we begin our analysis by examining the statutes that may authorize a board of education to expend moneys for an early reading program.

R.C. 3313.646(A) provides, in pertinent part:

The board of education of a school district, except a cooperative education district established pursuant to [R.C. 3311.521], may establish and operate a program to provide services to preschool-age children, provided the board has demonstrated a need for the program. A board may use school funds in support of preschool programs. The board shall maintain, operate, and admit children to any such program pursuant to rules adopted by such board and the rules of the state board of education adopted under [R.C. 3301.52-.57].

To ascertain the nature and scope of authority provided by R.C. 3313.646(A), it is necessary to construe the meaning of the phrase “a program to provide services to preschool-age children” in the first sentence and the meaning of “preschool programs” in the second sentence.

Words and phrases in a statute that have not acquired a particular or technical meaning shall be construed in context and in accordance with their ordinary meaning. R.C. 1.42. Neither “preschool-age children” nor “preschool programs” is defined in the Revised Code for the purpose of R.C. 3313.646(A). However, R.C. 3301.52(B) defines “preschool child” for the purpose of R.C. 3301.52-.59 as “a child who has not entered kindergarten and is not of compulsory school age.”² This statutory definition is consistent with the common meaning of “preschool,” which is “designating, of, or for a child between infancy and school age, typically a child three to five years of age[.]” *Webster’s New World College Dictionary* 1151 (5th ed. 2014). “Preschool program” is defined for the purpose of R.C. 3301.52-.59 as either:

- (1) A child care program for preschool children that is operated by a school district board of education or an eligible nonpublic school.
- (2) A child care program for preschool children age three or older that is operated by a county board of developmental disabilities or a community school.

R.C. 3301.52(A).³ R.C. 3301.52-.59 address licensing, building, and staffing requirements for preschool programs. In light of the similarity of subjects covered by R.C. 3301.52-.59 and R.C.

² The compulsory school age in Ohio is between six and eighteen years old. R.C. 3321.01(A)(1).

³ “Child care” is defined for the purpose of R.C. 3301.52-.59 as “administering to the needs of infants, toddlers, preschool children, and school children outside of school hours by persons other than

3313.646(A), and the fact that R.C. 3313.646(A) specifically refers to the rules adopted under R.C. 3301.52-.59, it is reasonable to apply the definitions in R.C. 3301.52 to guide our understanding of R.C. 3313.646(A).

Using those definitions, the first sentence of R.C. 3313.646(A) authorizes a school district board of education, other than a cooperative education district, to establish and operate a program to provide services to children who are not enrolled in kindergarten and are younger than the compulsory school age. The second sentence of R.C. 3313.646(A) authorizes a school district board of education to use moneys of the school district to support child care programs for certain children who are not enrolled in kindergarten and are younger than the compulsory school age that are operated by various entities. Even after applying the definitions in R.C. 3301.52, it is unclear whether the General Assembly intends that “a program to provide services to preschool-age children” constitute a “preschool program” as that term is defined in R.C. 3301.52(A).

A comparison of the current version of R.C. 3313.646(A) with the earlier version clarifies this ambiguity. Prior to its amendment in 2013, R.C. 3313.646(A) provided, in pertinent part:

The board of education of a school district, except a cooperative education district established pursuant to [R.C. 3311.521], may establish and operate *a preschool program*, provided the board has demonstrated a need for the program. A board may use school funds in support of preschool programs. The board shall maintain, operate, and admit children to any such program pursuant to rules adopted by such board and the rules of the state board of education adopted under [R.C. 3301.52-.57].

Am. Sub. H.B. 59, 130th Gen. A. (2013) (eff. Sept. 29, 2013) (emphasis added). Am. Sub. H.B. 59 amended the statute to replace “a preschool program” in the first sentence of R.C. 3313.646(A) with “a program to provide services to preschool-age children,” which is how the current version of the statute reads. Amending the statute to replace “a preschool program” with the phrase “a program to provide services to preschool-age children” while leaving “preschool programs” in the second sentence of the statute indicates the General Assembly’s intent that the first and second sentences refer to different types of programs. *See Wachendorf v. Shaver*, 149 Ohio St. 231, 236-37, 78 N.E.2d 370 (1948) (“the Legislature must be assumed or presumed to know the meaning of words, to have used the words of a statute advisedly and to have expressed legislative intent by the use of the words found in the statute”); 2002 Op. Att’y Gen. No. 2002-033, at 2-217 (“[i]t is well settled that, where the General Assembly uses different terms in a statute, it is presumed that different meanings were intended”). Accordingly, “a program to provide services to preschool-age children” need not constitute a “preschool program” as that term is defined in R.C. 3301.52(A).

their parents or guardians, custodians, or relatives by blood, marriage, or adoption for any part of the twenty-four-hour day in a place or residence other than a child’s own home.” R.C. 3301.52(L).

Whether R.C. 3313.646(A) authorizes a board of education to establish and operate an early reading program that provides one book each month to participating children from birth to age five years who reside in the school district but who are not enrolled in a school of the district initially depends upon whether the program constitutes “a program to provide services to preschool-age children” or a “preschool program.” Insofar as the early reading program does not involve child care, it cannot constitute a “preschool program” as that term is defined in R.C. 3301.52(A). To determine whether the early reading program constitutes “a program to provide services to preschool-age children,” we again consider the ordinary meanings of the words in R.C. 3313.646(A). A “service” is “an act giving assistance or advantage to another[.]” *Webster’s New World College Dictionary* 1328. As discussed above, the term “preschool-age children” means children who are not in kindergarten and are younger than the compulsory school age. Thus, “a program to provide services to preschool-age children” means a program that provides assistance or advantage to children who are not enrolled in kindergarten and are younger than the compulsory school age. A board of education may reasonably conclude that a program that provides books to children before they enroll in kindergarten to enhance their literacy and readiness for kindergarten constitutes “a program to provide services to preschool-age children[.]”

The next issue to consider is whether a board of education may expend public moneys of the school district to establish and operate an early reading program that provides one book each month to participating children from birth to age five years who reside in the school district but who are not enrolled in a school of the district. A board of education must have clear and distinct authority to act in a financial transaction. 1981 Op. Att’y Gen. No. 81-002, at 2-5. Any doubt as to the board’s authority to act shall be resolved against making the expenditure. *Id.* However, “[t]he authority of a public body to expend money for a particular purpose ‘may be fairly implied where it is reasonably related to the duties of the public agency.’” 2003 Op. Att’y Gen. No. 2003-019, at 2-152 (quoting *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 470, 423 N.E.2d 105 (1981)).

R.C. 3313.646(A) authorizes a board of education to “*establish and operate* a program to provide services to preschool-age children, provided the board has demonstrated a need for the program.” (Emphasis added.) “Establish” means “to set up ...; found; institute[.]” *Webster’s New World College Dictionary* 497. “Operate” means “to put or keep in action; work ... to conduct or direct the affairs of ...; manage[.]” *Id.* at 1025. The ordinary meanings of the words “establish” and “operate” lead us to conclude that the authority to establish and operate a program necessarily includes the authority to expend moneys for the costs of establishing and operating that program. Moreover, establishing and operating an early reading program that enhances children’s literacy and readiness for kindergarten are reasonably related to a board of education’s duty to provide a free education to the school-age youth of the school district, R.C. 3313.48(A), and to prescribe a curriculum for students that includes reading and writing, R.C. 3313.60(A)(1). *See also* 1981 Op. Att’y Gen. No. 81-052, at 2-199 (“boards of education have been created by statute to secure a thorough and efficient system of schools throughout the state as mandated by Ohio Const. art. VI, §§2, 3”). By expressly authorizing a school district board of education to establish and operate a program to provide services to preschool-age children in R.C. 3313.646(A), the General Assembly has authorized a board of education to expend public moneys of the district to pay the expenses necessary to establish and operate the program. Therefore, R.C. 3313.646(A) authorizes a board of education to expend public moneys of

the school district to establish and operate an early reading program that provides one book each month to participating children from birth to age five years who reside in the school district but who are not enrolled in a school of the district, provided that the board demonstrates a need for the program.⁴

Enactment of R.C. 3313.646(A) reflects the General Assembly's determination that a program to provide services to preschool-age children is a public purpose. *See* 2014 Op. Att'y Gen. No. 2014-030, at 2-262 to 2-263; 2003 Op. Att'y Gen. No. 2003-019, at 2-151 (“[w]hen the General Assembly enacts a law authorizing a board of education to spend money for a stated purpose, the General Assembly is expressing its determination that the stated purpose is a public purpose and that an expenditure authorized by statute is a proper expenditure of public money”). “A finding that an

⁴ Your letter states that “[t]he early reading program, sponsored by the Dollywood Foundation, is a service known as ‘Dolly Parton’s Imagination Library’[.]” It is unclear from your letter whether the school district board of education will contract with the Dollywood Foundation or another entity whereby the entity provides the early reading program, or whether the school district board of education will replicate the Dolly Parton’s Imagination Library program and directly establish and operate the program for the school district.

R.C. 3313.646(C) limits a board of education’s authority to contract to provide services to preschool-age children by stating:

A board of education may contract with any of the following preschool providers to provide services to preschool-age children, other than those services for which the district is eligible to receive funding under [R.C. 3317.0213]:

- (1) Any organization receiving funds under the “Head Start Act”;
- (2) Any nonsectarian eligible nonpublic school as defined in [R.C. 3301.52(H)];
- (3) Any child care provider licensed under [R.C. Chapter 5104].

Boards may contract to provide services to preschool-age children only with such organizations whose staff meet the requirements of rules adopted under [R.C. 3301.53] or those of the child development associate credential established by the national association for the education of young children.

Thus, if the board of education of the school district involved in your letter contracts with the Dollywood Foundation or another entity whereby the other entity provides the early reading program, the board may be prohibited from making such a contract unless the requirements of R.C. 3313.646(C) are met. However, if the board of education directly establishes and operates the early reading program by replicating Dolly Parton’s Imagination Library, then the requirements of R.C. 3313.646(C) are not applicable. *See* Dolly Parton’s Imagination Library, http://usa.imaginationlibrary.com/program_replication.php#.WG0J29IrKCg (last visited Jan. 4, 2017) (providing information on replicating and establishing a Dolly Parton’s Imagination Library).

expenditure is reasonably implied as necessary for the performance of a statutory function thus constitutes a finding that the expenditure serves the public purpose expressed in the statute.” 2003 Op. Att’y Gen. No. 2003-019, at 2-151. In other words, a board of education’s determination that purchasing books for preschool-age children residing in the district is reasonably implied as necessary for the provision of services to preschool-age children residing in the school district is a finding that the expenditure serves the public purpose specified in R.C. 3313.646(A).

A board of education has broad discretion to perform the board’s statutory functions. *See* 1999 Op. Att’y Gen. No. 99-007, at 2-49; 1981 Op. Att’y Gen. No. 81-052, at 2-200. A reasonable exercise of that discretion is entitled to deference. *Russell v. Gallia Cnty. Local Sch. Bd.*, 80 Ohio App. 3d 797, 803-804, 610 N.E.2d 1130 (Gallia County 1992); 1981 Op. Att’y Gen. No. 81-052, at 2-200 (“it is well settled that the judgments of boards of education, as to matters exclusively within their statutory realm, are entitled to deference”). “A court will not restrain a board of education from carrying into effect its determination of any question within its discretion, except for an abuse of discretion, or for fraud or collusion on the part of such board in the exercise of its statutory authority.” *Russell v. Gallia Cnty. Local Sch. Bd.*, 80 Ohio App. 3d at 803 (quoting *Brannon v. Bd. of Ed.*, 99 Ohio St. 369, 124 N.E. 235 (1919) (syllabus, paragraph three)). To constitute an abuse of discretion, a board of education shall have exercised its discretion in a manner that is “unreasonable, arbitrary or unconscionable.” *Russell v. Gallia Cnty. Local Sch. Bd.*, 80 Ohio App. 3d at 804.

Based on the foregoing, it is my opinion, and you are hereby advised that a board of education of a local or exempted village school district may expend public moneys of the school district to establish and operate an early reading program that provides one book each month to participating children from birth to age five years who reside in the school district but who are not enrolled in a school of the district so long as the board of education, in accordance with R.C. 3313.646(A), determines that the program provides a service to preschool-age children residing in the school district and the board demonstrates a need for the program.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General