

OPINION NO. 88-015**Syllabus:**

R.C. 5123.19(C) requires the Director of Mental Retardation and Developmental Disabilities to license and inspect the operation of residential facilities for persons with developmental disabilities. R.C. 5123.19(A)(1) excepts the residence of a person with developmental disabilities from the definition of "residential facility" only if that home is also the home of that person's relative or legal guardian; accordingly, R.C. 5123.19(C) requires the Director of Mental Retardation and Developmental Disabilities to license and inspect any public or private home or facility in which a person with developmental disabilities resides unless the home or facility is the home of that person's relative or legal guardian.

To: Robert E. Brown, Director, Ohio Department of Mental Retardation and Developmental Disabilities, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, March 30, 1988

I have before me your request for my opinion on the duties of the Department of Mental Retardation and Developmental Disabilities with regard to persons with developmental disabilities who reside in a home other than the home of a relative or legal guardian. Specifically, you ask:

1. May the Department of Mental Retardation and Developmental Disabilities refrain from licensing or otherwise being involved with a home in which a person with developmental disabilities resides when that home is not that of a relative or legal guardian of the person with developmental disabilities? Is the department required to license or otherwise take affirmative action to ensure adequate and proper supervision?
2. If licensing or other action is required, what other action may be deemed adequate?

You indicate in your letter that the homes to which you refer do not receive any state or federal funds for the care of the person with developmental disabilities. Accordingly, I presume that by "home" you mean a private home that is currently not being licensed and inspected as opposed to a home or other facility that is currently licensed and inspected pursuant to R.C. 5123.19 and accompanying regulations.

Turning to your first question, I note that R.C. 5123.19 regulates the licensing, inspection, and operation of residential facilities for persons with developmental disabilities. R.C. 5123.19(B) imposes licensure requirements on the operators of residential facilities, and R.C. 5123.19(C) requires the Director of the Department of Mental Retardation and Developmental Disabilities to license and inspect residential facilities:

(B) Every person desiring to operate a residential facility shall apply for licensure of the facility to the director of mental retardation and developmental disabilities unless the residential facility is subject

to section 3721.02, 5103.03, 5119.20, or 5139.37 of the Revised Code¹....

(C) The director of mental retardation and developmental disabilities shall license and inspect the operation of residential facilities and may renew and revoke such licenses.

The use of the word "shall" in both R.C. 5123.19(B) and (C) indicates that residential facility operators have a duty to apply for licenses and that the Director has a duty to license and inspect residential facilities. *See generally Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (Syllabus, paragraph one) ("In statutory construction...the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage"). In addition, the definition of "residential facility" in R.C. 5123.19(A)(1) encompasses the home you have described in your letter:

(A) As used in this section, section 5123.191, and section 5123.20 of the Revised Code:

(1) "Residential facility" means a home or facility in which a person with a developmental disability resides, *except the home of a relative or legal guardian in which a person with a developmental disability resides.* (Emphasis added.)

I note also that the Director of Mental Retardation and Developmental Disabilities adopted this definition in 9 Ohio Admin. Code 5123:2-3-01(SS), which defines "Residential Care Facility" as that term is used in the Administrative Code:

As used throughout these rules, the following definitions shall apply:

....
(SS) "Residential care facility" means a home or facility in which a person with a developmental disability resides, *except...the home of a relative or legal guardian in which a person with a developmental disability resides.* (Emphasis added.)

Thus, according to R.C. 5123.19(A)(1) and Rule 5123:2-3-01(SS), a residential facility is any home or facility other than the home of a relative or legal guardian in which a person with developmental disabilities happens to reside. Admittedly, this definition is a broad one; however, nothing indicates that the General Assembly intended a more narrow definition. On the contrary, the General Assembly excepted two types of homes from the definition—homes of relatives and legal guardians—and clearly could have excepted other types of homes if it so chose. *See generally Lake Shore Electric Railway Co. v. Public Utilities Commission of Ohio*, 115 Ohio St. 311, 319, 154 N.E. 239, 242 (1926) (noting that had the legislature intended a term to have a particular meaning, "it would not have been difficult to find language which would express that purpose"). *See also* 1980 Op. Att'y Gen. No. 80-027 at 2-111 ("The General Assembly, by excluding homes of relatives from the definition of residential facilities, has effectively precluded the Division [of Mental Retardation and Developmental Disabilities] from licensing the home of a relative in which a person with a developmental disability resides.") Accordingly, I conclude that the director of mental retardation and developmental disabilities has a duty to license and inspect any home in which a person with developmental disabilities resides except the home of that person's relative or legal guardian.

¹ Based on the facts presented in your letter, I conclude that the homes to which you refer are not subject to any of these statutes. R.C. 3721.02 regulates the licensing of nursing homes and rest homes; R.C. 5103.03 enumerates the powers and duties of the department of human services in the certification of institutions for children; R.C. 5119.20 regulates the inspection, licensing, and supervision of mental health hospitals; and R.C. 5139.37 requires the department of youth services to adopt rules prescribing standards for foster care facilities. The homes to which you refer in your letter are private homes, rather than hospitals or nursing or rest homes, and the persons with developmental disabilities are adults rather than children, who would fall within the jurisdiction of the department of youth services.

I turn now to your second question, in which you ask what "other action" may be deemed adequate if licensing is required. The statutes governing the licensing of residential facilities are clear; no "other action" will satisfy the licensing requirement of R.C. 5123.19(C). *See generally State ex rel. Stanton v. Zangerle*, 117 Ohio St. 436, 439, 159 N.E. 823, 824-25 (1927) (plain and unambiguous statute requires only application, not interpretation). I note, however, that R.C. 5123.19(C) gives the Director of Mental Retardation and Developmental Disabilities the authority to promulgate rules "providing for the...classification of various types of residential facilities," and provides, in pertinent part:

The director shall adopt and amend and rescind rules establishing procedures and fees for issuing, renewing, and revoking licenses, and for regulating the operation of residential facilities. Rules adopted pursuant to this section shall include but are not limited to rules providing for the inspection of facilities, training of personnel, classification of various types of residential facilities, establishment of such certification procedures for licensees and management contractors as the director determines are necessary to ensure that they have the skills and qualifications to properly operate or manage residential facilities, establishment of the maximum number of persons who may be served in a facility, and establishment of other standards for the services provided at such facilities, and waiver of any provision of any rule adopted under this section. Adoption, amendment, and rescission of rules, and appeals from orders affecting issuance, renewal, and revocation of licenses under this section are governed by Chapter 119 of the Revised Code. (Emphasis added.)

The use of the word "shall" in R.C. 5123.19(C) indicates that the Director has a duty to adopt rules regulating the licensure of different types of residential care facilities. *See generally, Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (Syllabus, paragraph one). Although R.C. 5123.19(C) requires the Director to adopt rules regulating the licensing and operation of all residential facilities, the language of the statute clearly contemplates that the Director may promulgate different types of rules for different types of residential facilities, providing that the director may adopt rules providing for the "inspection of facilities, training of personnel, *classification of various types of residential facilities*, [and] establishment of such certification procedures for licensees and management contractors as the director determines are necessary...." It is well established that rules and regulations promulgated pursuant to statutory authority have the force and effect of law unless they are unreasonable or in clear conflict with statutory enactments governing the subject matter. *See, e.g., Kroger Grocery and Baking Co. v. Glander*, 149 Ohio St. 120, 125, 77 N.E.2d 921, 924 (1948). Several statutes could have an impact on licensing requirements for residential facilities for people with developmental disabilities, including R.C. 5123.62 (providing that the rights of mentally retarded and developmentally disabled persons include "[t]he right to an appropriate, safe, and sanitary living environment that complies with local, state, and federal standards and recognizes the persons' need for privacy and independence," "[t]he right to be treated equally as citizens under the law," and "[t]he right to participate in decisions that affect their lives") and R.C. 5123.83 ("No person shall be deprived of any civil right...solely by reason of his having received services...for mental retardation. Any person in custody...under the provisions of [R.C. Chapter] 5123...retains all rights not specifically denied him under this or any other chapter of the Revised Code"). Of course, whether a particular rule is unreasonable or an abuse of discretion is a question of fact which only a court is competent to determine. *See* 1987 Op. Att'y Gen. No. 87-082 (Syllabus, paragraph three) ("R.C. 109.14 does not authorize the Attorney General to decide questions of fact by means of an opinion"); 1982 Op. Att'y Gen. No. 82-029 at 2-85.

Accordingly, it is my opinion and you are advised that R.C. 5123.19(C) requires the Director of Mental Retardation and Developmental Disabilities to license and inspect the operation of residential facilities for persons with developmental disabilities. R.C. 5123.19(A)(1) excepts the residence of a person with developmental disabilities from the definition of "residential facility" only if that home is also the home of that person's relative or legal guardian; accordingly, R.C. 5123.19(C) requires the Director of Mental Retardation and Developmental

Disabilities to license and inspect any public or private home or facility in which a person with developmental disabilities resides unless the home or facility is the home of that person's relative or legal guardian.