

OPINION NO. 97-035**Syllabus:**

A public children services agency is required by R.C. 5153.27 to be certified pursuant to R.C. 5103.03 if it operates a children's home or other institution; otherwise, a public children services agency is not required to be certified pursuant to R.C. 5103.03.

To: Arnold R. Tompkins, Director, Ohio Department of Human Services, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, July 3, 1997

We have received your request for an opinion concerning duties of the Ohio Department of Human Services with respect to public children services agencies (PCSAs).¹ You have listed various functions that PCSAs perform and have asked whether, in order to perform each of those functions, a PCSA must hold a license from the Department that grants authorization for that specific function. In particular, you have asked whether state law requires that a PCSA have a license from the Department in order to perform the following functions: (1) to act as a representative of the Department in recommending family foster homes for certification; (2) to accept temporary, permanent, or legal custody of children; (3) to operate or provide independent living arrangements; and (4) to place children for foster care or adoption.

You have indicated that PCSAs commonly perform all the functions listed above. You have informed us, however, that as a matter of longstanding practice, the Department has required that a PCSA have a license for only a very limited number of activities. R.C. 5153.27 provides that a PCSA "operating a children's home or other institution is subject to sections 5103.03 and 5103.04 of the Revised Code respecting certification by the department of human services."² The Department has thus required that a PCSA obtain a license in order to operate a children's home or other institution.³ Apart from that requirement, the Department has permitted PCSAs to carry

¹ A "public children services agency" is defined as "a children services board or a county department of human services that has assumed the administration of the children services function prescribed by [R.C. Chapter 5153]." R.C. 2151.011(B)(25). A children services board is an agency of the county with statutory duties relating to the care of children. R.C. 5153.15. Thus, a PCSA is a county entity with the duties prescribed by R.C. Chapter 5153.

² R.C. 5103.04 provides that no association may be incorporated for purposes including the care of dependent, neglected, abused, or delinquent children, or the placing of such children in private homes, unless the Department of Human Services first examines the articles of incorporation and finds that "in its judgment the incorporators are reputable and respectable persons, the proposed work is needed, and incorporation of such association is desirable and for the public good."

³ There is no clear definition of the word "institution" as used in R.C. 5153.27. Cf. R.C. 5103.02(A) (definition applicable to R.C. 5103.03-.19); 13 Ohio Admin. Code Chapter 5101:2-9 (governing child care institutions). [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-02(C), at 711, provides that a PCSA must submit an application for certification to operate a

out their statutory functions without obtaining licenses authorizing the specific functions. The Department has considered it to be unnecessary to license PCSAs for functions other than the operation of institutions, because of the statutory responsibilities given to PCSAs and because of the supervisory relationship that the Department maintains over the PCSAs. You have assured us that, for at least several decades, the Department has not required that a PCSA obtain a license for any purpose other than the operation of a children's home or other institution.

Your question has arisen because entities other than PCSAs are required to have a license from the Department in order to operate an institution and are also required to have a license in order to perform each of the functions listed above. In particular, private noncustodial agencies (PNAs) are required to be certified by the Department in order to operate a children's residential center, a group home, or residential parenting facilities, to operate or provide independent living arrangements, to act as a representative of the Department in recommending family foster homes for certification, or to participate in the placement of children in family foster homes or for adoption. [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-03(D), at 712; *see also* [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-01(II), at 709-10. Private child placing agencies (PCPAs) are required to be certified by the Department in order to operate a children's residential center, a group home, or residential parenting facilities, to operate or provide independent living arrangements, to act as a representative of the Department in recommending family foster homes for certification, to accept temporary, permanent, or legal custody of children, or to place children for foster care or adoption. [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-03(C), at 712; *see also* [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-01(HH), at 709-10. Your question raises concerns as to whether PCSAs should be subject to the same certification requirements as PNAs or PCPAs.

In order to answer your question, it is necessary to examine existing statutes and also to look at earlier versions of those statutes. It is also helpful to review the manner in which the various statutory provisions have been interpreted and applied.

The licensing requirement about which you are concerned appears in R.C. Chapter 5103 and is phrased in terms of "certification." It states, in relevant part:

children's residential center, group home, residential parenting facility, or independent living arrangement. In contrast, [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-03(B), at 712, which lists the specific functions of a PCSA that require certification, includes the operation of a children's residential center, group homes, and residential parenting facilities, but does not mention independent living arrangements.

"Independent living arrangement" is defined as "any living environment provided by an agency which includes service programs and activities to assist youth sixteen years of age and older to make the transition from substitute care to independent living." [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-01(X), at 709-10; [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-9-01(J), at 440. No more than five children may reside in an independent living environment unless it is licensed as a group home pursuant to 13 Ohio Admin. Code Chapter 5101:2-9. 13 Ohio Admin. Code 5101:2-42-19(G). Thus, a PCSA that operates an independent living arrangement for more than five children must obtain group home certification for that facility. Children's residential centers, group homes, and residential parenting facilities are clearly included as institutions. *See* [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-03(B), at 712; 13 Ohio Admin. Code Chapter 5101:2-9.

The department of human services shall adopt rules as necessary for the adequate and competent management of institutions or associations. Except for facilities under the control of the department of youth services, places of detention for children established and maintained pursuant to sections 2151.34 to 2151.3415 [2151.34.15] of the Revised Code, and child day-care centers subject to Chapter 5104. of the Revised Code, *the department of human services every two years shall pass upon the fitness of every institution and association that receives, or desires to receive and care for children, or places children in private homes.*

When the department of human services is satisfied as to the care given such children, and that the requirements of the statutes and rules covering the management of such institutions and associations are being complied with, it shall issue to the institution or association a certificate to that effect.

R.C. 5103.03 (emphasis added).⁴

The terms "institution" and "association" are defined by statute to include "any incorporated or unincorporated organization, society, association, or agency, *public or private*" that carries out specified tasks relating to the care or placing of children. R.C. 5103.02(A) (emphasis added). Exceptions are provided for facilities that are operated, regulated, or approved by various public entities, but PCSAs are not included within the exceptions. *See generally* 1987 Op. Att'y Gen. No. 87-080.⁵

⁴ Until its recent amendment, the fitness language of R.C. 5103.03 included express reference to "every benevolent or correctional institution, corporation, and association, public or private, that receives, or desires to receive and care for children, or places children in private homes." The words "benevolent or correctional," "corporation," and "public or private" were deleted by Am. Sub. H.B. 419, 121st Gen. A. (1996) (act eff. June 20, 1996; amendment to R.C. 5103.03 eff. Sept. 18, 1996).

⁵ R.C. 5103.02 states, in part:

As used in sections 5103.03 to 5103.19 of the Revised Code:

(A) "Institution" or "association" includes any incorporated or unincorporated organization, society, association, or agency, *public or private*, that receives or cares for children for two or more consecutive weeks; any individual who, for hire, gain, or reward, receives or cares for children for two or more consecutive weeks, unless the individual is related to them by blood or marriage; and any individual not in the regular employ of a court or of an institution or association certified in accordance with section 5103.03 of the Revised Code, who in any manner becomes a party to the placing of children in foster homes, unless the individual is related to such children by blood or marriage, or is the appointed guardian of such children; provided, that any organization, society, association, school, agency, child guidance center, detention or rehabilitation facility, or children's clinic licensed, regulated, approved, operated under the direction of, or otherwise certified by the department of education, a local board of education, the department of youth services, the department of mental health, or the department of mental retardation and developmental disabilities, or any individual who provides care for only a single-

The language of R.C. 5103.02 and R.C. 5103.03 thus suggests that PCSAs are included as institutions or associations and that they must be certified by the Department in order to receive and care for children or place children in private homes. This language, however, must not be examined in a vacuum. Instead, it is necessary to look also at the statutes governing the powers and duties of a PCSA and the relationship between a PCSA and the Department of Human Services.

Powers and duties of a PCSA are set forth in R.C. 5153.16, which states that the PCSA "shall" carry out various functions, "[s]ubject to the rules and standards of the state department of human services" and on behalf of children in the county who are in need of public care or protective services. R.C. 5153.16(B). Among the required functions are entering into agreements with respect to the custody, care, or placement of a child; accepting custody of children committed to the PCSA by a court exercising juvenile jurisdiction; providing temporary emergency care for children; finding family foster homes for the care of children; and acquiring and operating a county children's home, establishing a receiving home for the temporary care of children, or procuring family foster homes for this purpose. *Id.* Each PCSA is also required to conduct, or contract for, an annual evaluation of the services provided by the PCSA to children under its care. R.C. 5153.16(B)(16); *see also* R.C. 5153.164.

The Department has adopted a system of rules for the monitoring of PCSAs. *See* Chapter 5101:2-57 (eff. July 1, 1997) (to be codified at 13 Ohio Admin. Code Chapter 5101:2-57). An on-site structured quality assurance review of the agency child protection and permanency program must be performed no less frequently than every eighteen months. *See* rule 5101:2-57-02 (eff. July 1, 1997) (to be codified at 13 Ohio Admin. Code 5101:2-57-02). In addition, a PCSA is required to participate in ongoing evaluation and quality assurance reviews. Areas of concern must be addressed through implementation of a quality improvement plan, or sanctions, including the loss of funds, may result. *Id.* Thus, the Department has adopted rules and imposed standards upon PCSAs apart from certification requirements.

Your letter notes that certification is expressly required for the operation of a children's home or other institution by a PCSA, *see* R.C. 5153.27, but is not expressly required for other activities of a PCSA. This distinction suggests that a PCSA does not need to be certified except for the operation of a children's home or other institution.

Other language appearing in R.C. Chapter 5103 also suggests that PCSAs are not subject to the requirement that they be certified for functions other than the operation of institutions. For example, R.C. 5103.16 speaks in the alternative of placement of a child for adoption by a PCSA or by "an institution or association that is certified by the department of human services under [R.C. 5103.03] to place children for adoption." R.C. 5103.16(D).

Similarly, R.C. 5103.17 imposes a ban against advertising adoption services on every "person or government entity, other than a private child placing agency or private noncustodial agency certified by the department of human services under [R.C. 5103.03] or a public children services agency." In addition, the definitions of "private child placing agency" and "private noncustodial agency" include the requirement of certification by the Department, whereas the

family group, placed there by their parents or other relative having custody, shall not be considered as being within the purview of these sections. (Emphasis added.)

definition of PCSA contains no reference to certification. R.C. 2151.011(B)(8), (25), (48). *Accord, e.g.*, [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-01(HH), (II), (KK), at 709-10. Existing statutory language thus suggests that the certification requirements of R.C. 5103.03 are not generally applicable to PCSAs.

It is, therefore, apparent that certain provisions of statute cast doubt on the conclusion that a PCSA must be certified pursuant to R.C. 5103.03 to carry out functions other than the operation of a children's home or other institution. Further, the statutes do not state what action is to be taken if a PCSA has its certificate revoked and is unable to perform its statutory duties, thereby indicating that the General Assembly did not anticipate that a PCSA would be required to be certified in order to carry out the responsibilities imposed upon it by law.

In light of the ambiguity existing in the statutory scheme governing PCSAs and certification requirements, it is appropriate to look at the consequences of a particular construction. R.C. 1.49(E). If a PCSA were required to be certified pursuant to R.C. 5103.03 for each of its functions, then the PCSA's certification could be revoked pursuant to that statute for violation of a law or rule. R.C. 5103.03. In such circumstances, the juvenile court would be prohibited from committing a child to the custody of the PCSA after the certificate was revoked and for fifteen months following the date of reissuance. *Id.* Such a situation could create serious practical problems, because a PCSA is required by statute to accept custody of children committed by a court exercising juvenile jurisdiction and the court is authorized to commit a child to a PCSA in certain circumstances. *See, e.g.*, R.C. 2151.353; R.C. 5153.16(B)(3).⁶

In interpreting the requirements of a statutory scheme, courts give deference to the interpretation adopted by the administrative body with responsibility for implementing the statutes. *See, e.g.*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Lopez v. Ohio Dep't of Human Serv.*, 88 Ohio App. 3d 231, 233-34, 623 N.E.2d 689, 691 (Defiance County), *motion to certify overruled*, 67 Ohio St. 3d 1513, 622 N.E.2d 659 (1993). The Revised Code expressly states that, if a statute is ambiguous, a court may consider the administrative construction of the statute. R.C. 1.49(F). Thus, because the answer to your question is not clear from a consideration of all relevant statutes, it is appropriate to look to the administrative construction that has been given to the statutes.

If we look at the history of the certification requirement of R.C. 5103.03 and the statutes that preceded it, we discover that both public and private entities have long been included in the statutory language. A provision requiring the board of state charities to examine and certify the fitness of "every benevolent or correctional institution, corporation and association, public, semi-public or private as receives, or desires to receive and care for children, or places children in private homes" appeared in G.C. 1352-1 in 1913 and was the predecessor to R.C. 5103.03. *See*

⁶ Practical consequences could result if a PCSA were to lose the certification required to operate a children's home or other institution pursuant to R.C. 5103.03 and 5153.27. In such circumstances, however, the PCSA could accept custody of children and provide alternative placements.

1913 Ohio Laws 864, 865.⁷

An opinion of the Attorney General dated 1916 indicates that a county children's home was required to be certified under this statute and could also suffer the consequences of having its certification revoked. 1916 Op. Att'y Gen. No. 1432, vol. 1, p. 573. The consequences included the condition that "[n]o child shall be committed by the juvenile court to an association or institution which has not such certificate unrevoked and received within fifteen months next preceding the commitment." *Id.* at 574 (quoting G.C. 1352-1). The opinion concluded that, if certification were revoked, the county could continue to support the home for the benefit of the children already there.

Later, the statutes providing for services to children were revised and language was adopted providing that "[n]othing in [the county children services law] shall be taken to exempt any children's home or other institution maintained or operated by a [county child welfare] board or a [county] department [of welfare which has assumed the administration of child welfare] from the provisions of the General Code respecting certification by the division [of social administration of the state department of public welfare]." 1945-1946 Ohio Laws 538, 547 (enacting G.C. 3070-28). When the General Code was recodified into the Revised Code in 1953, *see* 1953-1954 Ohio Laws 7 (Am. H.B. 1, eff. Oct. 1, 1953), the language governing certification of county children's homes was changed from "nothing...shall be taken to exempt" to a positive statement: "A county child welfare board or a county department of welfare operating a children's home or other institution is subject to [R.C. 5103.03 and 5103.04] respecting certification by the division of social administration." 1953 Revised Code of Ohio, vol. 1, Title III, 178 (R.C. 335.27, now R.C. 5153.27, *see* 1956-1957 Ohio Laws 1012, 1021). Neither of these provisions indicates clearly whether a certification requirement applies to functions other than those specifically mentioned. It appears, however, that the body with responsibility for certifying institutions and associations has, for many years, taken the position that, except for operating a children's home or other institution, a PCSA is not required to be certified.

As discussed above, various provisions of existing law contrast private entities that must be certified with PCSAs. Recently, the General Assembly amended R.C. 5103.17, replacing the words "no persons, associations, or institutions that have not been certified by the division of social administration of the department of human services for the placement of children for adoptions or in foster homes" with the language "no person or government entity, other than a private child placing agency or private noncustodial agency certified by the department of human services under [R.C. 5103.03] or a public children services agency." Am. Sub. H.B. 419, 121st Gen. A. (1996) (act eff. June 20, 1996; amendment to R.C. 5103.17 eff. Sept. 18, 1996). This amendment indicates that, if PCSAs ever were subject to the requirement that they be certified to perform the function of placing children, they are so no longer.

It is firmly established that an administrative body has discretion to interpret in any reasonable manner the statutes it administers, provided that it does not adopt an interpretation that is contrary to statute. *See, e.g.* 1994 Op. Att'y Gen. No. 94-059. By administrative rule, the Department of Human Services requires that PCPAs and PNAs be certified to perform various

⁷ The definition of "institution" and "association" was adopted in 1919 and included "public or private" entities. 1919 Ohio Laws, Part I, 140 (G.C. 1352-6).

functions relating to the care and placing of children. [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-03, at 712. PCSAs, in contrast, need to be certified only if they operate a children's residential center, a group home, or residential parenting facilities. [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-03(B), at 712; *see* note 3, *supra*. These activities appear to come within the language of R.C. 5153.27 requiring certification for the operation of "a children's home or other institution." *See also* R.C. 5153.162.

As noted above, the Department has adopted a separate and comprehensive system for supervising PCSAs. *See* Chapter 5101:2-57 (eff. July 1, 1997) (to be codified at 13 Ohio Admin. Code Chapter 5101:2-57). Further, PCSAs are required to have policies on the same matters as PCPAs and PNAs, "as applicable to a function being performed, even though the PCSA is not required to be certified to perform a given function." [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-13(A), at 712-13; *see also* [1996-1997 Monthly Record, vol. 2] Ohio Admin. Code 5101:2-48-02, at 1810-11; [1996-1997 Monthly Record, vol. 2] Ohio Admin. Code 5101:2-48-04, at 1812. The policies must satisfy requirements established by rule. [1996-1997 Monthly Record, vol. 1] Ohio Admin. Code 5101:2-5-13, at 712-13. For these purposes, PCSAs are held to the same standards as PCPAs and PNAs, even when no certification is required.

Had the General Assembly intended to require that PCSAs obtain certification for each of their activities, it could easily have adopted language clearly imposing that requirement. The failure of the General Assembly to adopt any such language in light of the Department's longstanding practice of excluding PCSAs from certain certification requirements leads to the conclusion that the Department's interpretation of its statutes should be granted deference. *See, e.g., Industrial Comm'n v. Brown*, 92 Ohio St. 309, 311, 110 N.E. 744, 745 (1915) ("[a]dministrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do"). Under this interpretation, a PCSA is required by R.C. 5153.27 to be certified pursuant to R.C. 5103.03 if it operates a children's home or other institution; otherwise, a PCSA is not required to be certified pursuant to R.C. 5103.03.

For the reasons discussed above, it is my opinion and you are advised that a public children services agency is required by R.C. 5153.27 to be certified pursuant to R.C. 5103.03 if it operates a children's home or other institution; otherwise, a public children services agency is not required to be certified pursuant to R.C. 5103.03.