

**OPINION NO. 84-007****Syllabus:**

R.C. 5123.19 imposes upon the Director of Mental Retardation and Developmental Disabilities the duty of licensing any residential facility, as that term is defined in R.C. 5123.19(A)(1), whether or not such facility is certified by the Department of Public Welfare under R.C. 5103.03.

**To: Minnie F. Johnson, Ph.D., Director, Department of Mental Retardation and Developmental Disabilities, Columbus, Ohio**

**By: Anthony J. Celebrezze, Jr., Attorney General, February 21, 1984**

I have before me your opinion request in which you ask about the duty of the Department of Mental Retardation and Developmental Disabilities to license residential facilities which are certified by the Department of Public Welfare under R.C. 5103.03.<sup>1</sup>

R.C. 5123.20 states: "No person shall operate a residential facility or receive a person with a developmental disability as a resident of a residential facility unless such facility is licensed under [R.C. 5123.19]." Pursuant to R.C. 5123.19(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." R.C. 5123.19(A)(1) defines a residential facility as "a home or facility in which a person with a developmental disability resides, except a home subject to [R.C. Chapter 3721] [rest homes and nursing homes] or the home of a relative or legal guardian in which a person with a developmental disability resides." Thus, with two exceptions, any home or facility in which a person with a developmental disability resides must be licensed by the Department of Mental Retardation and Developmental Disabilities under R.C. 5123.19. The only exceptions to this definition set forth in R.C. 5123.19 are rest homes or nursing homes subject to R.C. Chapter 3721 or the home of a relative or legal guardian in which a person with a developmental disability resides. See generally 1980 Op. Att'y Gen. No. 80-027 (discussing authority of the Division of Mental Retardation and Developmental Disabilities of the Department of Mental Health and Mental Retardation (now the Department of Mental Retardation and Developmental Disabilities) to license residential facilities).

You state that the Department of Mental Retardation and Developmental Disabilities has adopted residential licensure rules "which recognize the residential certification approval of the Ohio Department of Public Welfare pursuant to O.R.C. 5103.03." Specifically, 7 Ohio Admin. Code 5123:2-3-07(T) states:

<sup>1</sup> R.C. 5103.03 sets forth various powers and duties of the Department of Public Welfare with respect to the certification of institutions for children.

Any residential care facility or home for children which is subject to inspection, supervision, and certification by the Ohio department of public welfare, pursuant to section 5103.03 of the Revised Code, and admits only children who are under the care, supervision, and custody of a public or private agency or institution which is subject to the rules of the Ohio department of public welfare shall not be licensed by the department. (Emphasis added.)

Pursuant to this rule, the Department of Mental Retardation and Developmental Disabilities does not license certain facilities which are subject to inspection, supervision and certification by the Department of Public Welfare. In light of this rule, you ask whether R.C. 5123.20 prohibits the operation of a residential facility or the receipt of a developmentally disabled person in a residential care facility subject to rule 5123:2-3-07(T).

The Department of Mental Retardation and Developmental Disabilities is a creature of statute and has certain duties imposed upon it by the General Assembly. See, e.g., R.C. 5123.02 and R.C. 5123.03. R.C. 5123.19 sets forth certain duties with respect to the licensure of residential facilities, stating: "The director of mental retardation and developmental disabilities shall license and inspect the operation of residential facilities. . . . Before issuing or renewing a license, the director of the department or his designee shall inspect each residential facility for which application is made" (emphasis added). Thus, the Director is under a duty to license and inspect residential facilities. See Dorrrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (the use of the word "shall" in a statute indicates that the provision in which it is contained is mandatory). The statute also establishes certain procedures which the Director must follow in considering the issuance, renewal, or transfer of a license.

Concerning the adoption of licensure rules, R.C. 5123.19 states:

The director shall adopt and may amend and rescind rules establishing procedures and fees for issuing and renewing licenses and regulating the operation of residential facilities. 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.

Pursuant to this provision the Director has authority to adopt rules concerning procedures and fees for the licensure of residential facilities. It is well settled that a rule issued pursuant to statutory authority has the force and effect of law, unless the rule is unreasonable or is in clear conflict with a statutory provision governing the same subject matter. Kroger Grocery & Baking Co. v. Glander, 149 Ohio St. 120, 77 N.E.2d 921 (1948).

In the situation you present, R.C. 5123.19 has imposed upon the Director of Mental Retardation and Developmental Disabilities a duty to license residential facilities as that term is defined by statute. As stated before, R.C. 5123.19(A)(1) defines a residential facility generally as "a home or facility in which a person with a developmental disability resides." The two exceptions to this definition are rest homes or nursing homes subject to R.C. Chapter 3712 and the home of a relative or legal guardian in which a person with a developmental disability resides. R.C. 5123.19(A)(1). Thus, even though a facility is subject to inspection, supervision, and certification by the Department of Public Welfare, so long as it qualifies as a residential facility, as defined by R.C. 5123.19(A)(1), R.C. 5123.19 requires that the Director of Mental Retardation and Developmental Disabilities license the facility. See State ex rel. Galloway v. Industrial Commission, 134 Ohio St. 496, 17 N.E.2d 913 (1938) (modification of the provisions of a statute is the province of the legislature). See also Athens Home Telephone Co. v. Peck, 158 Ohio St. 557, 110 N.E.2d 571 (1953) (since administrative agencies are creatures of statute and possess only such rule-making power as is delegated to them by the legislature, where such agency adopts a rule in conflict with a statute, the rule must fall).

Part of your question is whether R.C. 5123.20 prohibits the housing of a developmentally disabled person in a residential facility which, because of rule 5123:2-3-07(T), is not licensed by the Director of Mental Retardation and

Developmental Disabilities. As set forth above, R.C. 5123.20 prohibits a person from operating a residential facility or receiving a person with a developmental disability as a resident of a residential facility unless the facility is licensed under R.C. 5123.19. Since the Director is under a duty to license all facilities defined as "residential facilities," even though such facilities may also be certified by the Department of Public Welfare, the prohibitions contained in R.C. 5123.20 apply to any residential facility, whether or not it is certified by the Department of Welfare.

Since R.C. 5123.19 requires the Department of Mental Retardation and Developmental Disabilities to license all residential facilities, as defined by R.C. 5123.19(A), even though such facilities may be subject to inspection and supervision by the Department of Public Welfare, it appears that rule 5123:2-3-07(T) conflicts with the licensing duties imposed upon your department by R.C. 5123.19. I note, however, that R.C. 5123.19 authorizes the Department of Mental Retardation and Developmental Disabilities to amend and rescind its rules concerning the procedures and fees for licensing and regulating the operation of residential facilities. Thus, your department has authority to amend rule 5123:2-3-07(T) and may provide for incorporating the functions of the Department of Public Welfare within the licensing procedure required by R.C. 5123.19. Although such a rule could not eliminate the Department's statutory duty to license residential facilities which are subject to inspection, supervision, and certification by the Department of Public Welfare, the adoption of the rule could eliminate duplicated efforts by both departments. For example, R.C. 5123.19 states that: "Before issuing or renewing a license, the director of the department or his designee shall inspect each residential facility for which application is made" (emphasis added). By making the Department of Public Welfare its designee for purposes of inspecting those residential facilities which the Department of Public Welfare is otherwise required to inspect, the Department of Mental Retardation and Developmental Disabilities could incorporate within its licensing function the inspection performed by the Department of Public Welfare. See R.C. 121.17 (duty and authority of directors of departments to cooperate and coordinate for the elimination of duplication and overlapping functions). Of course, if additional conditions which are imposed upon the Department of Mental Retardation and Developmental Disabilities by statute in performing an inspection are not performed by the Department of Public Welfare, the Department of Mental Retardation and Developmental Disabilities would maintain the duty to perform at least a limited inspection.

Based on the foregoing, it is my opinion, and you are advised that, R.C. 5123.19 imposes upon the Director of Mental Retardation and Developmental Disabilities the duty of licensing any residential facility, as that term is defined in R.C. 5123.19(A)(1), whether or not such facility is certified by the Department of Public Welfare under R.C. 5103.03.