

OPINION NO. 86-049

Syllabus:

Pursuant to R.C. 340.03(G), where a community mental health board serving a single-county district with a population of less than 100,000 contemplates operation of a mental health service, program, or facility for more than one year, it may do so with the approval of the board of county commissioners and the chief of the division of mental health facilities and services of the Department of Mental Health.

To: Stephen M. Stern, Jefferson County Prosecuting Attorney, Steubenville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 21, 1986

I have before me your request for my opinion on the following question: "Does the Jefferson County Community Mental Health Board have the power to directly perform mental health service programs under [R.C. 340.03(G)] or must the board create another corporation to perform these duties?"

It is my understanding that the Jefferson County Community Mental Health Board serves a single-county district with a population of less than 100,000. Further, in the past, the Board entered into contracts with other agencies for the provision of mental health services and facilities within the district. The Board came to believe, however, that continued direct operation of mental health services and facilities is the most effective means of operation within the district, and beginning in 1980, assumed such operation. Your opinion request further states that the Department of Mental Health objects to the Board's continued direct operation and contends that the Board must now create a corporation to assume such operation.

Community mental health districts and their governing bodies are provided for in R.C. Chapter 340. As creatures of statute, community mental health boards have those powers and duties as are conferred upon them by the legislature. 1982 Op. Att'y Gen. No. 82-067. R.C. 340.03 sets forth various duties of community mental health boards, and states in part:

Subject to rules of the director of mental health, the community mental health board shall:

...
(G) Enter into contracts with public and private agencies for the provision of mental health services and facilities. A board in a district having a population of less than five hundred thousand may operate a mental health service, program, or facility for no longer than one year with the prior approval of the chief [of the division of mental health facilities and services] if there is no other qualified private or public agency that is immediately available and willing to operate such service, program, or facility. In an emergency situation and with the prior approval of the chief [of the division of mental health facilities and services], any board may operate a mental health service, program, or facility in order to provide essential services. A board in a district having a population of less than one hundred thousand may operate a mental health service, program, or facility for more than one year with the approval of the chief and of the board of county commissioners in

a single-county district or of the majority of boards of county commissioners in a joint-county district. The approval of the chief may not be given unless he has determined that continued board operation will provide greater administrative efficiency and more or better services or programs than would contract operation. The chief shall not approve more than one year of board operation of a service, program, or facility previously operated by a contract agency unless the board has established to the chief's satisfaction that the agency is unable to effectively operate the service, program, or facility or that the agency has requested the board to take over operation. The chief shall review and evaluate any board operation of a mental health service, program, or facility.

Pursuant to this statute, although a community mental health board is empowered to contract with public and private agencies for the provision of mental health services and facilities, the board itself is empowered to operate a mental health service, program, or facility in certain circumstances.

R.C. 340.03(G) specifically authorizes a community mental health board which serves a district having a population of less than 500,000 to operate a mental health service, program, or facility for no longer than one year, so long as the board obtains prior approval from the chief of the division of mental health facilities and services, see generally R.C. 5119.05 (creating divisions within the Department of Mental Health), if there is no other qualified agency that is immediately available and willing to operate such service, program, or facility. Because the Jefferson County Community Mental Health Service District has a population of less than five hundred thousand, the Board may operate a mental health service, program, or facility for no longer than one year, with the approval of the chief of the division of mental health facilities and services, under the conditions set forth in R.C. 340.03(G). The Board is interested, however, in operating mental health services for a period of more than one year. R.C. 340.03(G) also provides that in mental health service districts with a population of less than 100,000, the board may operate a mental health service, program, or facility for more than one year with the approval of the chief of the division of mental health facilities and services and the appropriate board or boards of county commissioners.¹ Since the Jefferson County Community Mental Health Service District has a population of less than 100,000, R.C. 340.03(G) empowers the Board to operate a mental health service, program, or facility for more than one year, so long as it obtains the approval of the Jefferson County Commissioners and the chief of the division of mental health facilities and services.

I note, however, that R.C. 340.03(G) sets forth certain standards which the chief must observe in granting approval of

¹ R.C. 340.03(G) empowers a community mental health board, regardless of the size of the district which it serves, to operate a mental health service, program or facility in an emergency situation to provide essential services. It appears, however, that the situation about which you ask is not an emergency situation, but, rather, a plan for continued board operation for an indefinite period of time.

board operation of a mental health service, program, or facility for more than one year. The chief may not approve board operation, "unless he has determined that continued board operation will provide greater administrative efficiency and more or better services or programs than would contract operation." R.C. 340.03(G). Further, R.C. 340.03(G) prohibits the chief from approving board operation for more than one year of a service, program, or facility "previously operated by a contract agency unless the board has established to the chief's satisfaction that the agency is unable to effectively operate the service, program, or facility or that the agency has requested the board to take over operation." Thus, the approval of board operation by the chief of the division of mental health facilities and services, is, within the standards set forth in R.C. 340.03(G), a matter of discretion. See generally State ex rel. Kahle v. Rupert, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918)("[e]very officer of this state...not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty"); 9 Ohio Admin. Code 5122:2-1-05 (community mental health board operation of mental health services, programs, or facilities).

Confusion as to the authority of a community mental health board to operate a mental health service, program, or facility appears to have arisen out of the former statutory scheme governing community mental health boards. In 1979-1980 Ohio Laws, Part I, 499 (Am. Sub. S.B. 160, eff. Oct. 31, 1980), the legislature amended R.C. 340.03 and added division (G) in substantially the same language as it currently reads. The Legislative Service Commission analysis of Am. Sub. S.B. 160 (as reported by H. Finance-Appropriations) discusses the changes made with respect to the powers and duties of community mental health boards, and states:

Under existing law, 648 boards [currently community mental health boards] may not operate programs directly unless there is no contract agency available to do so, and then may operate a program only until an agency becomes available to assume its operation. The bill would permit direct board operation in the following circumstances:

....
 3. A board in a district with a population of less than 100,000 could operate a service, program, or facility for more than one year with the approval of the Chief and the approval of the board of county commissioners in a single-county district....The Chief could not approve direct operation unless he determined that continued board operation would provide greater administrative efficiency and more or better services than would contract operation. He could not approve more than one year of direct operation of any service, program, or facility previously operated under contract unless the board established that the agency was unable to effectively operate the service, program, or facility, or that the agency had asked the board to take over operation.

It is clear, therefore, that after October 31, 1980, "648 boards" (now community mental health boards) were empowered to operate programs directly. See generally 1971 Op. Att'y Gen. No. 71-070 (analyzing the power of community boards under prior version of R.C. 340.03, 1969-1970 Ohio Laws, Part III, 2929 (Am. H.B. 1078, eff. July 16, 1970), and concluding that a community board could contract with other agencies for

operation of a community mental health facility, but had only interim responsibility for operation of such facility; further concluding at 2-239: "[s]ome other public agency or, as here, a non-profit private corporation, must be found to conduct the actual operation of the facility").

From the foregoing it is clear that R.C. 340.03(G) authorizes a community mental health board which wishes to operate a mental health service, program, or facility for longer than one year to do so with the approval of the chief of the division of mental health facilities and services and, in the case of a single-county board, the board of county commissioners. The formation of a corporation by the community mental health board to assume such direct operation is not necessary. Further, I note that a community mental health board is without statutory authority to form such a corporation. Cf. 1979 Op. Att'y Gen. No. 79-055 (although a board of county commissioners has broad authority under R.C. 307.85 to take actions related to the establishment and operation of programs created by federal law, it may not form a non-profit corporation for such purpose).

It is, therefore, my opinion, and you are advised that, pursuant to R.C. 340.03(G), where a community mental health board serving a single-county district with a population of less than 100,000 contemplates operation of a mental health service, program, or facility for more than one year, it may do so with the approval of the board of county commissioners and the chief of the division of mental health facilities and services of the Department of Mental Health.