

**LETTER OPINION**  
**98-L-14**

February 17, 1998

Ms. Carol K. Olson  
Executive Director  
Department of Human Services  
State Capitol, Judicial Wing  
600 East Boulevard Avenue  
Bismarck, ND 58505-0250

Dear Ms. Olson:

Thank you for your letter concerning whether an after-school program provided in Bismarck Public School District facilities is excluded from the definition of early childhood services regulated by the state.

You advise that the Bismarck Parks and Recreation District (Park District) operates an after-school program for children in grades kindergarten through six. The program is offered in several Bismarck Public Schools. The North Dakota Department of Human Services (Department) licenses early childhood facilities under N.D.C.C. ch. 50-11.1. The definition of early childhood services excludes child care "provided in any educational facility . . . in grade one or above . . . in a kindergarten . . . or a nonpublic elementary school program . . . ." N.D.C.C. § 50-11.1-02(5)(b),(c). You specifically ask whether the Park District program is excluded from the definition of early childhood services and thus, from regulation by the Department.

In January of 1988, the Park District and the Bismarck Public School District (School District) explored a cooperatively sponsored "latch-key" program. The purpose of the program was to provide grade school children with supervised after-school recreational, educational and physical activity in four grade schools. A collaborative program was endorsed at a joint School District and Park District meeting March 2, 1988. See MINUTES OF JOINT SCHOOL BOARD/PARK BOARD MEETING. In 1988, the School District and Park District signed an Agreement for the Joint Exercise of Governmental Powers, which opened School District facilities to Park District programs and activities. The Agreement was updated in 1992. See 1992 AGREEMENT FOR THE JOINT EXERCISE OF GOVERNMENTAL POWERS. In early 1989, the School District applied to the Department of Public Instruction and received a grant to implement the latch-key program. The program was operated for two years by the Park District, and then by the Bismarck Youth Works

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organization from 1990 to 1992. The program has since been continued by the Park District and is now called B.L.A.S.T. (Bismarck's Life After School Time). The elective after-school program has at all times been provided in school facilities for a fee.

N.D.C.C. § 50-11.1-02(5) defines early childhood services as child care "unaccompanied by the child's parent, guardian, or custodian, which is provided in exchange for money, goods, or other services and is, or is anticipated to be, ongoing for periods of two or more hours per day for a part of three or more days per week." But "early childhood services" does not include child care provided in any educational facility "in grade one or above," or "in a kindergarten which has been established pursuant to chapter 15-45 or a nonpublic elementary school program approved pursuant to subsection 1 of section 15-34.1-03." N.D.C.C. § 50-11.1-02(5)(b),(c).

The after-school child care program operated by the Park District in cooperation with the School District does not appear to be excluded from the definition of early childhood services, because although it may be child care provided in an educational facility, the exceptions from the definition of early childhood services under N.D.C.C. § 50-11.1-02(5)(b) and (c) exclude children in a school setting. For example, the exclusion for child care provided in any educational facility, whether public or private, is qualified by reference to its provision "in grade one or above." If the exclusion from the definition was meant to apply to any child care program located in any educational facility, child care providers could escape licensure simply by contracting to operate a child care program in a school. Such a construction would be an impermissible, absurd consequence that could effectively thwart the Department's oversight responsibilities concerning child care providers. See County of Stutsman v. State Historical Soc., 371 N.W.2d 321, 325 (N.D. 1985) (statutes must be construed to avoid absurd results). Although the legislative history of these exceptions is generally silent, it is apparent from the language of the exceptions that the legislature intended in N.D.C.C. § 50-11.1-02(5)(b),(c) to avoid dual oversight by the Department of school functions monitored by the Department of Public Instruction and local school districts.

In a technical sense, the Department licenses operators of early childhood facilities. See N.D.C.C. §§ 50-11.1-03, 50-11.1-04. "No person, partnership, firm, corporation, limited liability company, association, or nongovernmental organization may establish or operate a group child care facility, preschool educational facility, or child care center unless licensed . . . ." N.D.C.C. § 50-11.1-03(2) (emphasis added). The Park District is none of the foregoing. It is

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a political subdivision or governmental entity. See N.D.C.C. §§ 32-12.1-02(5) (political subdivision includes park districts); 44-04-17.1(10) (same).

N.D.C.C. § 50-11.1-03(2) provides that a governmental organization, although exempt from licensure requirements, may not operate a group child care facility, preschool educational facility, or child care center without first certifying to the Department that it has complied with the Department rules applicable to these facilities. The Park District after-school program is not a preschool educational facility "that offers early childhood services and follows a preschool curriculum and course of study designed primarily to enhance the educational development of the children enrolled in the facility . . . for [no] more than three hours per day." N.D.C.C. § 50-11.1-02(11). It is my opinion that the Park District after-school program constitutes a group child care facility or a child care center. See N.D.C.C. §§ 50-11.1-02(1) (a child care center is a facility providing child care to 19 or more children); 50-11.1-02(7) (a group child care facility is a facility where child care is provided for eight through eighteen children, or a facility other than a private residence serving less than eight children).

The after-school program operated by the Park District falls within the definition of early childhood services in N.D.C.C. § 50-11.1-02(5) and is not excluded from the definition by the exceptions for child care provided in an educational facility in grades one and above, in a kindergarten, or in a nonpublic elementary school program. Therefore, it is my opinion that the Park District is subject to the requirements of N.D.C.C. § 50-11.1-03(2) that it certify to the Department that it is in compliance with rules applicable to child care centers and group child care facilities.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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