

LETTER OPINION
95-L-4

January 17, 1995

Mr. Henry C. "Bud" Wessman
Executive Director
ND Department of Human Services
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Wessman:

Thank you for your letter inquiring about the confidential treatment of records maintained with respect to early childhood services pursuant to North Dakota Century Code (N.D.C.C.) ? 50-11.1-07(3).

N.D.C.C. ch. 50-11.1 concerns the licensing and regulation of early childhood services in early childhood facilities which are commonly called day care facilities. N.D.C.C. ? 50-11.1-02(4),(5). The North Dakota Department of Human Services (Department) licenses operators of family child care homes, group child care facilities, child care centers, and preschool educational facilities. N.D.C.C. ?? 50-11.1-02(1),(6),(7),(9),(11); 50-11.1-03; 50-11.1-04; N.D. Admin. Code chs. 75-03-08, 75-03-09, 75-03-10, 75-03-11. Persons who provide early childhood services in a child's home are not required to be licensed, but they may obtain a registration document from the Department indicating the registrant has complied with the standards in N.D.C.C. ch. 50-11.1 and Department rules. N.D.C.C. ?? 50-11.1-02(8),(12),(13),(14); 50-11.1-06; N.D. Admin. Code ch. 75-03-07.

N.D.C.C. ? 50-11.1-07 provides:

1. The department and the county agency at any time may investigate and inspect the conditions of the facility, the qualifications of the providers of early childhood services in any early childhood facility, and the qualifications of any in-home provider seeking or holding a license or registration document under this

Mr. Henry C. "Bud" Wessman
January 17, 1995
Page 2

chapter. Upon request of the department or the county agency, the state department of health and consolidated laboratories or the state fire marshal, or the fire marshal's designee, shall inspect any facility for which a license is applied for or issued and shall report the findings to the county agency.

2. Licensees and registrants shall:
 - a. Maintain such records as the department may prescribe regarding each child in their care and control, and shall report to the department, when requested, such facts as the department may require with reference to the children upon forms furnished by the department; and
 - b. Admit for inspection authorized agents of the department or the county agency and open for examination all records, books, and reports of the home or facility.
3. Except as provided in subsection 4, all records and information maintained with respect to children receiving early childhood services are confidential and must be properly safeguarded and may not be disclosed except:
 - a. In a judicial proceeding;
 - b. To officers of the law or other legally constituted boards or agencies; or
 - c. To persons having a definite interest in the well-being of the child or children concerned and who, in the judgment of the department, are in a position to serve their interests should that be necessary.
4. A provider of early childhood services, upon the request of the parent or guardian of a child for whom the provider provides such services, shall make available to the parent or guardian a list of the names, telephone numbers, and addresses of the parents or guardians of children for whom early childhood services are provided. The list may only include the names, telephone numbers, or addresses of parents or guardians who grant the provider permission to disclose that information.

Mr. Henry C. "Bud" Wessman
January 17, 1995
Page 3

You specifically ask whether the press is included in the definition of "persons having a definite interest in the well-being of a child or children." N.D.C.C. ? 50-11.1-07(3)(c). You also ask for guidance regarding persons included in this class. First, persons in the class must have "a definite interest in the well-being of the child or children" receiving early childhood services. Second, in the judgment of the Department, the person must be in a "position to serve [the child's or children's] interests." N.D.C.C. ? 50-11.1-07(3)(c).

The meaning of N.D.C.C. ? 50-11.1-07(3)(c) is to be derived from the language of the statute. Because the words in the statute are not defined in the code, they are to be given their plain, ordinary, and commonly understood meaning. Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990). In construing a statute "consideration should be given to the ordinary sense of the statutory words, the context in which they are used, and the purpose which prompted their enactment." County of Stutsman v. State Historical Soc., 371 N.W.2d 321, 327 (N.D. 1985); see also Peterson v. Heitkamp, 442 N.W.2d 219, 221 (N.D. 1989).

"Definite" means "[h]aving distinct limits . . . [k]nown positively; certain . . . [c]learly defined" The American Heritage Dictionary 375 (2d coll. ed. 1991). A "certain" interest in the well-being of a child is one that is established beyond doubt or question. Id. at 254. There is little doubt a parent, guardian, custodian, health care provider, or counselor would be a person with a certain and clearly-defined interest in the well-being of a child, as well as a person who would be in a position to serve the child's interests.

While the press and others may have a general interest in the well-being of a child or children, that interest is not necessarily a certain interest established beyond doubt or question, or a clearly-defined interest. However, even if the press arguably could have a definite interest in the well-being of a particular child, the determination of whether a person is one to whom records and information concerning that child may be disclosed under N.D.C.C. ? 50-11.1-07(3)(c) is ultimately a fact question, depending on whether "in the judgment of the department" the person is "in a position to serve [the child's or children's] interests."

You also ask whether the reference to "child or children concerned" in N.D.C.C. ? 50-11.1-07(3)(c) includes children who may be cared for in the future by an early childhood

Mr. Henry C. "Bud" Wessman
January 17, 1995
Page 4

services provider. I surmise your concern is whether information and records pertaining to an investigation and inspection of the conditions of a facility and the qualifications of providers may be disclosed to current or future users of early childhood services. It should be noted that N.D.C.C. ? 50-11.1-07(3) only makes confidential "records and information maintained with respect to children receiving early childhood services." Because the information and records pertaining to an investigation and inspection of the conditions of a facility and the qualifications of providers do not specifically relate to "children receiving early childhood services," they are not made confidential under N.D.C.C. ? 50-11.1-07(3).

Using the ordinary meaning of the words in N.D.C.C. ? 50-11.1-07(3)(c), it is my opinion that the "child or children concerned" are those recipients of "early childhood services" whose "records and information [are] maintained" and "safeguarded" under that subsection. Because disclosure is limited to persons who have a definite interest in the well-being of the child for whom the requested records and information are maintained, it is my further opinion that one may not have access to records maintained with respect to a child in whom that person does not have a definite interest.

The language of the statute is plain and cannot be disregarded under the pretext of pursuing its spirit. County of Stutsman v. State Historical Soc., 371 N.W.2d at 325. It is improper to construe a statute "so as to legislate that which the words of the statute do not themselves provide." Peterson v. Heitkamp, 442 N.W.2d at 221. If confidentiality of records and information concerning the qualifications of providers of early childhood services or the conditions of facilities is desired, additional legislation would be required. Likewise, additional legislation would be required to authorize the disclosure of records maintained with respect to a child "receiving early childhood services" to the parent of another child who is currently receiving those services or may receive them in the future.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

tam\jfl