

LETTER OPINION
95-L-137

June 8, 1995

Mr. Henry C. "Bud" Wessman
Executive Director
North Dakota Department of
Human Services
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0250

Dear Mr. Wessman:

Thank you for your April 25, 1995, letter asking whether issuance of a correction order to an early childhood facility pursuant to N.D.C.C. ? 50-11.1-07.2 is a condition precedent to revoking the license of the early childhood facility. In my opinion, a license revocation proceeding may be commenced without first issuing a correction order.

The North Dakota Department of Human Services (Department) is authorized to take whatever action may be necessary to carry out the purposes of N.D.C.C. ch. 50-11.1 to assure and safeguard the health, safety, and development of children receiving early childhood services. N.D.C.C. ?? 50-11.1-01, 50-11.1-08(2). The 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.

A person who provides early childhood services in a child's home is not required to be licensed, but 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. The Department has also adopted rules establishing minimum standards governing the operation of early childhood facilities pursuant to N.D.C.C. ? 50-11.1-08.

In connection with these oversight responsibilities, the

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Department and the county social service board may investigate and inspect the conditions of any early childhood facility and the qualifications of early childhood services providers. N.D.C.C. ? 50-11.1-07(1),(2). N.D.C.C. ? 50-11.1-09 provides that:

The department may revoke the license of any early childhood facility, or the registration document of any in-home provider upon proper showing of any of the following:

1. Any of the applicable conditions set forth in section 50-11.1-04 as prerequisites for the issuance of the license no longer exist.
2. The licensee or registrant is no longer in compliance with the minimum standards prescribed by the department.
3. The license or registration document was issued upon fraudulent or untrue representation.
4. The licensee or registrant has violated any rules of the department.
5. The licensee or registrant has been guilty of an offense determined by the department to have a direct bearing upon a person's ability to serve the public as a licensee or registrant.
6. The licensee has been convicted of any offense and the department, acting pursuant to section 12.1-33-02.1, has determined that he has not been sufficiently rehabilitated.

See also N.D. Admin. Code ?? 75-03-08-05(1), 75-03-09-05(1), 75-03-10-05(2), 75-03-11-05(1).

Revocation of an early childhood service provider's license is not the only remedy authorized in N.D.C.C. ch. 50-11.1 for violating the provisions of that chapter or the Department's rules. N.D.C.C. ? 50-11.1-07.2 provides that:

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Whenever the county agency finds, upon inspection of an early childhood facility, that the facility is not in compliance with the provisions of [N.D.C.C. ch. 50-11.1], or the rules and regulations promulgated thereunder, a correction order must be issued to the facility. The correction order must cite the specific statute or regulation violated, state the factual basis of the violation, state the suggested method of correction, and specify the time allowed for correction.

The correction order must specify the amount of any fiscal sanction to be assessed if deficiencies are not corrected within the time specified by Department rules. Id. An early childhood facility is to be reinspected at the end of the period allowed for correction. N.D.C.C. ? 50-11.1-07.3. If a violation specified in the correction order has not been corrected, a notice of noncompliance must be mailed to the facility. Id. The notice must specify the assessment of fiscal sanctions established by Department rules. N.D.C.C. ? 50-11.1-07.4. An early childhood facility is to notify the county agency when corrections are made. N.D.C.C. ? 50-11.1-07.5. The facility is to be reinspected upon receipt of the notification and fiscal sanctions must be resumed if the corrections have not been made. Id. N.D.C.C. ?? 50-11.1-07.1 through 50-11.1-07.7, relating to correction orders and fiscal sanctions, provide a scheme to encourage compliance with state laws and rules governing early childhood service facilities.

You specifically ask whether these two remedies in N.D.C.C. ch. 50-11.1 are independent, or if a correction order must be issued before an early childhood service provider's license may be revoked.

While N.D.C.C. ? 50-11.1-07.2 provides that a county agency "must" issue a correction order if a facility is found not to be in compliance with statutes and rules pertaining to early childhood services facilities, it is my opinion that this language is directory rather than mandatory. Solen Public Dist. No. 3 v. Heisler, 381 N.W.2d 201 (N.D. 1986). The mandatory-directory dichotomy relates to whether the failure to perform a duty will invalidate later proceedings. Id. at 203.

Statutory provisions concerning the performance of duties by public officers within a specified time are generally construed to be directory so that the

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interests of private parties and the public will not be injured because of the delay. . . . That result is premised on grounds of policy and equity to avoid harsh, unfair, or absurd consequences when a mandatory construction may do great injury to a party not at fault."

Id. at 204. In order to protect all interests, a balancing test is used to determine whether prejudice to a party in allowing proceedings after a statutory time limit is outweighed by the interests of another party or the public. Id.

Where some antecedent action must be taken before proceeding, a statute directing the fulfillment of such action is mandatory. Application of Megan, 5 N.W.2d 729, 733 (S.D. 1942). Where no antecedent action is prescribed before proceeding, the statute is directory. Id. N.D.C.C. ? 50-11.1-09 specifically authorizes the Department to revoke a license or registration document upon a certain showing listed in that section. There is no suggestion in N.D.C.C. ch. 50-11.1 that issuance of a correction order is a condition precedent to revocation of a license or registration document. The only statutory condition precedent to commencement of a revocation proceeding is that "written charges as to the reasons therefore must be served upon the applicant, licensee, or registrant." N.D.C.C. ? 50-11.1-10. Thus, the requirements of N.D.C.C. ? 50-11.1-07.2 are directory rather than mandatory. Compare Fed. Land Bank of St. Paul v. Waltz, 423 N.W.2d 799, 802 (N.D. 1988) (concluding that the Legislature intended strict compliance with statutory provisions requiring certain language in a notice of foreclosure).

The use of the word "must" in N.D.C.C. ? 50-11.1-07.2 does create some confusion. "The word 'must' cannot be construed to impose or grant a merely directory or nonmandatory duty or right unless the context within which it is used clearly indicates that such was the intent of the Legislature." In re D.S., 263 N.W.2d 114, 119 (N.D. 1978). However, concluding that a license revocation proceeding can only be commenced after a correction order has been issued could result in unjust and absurd consequences. For example, it would be absurd to suggest that a licensee found guilty of molesting a child in the licensee's facility and placed on probation must be issued a correction order and allowed time to correct such deficiency and thus continue operation of the facility. See N.D. Admin. Code ?? 75-03-09-09(3)(g), 75-03-10-09(3)(j).

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Some deficiencies simply cannot be corrected.

In addition, the penalty in N.D.C.C. ch. 50-11.1 for noncompliance with a correction order is not license revocation, but the accrual of fiscal sanctions at a maximum of twenty-five dollars per day. N.D.C.C. ? 50-11.1-07.4. Thus, if "must" is mandatory, a license could never be revoked under N.D.C.C. ? 50-11.1-09. It is presumed that the Legislature intended the entire statute to be effective. N.D.C.C. ? 1-02-38. Therefore, taken in context, the term "must" as used in N.D.C.C. ? 50-11.1-07.2 is directory rather than mandatory.

Extrinsic aids such as legislative history may be used to interpret a statute "[i]f adherence to the strict letter of the statute would lead to an absurd or ludicrous result." County of Stutsman v. State Historical Soc., 371 N.W.2d 321, 325 (N.D. 1985); see also In re B.L., 301 N.W.2d 387, 390 (N.D. 1981). Legislative history is helpful in outlining the purpose of a statute, which is to be construed consistent with its purpose. Kallhoff v. N.D. Workers' Comp. Bureau, 484 N.W.2d 510, 512 (N.D. 1992). "In construing a statute, we consider the entire enactment of which it is a part and, to the extent possible, interpret the provision consistent with the intent and purpose of the entire Act." In re M.Z., 472 N.W.2d 222, 223 (N.D. 1991). The objects sought to be obtained, the statute's connection to other related statutes and the consequences of a particular construction may also be considered. Id. at 223. "Statutes must be construed logically so as not to produce an absurd result." Id.

The primary objective of N.D.C.C. ch. 50-11.1 is to protect children receiving early childhood services. A more narrow purpose of N.D.C.C. ? 50-11.1-07.2, according to its legislative history, is to provide a procedure for early childhood service providers to bring their facilities into compliance with state laws and rules. 1981 N.D. Sess. Laws ch. 491, ?? 12-18. The "philosophy behind fiscal sanctions" and the issuance of correction orders was to authorize an alternative remedy to revocation. Hearing on H. 1132 Before the House Comm. on Social Services and Veterans Affairs, 47th N.D. Leg. (Jan. 8, 1981) (written testimony of Shirley Dykshoorn). This additional remedy was not meant to supplant or eliminate license revocation when appropriate.

Ms. Dykshoorn observed that seeking criminal penalties for operating unlicensed day care facilities or closing a day care facility for violating statutes or rules does not address

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"care for the children" nor "problems of employed parents who must find care for their children." Id. "The alternative to letting bad [day care] centers operate would be to develop a tool to help make them into good centers. Fiscal sanction is that tool. A fiscal sanction would be a significant penalty, but would not force closing of the center." Id. As conceived, fiscal sanctions provide another mechanism to "ease the problems involved in the enforcement of the statutes." Id. Such sanctions encourage compliance with state laws or rules short of the drastic step of revoking a license.

In my opinion, N.D.C.C. ? 50-11.1-09 provides for the revocation of an early childhood facility license or registration document without regard to whether a correction order has been issued. Issuance of a correction order is not a prerequisite to revoking an early childhood facility license, but it is an alternative to bring early childhood facilities into compliance with state laws and rules without resort to license revocation and closure. Implied in the statutes authorizing correction orders is the authority of the Department to forego license revocation in favor of a less drastic remedy. The decision to pursue one or the other alternate remedies, or both, is left to the discretion of the Department.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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