

Opinion No. 59-131

August 28, 1959

BY: HILTON A. DICKSON, JR., Philip R. Ashby

TO: Mr. F. A. Brookshier Superintendent New Mexico Boys' School Springer, New Mexico

{*201} This is in response to former Superintendent Gardner's recent inquiry in which he requested our opinion regarding the following questions:

1. May you refuse to accept boys into the School beyond the number allowed by the State Department of Public Health in their license to you? The license presently calls for a capacity of 200 boys.
2. Under the present law, may boys be released from the Boys' School without the express, written consent of the committing court? May they be paroled without such consent? May they be placed outside the School under the supervision of the School without such consent?
3. Is there any other possible way that you may exercise a control over the School and stay within the limits of the physical plant and available funds?

We answer the questions as follows:

1. You cannot refuse to accept boys into the School if they are properly committed there by a court of competent jurisdiction even though the total number of boys exceeds the number allowed by the license issued by the Health Department.
2. You cannot release or parole boys from the School even if you maintain supervision over them without the express, written consent of the committing court.
3. The answer to this question will be explained later.

Section 42-4-1, N.M.S.A., 1953 Comp., provides that the New Mexico Industrial School for Boys (now known as the New Mexico Boys' School) shall be used for the detention, reformation and instruction of boys under 18 years of age who may be convicted of any offense less than murder or manslaughter or who may be adjudged as juvenile delinquents.

The sole jurisdiction over juveniles in the State of New Mexico has been vested in the juvenile court by virtue of Section 13-8-26. Such court may commit a juvenile boy to the School for the commission of any offense including a felony or may make such commitment pursuant to Section 13-8-53 of boys adjudged juvenile delinquents as provided by Sections 13-8-9 {*202} through 13-8-73. The statutes further provide that

the juvenile court may certify a criminal case from the juvenile court to any court having trial jurisdiction and although the statutes do not so specify it is our opinion that the trial court may commit the boy upon conviction to the School. Therefore, you are required to accept boys properly committed to the School, there being no provision in the statutes authorizing a refusal to accept such boys.

We realize that you have been granted a license by the New Mexico Department of Public Health pursuant to Section 12-1-3 (12), such license authorizing facilities for 200 boys. It is clear from the statute that the Department of Public Health has the power to prescribe reasonable rules and regulations relating to the setting and maintenance of standards relating to health, safety and humane treatment in public institutions. However, we are of the opinion that this power vested in the Department of Public Health cannot be so exercised as to limit the number of boys in the School when such boys have been properly committed by the juvenile court or other court after certification of a criminal case from the juvenile court. Any other result would be absurd, for once the court has determined that a boy must be committed to your institution, a refusal on your part to accept him would, in effect, abrogate the power of the court to make the commitment. To carry this reasoning even further, suppose that all other penal institutions of the State refuse to accept the boy for the same reasons, i.e., they also had reached their capacity as prescribed by Department of Public Health license, the boy simply could not be committed anywhere. In our opinion, the law was not intended to reach such a result, absent any statutory provision specifically allowing you to refuse to accept a boy even if committed.

In answer to your second question, it is our opinion that there is no authority for you to release a boy from the School unless he has completed his sentence, if committed upon conviction of a felony or other criminal offense, or until he is 21, if committed after having been adjudged a juvenile delinquent, without the consent of the committing court. Section 13-8-62 provides that a parole from the Boys' School by the Board of Trustees must be approved by the committing court after it is notified by the Board as to the proposed terms of the parole. Said section further states that a release from the School may be made only after the committing court has received a recommendation from the Board as to the advisability of such a release. This latter provision does not specifically state that the court must approve such recommendation in order for the release to become effective but in our opinion such approval is necessary because of the inherent jurisdiction retained by the court over the boy until he is 21, or until he has completed his sentence. As stated before, such jurisdiction is retained pursuant to Section 13-8-26. We might add that Section 13-8-62 provides that boys may be transferred from the New Mexico State Penitentiary to the Boys' School upon report from the warden of said penitentiary and order of the committing court. On the other hand, Sections 42-4-7 and 42-4-8 authorize a transfer of boys from the School to the proper authorities of reform or industrial schools in other states pursuant to contracts with such states providing for the imprisonment and care of such boys. Under Section 42-4-9, the committing court must be notified of such transfer.

In answer to your specific question as to whether boys may be placed outside the School under the School's supervision without the court's consent, it is our opinion that this, in effect, amounts to a parole and cannot be done without the express, written consent of the court.

Mr. Gardner in his third question asked whether there is any other control that may be exercised {*203} by the School and still stay within the limits of the physical plant and available funds. We cannot give any specific answer to this question, as its ramifications are too broad for any specific reply. You have, of course, inherent authority to carry out the policies of the Board of Trustees as to the internal management of the School. See Section 42-4-2.2. In addition to this, you are undoubtedly aware that both the 1957 and 1959 Session Laws authorize certain bond financing for construction of facilities at the School. Also, you may, if a true emergency exists, obtain further operating revenues from the emergency funds under control of the Board of Finance. However, we stress that these funds are strictly for emergency purposes and requests for their use must be completely justified.

Assistant Attorney General