Opinion No. 61-13

January 31, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Carl P. Dunifon, Assistant Attorney General

TO: Mr. Philip T. Manly, Attorney, New Mexico Legislative, Council, Capitol Building, Santa Fe, New Mexico

QUESTION

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May the State Board of Health acting under statutory powers require possession of a teacher's certificate or require employment of persons holding teachers' certificates in order to obtain a license for the operation of a private kindergarten?

CONCLUSION

No, see analysis.

OPINION

ANALYSIS

An examination of New Mexico Statutes discloses no statute referring to private kindergartens. So far as New Mexico Statutory law is concerned, our answer to your question could readily be a flat no. We choose, however, to interpret your question in the broader sense as regards the rule-making powers of the State Department of Public Health.

First, however, we are constrained to mention the fact that that we have no statute covering the operation of "private kindergartens". The only New Mexico Statute bearing upon the subject of kindergartens which we have found is Section 73-15-3, N.M.S.A., 1953 Compilation, reading as follows:

"Any school in a school district having four hundred [400], or more, pupils, in average daily attendance, shall have power to establish and maintain through their governing authorities, kindergartens for the instruction of resident children of the district between five [5] and six [6] years of age, the cost thereof to be included in the budget allowance of the district and paid from tax proceeds as other maintenance expenses are paid. The governing authorities may, at their discretion, establish and maintain such kindergarten. **The state board of education shall have the power to prescribe the course of training, study and discipline for said kindergartens. No person shall teach a kindergarten without a diploma from a reputable kindergarten teacher's institute**

or without passing an examination in kindergarten work prescribed by the state board of education." (Emphasis supplied)

This section governs the operation of "public kindergartens" as distinguished from "private kindergartens", which latter class is the subject of your inquiry.

Not so incidentally, we are advised that there are only two "public kindergartens" in the State of New Mexico, one at Los Alamos, the other at Holloman Air Force Base near Alamogordo.

While the State Board of Education is reported to have investigated and discussed the problem of supervision of private kindergartens, it is our information that to this date said Board has adopted no formal policy as to the regulation of private kindergartens.

Our legislature has not seen fit by the enactment of specific legislation to grant supervisory control of private kindergartens to any person, board or department.

We are advised that records of the State Health Department show that 96 kindergartens with a cumulative capacity of 2,526 pre-school age children are licensed currently.

Section 12-1-4, N.M.S.A., 1953 Compilation, reads in part, as follows:

"The state department shall be responsible for the administration of the public health activities of the state as hereinafter provided, and in that respect shall:

(1) Supervise the health of the people of the state.

(2) Investigate, control and abate the causes of diseases, especially epidemics, sources of mortality and effects of localities, employment and other conditions of public health.

* * *

(19) Establish, maintain and enforce such rules and regulations as may be necessary to carry out the intent of this act and to publish same."

Our New Mexico Supreme Court has decided no cases even remotely bearing upon the question at hand other than **Arnold v. Board of Barber Examiners,** 45 N.M. 57. Paragraph 15 of said decision reads in part as follows:

"The courts have recognized a wide latitude in the legislature to determine the necessity for protecting the peace, **health,** safety, morals and general welfare of the people. * * *" (Emphasis supplied)

In the absence of a specific statute and in the absence of cases decided by our Supreme Court, we are compelled to go elsewhere for the law bearing upon the subject

at hand, to-wit, to the encyclopedias and the decisions of the courts of other states of the Union. 25 Am. Jur., Sec. 3, page 287, reads:

"The preservation of the public health is one of the duties devolving on the state as a sovereign power. In fact, among all the objects sought to be secured by governmental laws, none is more important than the preservation of the public health; and an imperative obligation rests upon the state, through its proper instrumentalities or agencies, to take all necessary steps to promote this object. * * *"

Section 11, 25 Am. Jur., page 293, reads:

"The general rule is that boards of health and other health authorities have only such powers as are conferred upon them by statute, either expressly or by necessary implication. * * *"

Section 21, 25 Am. Jur., page 300, reads in part:

"* * * However, legislative authority in this field of the police power, the same as in any other, is fenced about on all sides by constitutional limitations. It cannot properly extend beyond such reasonable interferences as tend to preserve and promote the public health. * * * The test, when such regulations are called in question is, as previously indicated, whether they have **some relation** to the public health or public welfare, and whether such is, in fact, the end sought to be attained." (Emphasis supplied)

It has been impossible for the author of this opinion to find a case on all fours with the proposition presented by the request posed herein.

We are convinced that the crux of the instant proposition is whether or not the requirement of the State Board of Health is reasonable or unreasonable and if the requirement of teachers' certificates has some relation to the public health.

It cannot be doubted but that the Board promulgated the rule or requirement with the very best of intentions. It sought to regulate in an important sphere where no state department has been authorized to operate by legislative enactment.

While courts generally have upheld health regulations, even regulations of an extreme character as a matter of necessity, there is a point beyond which they will not go.

A number of cases setting forth the reasonable or unreasonable doctrine have been decided by the appellate courts of the various states.

To our mind, a recent (1953) case decided by the Supreme Court of the State of New Hampshire, **Richardson et al., v. Beattie, et al.,** 95 Atl. Rep. 2d 122, impresses us as being the outstanding judicial pronouncement on the subject of what is reasonable and what is not as applied to the question at hand.

We will quote at random but not verbatim from the **Richardson** case. Petition was for a declaratory judgment and a decree declaring null and void a regulation promulgated by the State Board of Health prohibiting all human activity on a part of Lake Massabesic known as Back Pond. Lake Massabesic is a great pond which is the water supply for the City of Manchester. It is divided into two ponds usually known as Front and Back Pond, which ponds are connected by a narrow channel. The whole pond or lake stores about 15,000,000,000 gallons of water. Since 1928, the water has been chlorinated prior to distribution.

Swimming has been prohibited in both ponds for many years. Boating and fishing was permitted and was practiced extensively in Front Pond where some 300 boats were sometimes kept. The plaintiffs were owners or lessees of shore property. Except for one short period during the last war, they had always enjoyed the privilege of boating and fishing on the pond as one of the principal attractions of ownership. A regulation was promulgated by the State Board of Health prohibiting all human activity including boating and fishing on the lake. The trial court found that the regulation was **unreasonable and void.** In paragraphs 3-5 of the Opinion of the Supreme Court, it was stated in substance that whether or not dangerous contamination existed or was threatened was a question of fact. Whether the regulations adopted were reasonable in **the light of the facts** was a question of law which the plaintiffs were entitled to have judicially determined. Individual rights should not be overridden without judicial review. In passing upon the reasonableness of legislation, of a statute, a municipal ordinance or a regulation promulgated under legislative authority, the court is required to balance the importance of the public benefit which is sought to be the restriction promoted against the seriousness of the restriction of private right sought to be imposed. If a **police measure** is directed to a public interest of minor concern, while imposing serious restrictions in regulation or law of guaranteed rights to accomplish the interest, it tends to show it is unreasonable. On the other hand, the **insistent the public need,** the more may private rights be restricted.

The appellate court determined in effect that the regulation was directed to a situation of no danger to the public health and concluded that the regulation of the State Board of Health was **unreasonable.**

In paragraphs 6, 7, the court further stated in substance that the prohibition of all human activity in Back Pond as a means of preventing contamination, at best only **remotely connected** with the activity prohibited, appears to us to be "clearly unreasonable". It cannot be doubted on the evidence that the private right of the owners of shore properties would be substantially restricted by the regulation.

Now, to return to the question of the authority of the New Mexico State Board of Health to require the possession of teachers' certificates, it is necessary in the absence of judicial determination for this office to assume the role of a court. It thus becomes our duty to decide what is reasonable or unreasonable. From a review of the authorities relative to the exercise of the police power and bearing in mind the limitations on the rulemaking authority of the State Health Department as set forth in Section 12-1-4,

N.M.S.A., 1953 Compilation, supra, it is our conclusion that the regulation in question has no relation to the activities of the Health Department in its area of responsibility. Thus, it is the opinion of this office that the New Mexico State Board of Health clearly exceeded its authority in its promulgation of a rule requiring possession of teachers' certificates in order to obtain a license for the operation of a private kindergarten.