

Opinion No. 62-05

January 15, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

TO: Dr. Stanley J. Leland, Director, New Mexico Department of Public Health, Santa Fe, New Mexico

QUESTION

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May the City of Albuquerque lawfully require immunization of a pre-school aged child as a prerequisite to admission to a child care center if the child has presented an immunization exemption certificate pursuant to Section 12-3-4.3, N.M.S.A., 1953 Compilation (P.S.)?

CONCLUSION

Not if the particular child care center is to be classified as a school.

OPINION

ANALYSIS

Section 13-3-4.1, N.M.S.A., 1953 Compilation (P.S.) provides:

"The state board of public health shall, after consultation with the state board of education, promulgate rules and regulations governing the immunization against diseases deemed to be dangerous to the public health, **to be required of children attending public, private or parochial schools in the state.**" (Emphasis added).

Section 12-3-4.2, N.M.S.A., 1953 Compilation (P.S.) provides that:

"It is unlawful for any student to attend school for longer than one month unless he has been immunized as required under the rules and regulations of the state board of public health."

Section 12-3-4.3, N.M.S.A., 1953 Compilation (P.S.) sets up an exemption procedure whereby immunization of certain children may be waived for specified physical or religious reasons.

The licensing ordinance of the City of Albuquerque relative to child care centers requires that each child be immunized against certain diseases as a prerequisite to

admission. The ordinance contains no immunization exemption provision. Another ordinance provision defines school as "any public school and that portion of any private school providing educational instruction for children who would otherwise be required by law to attend public schools."

Briefly the background facts as related to this office are as follows: one child care center in Albuquerque gives some educational instruction to pre-school age children. In addition, it also has classes for school age children and its educational program has been certified by the school board. Two pre-school age children have presented immunization exemption certificates to this child care facility.

Whether these exemption certificates can or must be honored and admission granted to these two children depends upon whether this particular child care center is to be categorized as a school. If so, the state statutes providing for an immunization exemption procedure are controlling.

While ordinarily a day nursery or child care center would not be classified as a school, under the fact situation here presented that portion of the particular private child care center here under consideration, which provides educational instruction for children who would otherwise be required by law to attend public schools, must be so classified. Under the definition of school contained in the ordinance it is the actual method of operation, i.e., educational instruction for school age children, rather than the age of the children with immunization certificates that is the determinative factor.

It is true that a municipal corporation may generally exercise the police power concurrently with the State. **Mitchell v. City of Roswell**, 45 N.M. 92, 111 P.2d 41. It may supplement and go beyond a state statute or cover any part of an authorized field of local legislation that is not covered by state legislation. **State ex rel., Sutton v. Caldwell**, 195 La. 507, 197 So. 214; **Fox v. City of Racine**, 225 Wis. 542, 275 N.W. 513, **Aliotta v. City of Chicago**, 389 Ill. 418, 59 N.E. 2d 829. However, a city ordinance cannot forbid that which a state statute expressly permits. **City of Harlan v. Scott**, 290 Ky. 585, 162 S.W. 2d 8; **People v. McDaniel**, 303 Mich. 90, 5 N.W. 2d 667; **Murphy v. Wright**, Tex. Civ. App., 115 S.W. 2d 448; **Stary v. City of Brooklyn**, 162 Ohio St. 120, 121 N.E. 2d 11. Consequently, the state statute relative to exemption from immunization is controlling as to children attending public, private or parochial schools. And since it appears that the child care center here involved falls within the definition of school as contained in the ordinance, the state statute relative to exemption from immunization is applicable.