

**OPINION
75-69**

September 26, 1975 (OPINION)

Mr. John A. Zuger
City Attorney
P.O. Box 1695
Bismarck, ND 58501

RE: Application of Chapter 18-12
to Private Kindergartens

Dear Mr. Zuger:

This is in reply to your letter of September 17, 1975, in which you set forth the following facts and questions:

"In the City of Bismarck, the Board of Education has not operated and maintained kindergartens as part of the public school operation, as authorized or permitted by Chapter 15-45 N.D.C.C.

"Individual persons have operated kindergartens on a private tuition basis open to the public. These private kindergartens have been operated in church school buildings in which the private operator has paid for janitorial and utility and other services.

"The schools as stated, although conducted in either church buildings or church school buildings, are open to the public and there is no limitation as to religious faith or denomination.

"The city officials of Bismarck have interpreted the Chapter 18-12 to apply in its requirements to these private schools as educational institutions which the students attend in lieu of a public school attendance furnished by the Board of Education within the meaning of Section 18-12-02.

"The contention has been raised by private operators and by the church persons who are renting out the facilities for such use, that Chapter 18-12 does not apply to this situation.

"Your opinion on the application of Chapter 18-12 to such private kindergartens under the stated facts is requested."

We note that the question presented to us is necessarily a bare legal question and we do not purport to advise as to whether the existent fire code set forth in Chapter 18-12 of the N.D.C.C. should or should not apply to the situation outlined in your letter as a safety precaution. In addition we note that while those school buildings governed by Chapter 18-12 must meet the requirement set forth therein, the city has the authority to adopt standards in addition to those provided by Chapter 18-12. See, e.g., Section 40-04-01(35) and 40-04-02(7) of the N.D.C.C.

With respect to the legal question presented, Section 18-12-01 of the N.D.C.C. provides:

"APPLICATION. The provisions of this chapter shall apply to the construction of all new school buildings, additions thereto, and remodeling of school buildings, both public and private, at either the elementary or secondary level and shall further apply to all instructional areas of all institutions of higher education."

Section 18-12-02 of the N.D.C.C. provides:

"DEFINITIONS. A public school building shall be defined as a building used wholly or in part as an instructional or recreational facility by students. A private school is defined as an educational institution which students attend in lieu of public school attendance."

Section 18-12-03 of the N.D.C.C. provides that plans and specifications for all private schools are to be submitted directly to the state fire marshal for approval.

We do not believe the kindergartens and nursery schools which are private can be said to be "educational institutions which students attend in lieu of public school attendance", particularly in those instances in which the school district in which such private kindergartens are established has not established public kindergartens pursuant to Chapter 15-45 of the N.D.C.C.

Children are ordinarily considered to be attending a private school in lieu of a public school pursuant to Section 15-34.1-03 of the N.D.C.C., the compulsory school attendance law, which permits children in attendance in a parochial or private school approved by the county superintendent of schools and the Superintendent of Public Instruction to be excused from attendance at the public schools if the child is seven years of age. In fact, of course, attendance at kindergarten is not required even in those districts which have established public kindergartens. We find it hard to conclude that a child is attending a private school in lieu of a public school when the public school does not offer the program which the child is attending at the private school. Were we to conclude that this chapter applied to kindergartens we obviously could not conclude it would apply to the nursery schools since nursery schools are not mentioned in the statutes and a child attending a nursery school could not be said to be attending a private school in lieu of a public nursery school. While the statutes do provide for the establishment of public kindergartens, attendance therein is not, as noted above, mandatory, nor has the Legislature attempted to regulate the operation of private kindergartens from the educational standpoint, in the same manner as it has regulated the private elementary and secondary schools. As an example, House Bill 1483 indefinitely postponed by the 1975 Legislature, would have prohibited the use of the term "kindergarten" by persons offering private preschool programs unless the teachers meet minimum requirements for public school kindergarten teachers. On the other hand, the state requires that teachers in private elementary and secondary schools be

legally certificated. See Section 15-34.1-03(1) of the N.D.C.C., as amended.

As noted above, we have considered herein only the bare legal question presented. From the practical standpoint, it would appear to make little difference as to legal definitions, if the children are involved in a setting that is comparable to that of a private or public school. However we are bound by the legal definitions and cannot substitute our judgment as to the practicality of the situation for that of the Legislature.

In summary, it is our opinion that Chapter 18-12 of the N.D.C.C. does not apply to private kindergartens in those instances in which the state does not require attendance at kindergarten and in which the school district in which private kindergartens are located has not established a public school kindergarten system, unless the city governing body, by ordinance, adopts those provisions for such private kindergartens.

Sincerely,

ALLEN I. OLSON

Attorney General