OPINION
53-13

April 22, 1953 (OPINION)

CHILDREN'S HOMES

RE: Registration for Temporary Use

This is in reply to your letter of April 14, 1953. You state that the Indian Bureau is about to close all their high schools and that among these schools is the Elbowoods High School with ninety students. You state that these students and other future students who would have attended there will be sent in part to Indian schools, but about forty-five will have to arrange to attend regular high schools in such communities as New Town, Garrison, Hazen and Stanton.

You state that these students will have to arrange to secure board and room at the homes of private citizens in these communities while attending school. You ask if such homes must then secure licenses under the provisions of section 50-1101 of the North Dakota Revised Code of 1943, which provides as follows:

> "CHILDREN'S HOME; LICENSE REQUIRED. Any person, partnership, voluntary association, or corporation owning or operating a home or institution receiving for day nursery or full time care or otherwise, during the calendar year, one or more children under the age of eighteen years shall procure annually from the division of child welfare of the public welfare board a license so to do. The provisions of this section shall not apply when the children received by such person are related to him by blood or marriage, nor shall it apply to any home or institution under the management and control of the state."

It is our opinion that such a private home owner does not need to secure such a license. The law says "for day nursery, full time care or otherwise." It clearly is not an instance of "day nursery service or full time care." What did the Legislature then mean by "otherwise", which is the third category of care services mentioned? We do not believe it intended to cover such isolated individual cases as these. In order to require a license, it is our opinion that the home must engage in a continuous series of acts or course of conduct, which constitute doing business as a home providing care for one or more children. It is a well-settled rule of law that isolated or single instances of performing a certain function do not constitute the doer as a member of a trade, or a person carrying on a certain kind of business.

The moment, of course, that the Child Welfare Division of the Public Welfare Board concludes that a certain private home owner is in fact engaging in the business of providing home care for children, the provisions of chapter 50-11 would be applicable and enforceable.

You also cite a case where rural parents, rather than the students themselves, arrange for a boarding and rooming place for a child attending high school away from home. The same rule outlined above

would apply. The test would be whether or not it is a regular course of conduct and a case of doing business by the home owner in question.

In further response to your subsequent questions:

In a case where a home owner caused himself to be listed formally or in any informal fashion with an interested agency as a person supplying board and room for minor children, then clearly he would be required to comply with the licensing and other provisions of chapter 50-11, inasmuch as he is placing himself in the category of one doing business in this field. If, however, the agency in question simply selected a private home owner and asked him to undertake this one particular instance of child care, at their instigation, then he would not be subject to being licensed.

In a case where the high school students themselves made arrangements to rent rooms and do their own cooking and housekeeping, which you cite, then the landlord would not be subject to the provisions of chapter 50-11 or required to get the license therein provided. He, in such case, is providing no car whatsoever and not receiving the students into his home. He is merely acting as landlord in the legal relationship of landlord and tenant.

In the case of a working mother who places children with friends or neighbors during working hours, such friend or neighbor is not subject to the provisions of chapter 50-11 unless he or she, by reason of other activities and acts, meets the test previously stated of being a person regularly engaged in the business of providing child care. It is further believed the Legislature intended to exclude such instances of part-time care when it specified the category of "full-time care" in this statute.

The socially desirable motives underlying this licensing and regulatory legislation embodied in chapter 50-11 are well known. It is believed, however, that this chapter was not intended to apply in those cases which we have answered negatively above, for the reason that such extended application of the statute to individual and isolated or casual instances, could ultimately lead to absurd and unworkable attempts to regulate things which are in fact merely casual and personal relationships not affecting society as a whole. As to any person whose acts and course of conduct clearly indicates he or she is in the business of furnishing "day nursery, full time care or otherwise" in whatever degree, however limited, then chapter 50-11 should be most strictly enforced.

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