

**OPINION NO. 70-116****Syllabus:**

1. A facility which is primarily intended to provide recreational opportunities, such as a preschool program operated by a municipality falls within the scope of Chapter 5104 of the Revised Code.
2. There is no basis for exempting operations of a city because of home-rule provisions for charter cities.
3. Prekindergarten programs, such as Headstart, are subject to being licensed as child day-care centers, whether located in or outside a school building.
4. Baby-sitting services provided by some recreational centers such as bowling alleys and YWCA's for children while their parent or parents are present and using the facilities of the center, do not require licensing.
5. A license fee established by Section 5104.03, Revised Code, applies to each individual center and a single fee cannot be accepted from a single organization which operates more than one center.

6. Preschool kindergarten programs financed under Title I of the National Education Act are required to be licensed as child day-care centers even though the programs are located in school buildings.

7. Nursery schools operated by colleges and vocational schools to give training to students enrolled are required to be licensed as child day-care centers.

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To: Denver L. White, Director, Dept. of Public Welfare, Columbus, Ohio  
By: Paul W. Brown, Attorney General, September 1, 1970

I have your request for my opinion which reads as follows:

"Chapter 5104 of the Revised Code provides for licensing of child day-care centers by the Department of Public Welfare. Some facilities which are taking care of children during part of the day are questioning whether their operations fall within the provisions of the statute. We are requesting your opinion on the following situations:

"(1) Does a facility which is primarily intended to provide recreational opportunities come within the scope of the law? An example of this is a preschool program operated by the Recreation Department [of a municipality], half days for preschool children.

"(2) Is there any basis for exempting operations of a city from the licensing requirement? An assistant city attorney has contended that programs within the city were not subject to licensing because of the home rule provisions for charter cities.

"(3) Are prekindergarten programs such as Headstart, which are operated by boards of education subject to licensing? Does it matter whether they are located in a school building or outside a school building?

"(4) Baby-sitting services are provided by some recreational centers such as bowling alleys, YWCA's, etc. for children while their mothers are using the facilities of the center. Do these facilities require licensing?

"We would also ask your opinion on one other question which is raised from time to time. This is in connection with the fee established by Section 5104.03. Are we correct in assuming that the fee applies to each in-

dividual center and that there is no basis on which we could accept a single fee from an organization which operates more than one place? For example, the Board of Education [of a municipality], operates forty-five Headstart programs."

Also a second request:

"(1) Many city schools in Ohio operate preschool kindergarten programs which are financed under Title I of the National Education Act. Funds are allocated by the State Department of Education and the programs are supervised by that department. The programs are located in school buildings. Licensing these facilities would create many problems and we are anxious to know whether they fall within the purview of Chapter 5104 or not.

"(2) Nursery schools are operated by several colleges and vocational schools to serve as a place in which to give training to students enrolled in the educational program. Is there any basis for exempting these facilities from the purview of Chapter 5104?"

Section 5104.01, Revised Code, is the definition section of Chapter 5104, Revised Code, and reads in pertinent part as follows:

"As used in Chapter 5104. of the Revised Code:

"(A) 'Child day-care' means administering to the needs of infants, pre-school children, and school-age children outside of school hours by persons other than their parents for any part of the twenty-four hour day, for part or all of at least two consecutive weeks, but does not include the care of children in places of worship during religious services.

"(B) 'Child day-care center' means any place in which child day-care is provided for five or more infants, pre-school children, or school-age children outside of school hours in average daily attendance, other than the children of the owner or administrator of the center, with or without compensation."

I am assuming that the schools or agencies described in your question have five or more children in average daily attendance, other than the children of the owner or administrator, and that they operate for a part of the twenty-four hour day for part or all of at least two consecutive weeks.

As a matter of first concern, it appears that the legislature intended that the person or agency who operates a child day-care center should be licensed by the director of public welfare, whether such person or agency be private or public.

Section 5104.03, Revised Code, as amended, effective June 12, 1970, reads in part as follows:

"A municipal corporation which owns and operates a child day-care center or which makes application for license prior to the establishment of a municipally owned and operated center is excepted from the requirement for payment of a license fee under this section.

" \* \* \* \* \* \* \* \* "

It thus appears that while a municipally owned and operated child day-care center may be excepted from the requirement of payment of the license fee, it must nevertheless be licensed.

In addition, Section 5104.07, Revised Code, provides that the director of public welfare may prescribe additional requirements for licensing tax supported or community supported day-care centers. It is thus obvious that the fact that the owner and operator of a day-care center is a public or tax supported agency does not exempt the day-care center from the requirements of being licensed. Based upon the above quoted definitional language under Section 5104.01, supra, I must conclude that the legislature did intend that a facility which is primarily intended to provide recreational opportunities for preschool children, such as would be contained in a preschool program operated by a municipality, be included within the meaning of "child day-care center" and therefore subject to being licensed.

The position that programs within a municipality are exempt from licensing because of home-rule provisions for charter cities is not well taken. Chapter 5104, supra, requiring licenses for child day-care centers, is a general law and an exercise of the police power of the state of Ohio and as such may not be controverted by any municipality. Niehaus v. State, 111 Ohio St. 47 (1924); Bucyrus v. State Dept. of Health, 120 Ohio St. 426 (1929).

Prekindergarten programs fall directly within the purview of the definition of child day-care centers under the language set out in Section 5104.01, supra, first above quoted, and the fact that they are operated by a board of education does not exempt them from the requirement of being licensed.

In the case of baby-sitting services provided by recreational centers such as bowling alleys and YWCA's, if it were established as fact that at least one of the parents was present at the facility at all times while the child was being cared for in the baby-sitting service at the same facility, I do not feel

that the element of parental control would be sufficiently removed to constitute a care of the child by persons other than the parents to bring such services within the definition of "child day-care" as provided in Section 5104.01, supra.

With respect to the fee established by Section 5104.03, supra, you are correct in assuming that the fee applies to each individual center. There is no basis upon which you could accept a single fee from an organization which operates more than one center.

Section 5104.03, supra, provides in part as follows:

"Every person, firm, organization, corporation, or agency operating a child day-care center on January 1, 1970 and after such date any person, firm, organization, corporation, or agency desiring to establish a child day-care center shall apply for a license to the director of public welfare on such form as the director prescribes. \* \* \* A fee of one hundred dollars shall be paid at the time of application for a license to operate a child day-care center having both morning and afternoon programs and an average daily attendance of thirty or more and a fee of fifty dollars shall be paid at the time of application for a license to operate any other child day-care center.  
\* \* \*"

You cite the case of preschool kindergartens financed under Title I of the National Education Act and supervised by the State Department of Education. The fact that this form of child day-care center is supervised by a public authority does not serve to exempt it from being licensed. The further fact that these programs are located in school buildings does not exempt them from the requirement of a license.

Based upon the first above quoted language from Section 5104.01, supra, there is no basis for exempting nursery schools operated by colleges or vocational schools to give training to students from licensing requirements of Chapter 5104, supra.

I am, therefore, of the opinion and you are so advised:

1. A facility which is primarily intended to provide recreational opportunities, such as a preschool program operated by a municipality falls within the scope of Chapter 5104 of the Revised Code.

2. There is no basis for exempting operations of a city because of home-rule provisions for charter cities.

3. Prekindergarten programs, such as Headstart, are subject to being licensed as child day-care centers, whether located in or outside a school building.

4. Baby-sitting services provided by some recreational centers such as bowling alleys and YWCA's for children while their parent or parents are present and using the facilities of the center, do not require licensing.

5. A license fee established by Section 5104.03, Revised Code, applies to each individual center and a single fee cannot be accepted from a single organization which operates more than one center.

6. Preschool kindergarten programs financed under Title I of the National Education Act are required to be licensed as child day-care centers even though the programs are located in school buildings.

7. Nursery schools operated by colleges and vocational schools to give training to students enrolled are required to be licensed as child day-care centers.