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ATTORNEY GENERAL OPINION NO. 82- 2

The Honorable Ardena Matlack
State Representative, Ninety-Third District
615 Elaine Avenue
Clearwater, Kansas 67026

Re: " Public Health--Homes for Children--Licensure of
Boarding Homes for Children

Synopsis: Although a "pre-school," commonly understood to be a place where preschool-age children are involved in educational activities appropriate for their age, is neither defined by nor specifically made subject to the jurisdiction of the Secretary of Health and Environment by pertinent statutes and regulations, a pre-school is subject to regulation by the Secretary. Depending on the number and the age of children cared for, a pre-school may be regulated as either a "boarding home for children" or a "family day care home," which terms are defined by K.S.A. 65-503(a) and 65-517(a), respectively. Moreover, if a pre-school is a boarding home for children, the Secretary has the authority to regulate the pre-school as a "day care center," as that term is defined in K.A.R. 1980 Supp. 28-4-200(a). Cited herein: K.S.A. 65-501, 65-503, 65-517, 65-519 and 65-521; and K.A.R. 1980 Supp. 28-4-200.

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Dear Representative Matlack:

You inquire whether the Secretary of Health and Environment possesses the authority to regulate "pre-schools," and, if such

authority exists, whether the Secretary must provide separate regulations for "child care centers" and "pre-schools." In addition, you inquire whether "pre-schools" come within the statutory definition of "boarding home for children" or "family day care home."

Your inquiries concern the provisions of K.S.A. 65-501 to 65-516, inclusive, which relate to maternity hospitals or homes, and boarding homes for children, and the provisions of K.S.A. 65-517 to 65-522, inclusive, which concern family day care homes. In K.S.A. 65-503(a)(2), the term "boarding home for children" is defined. Under this statutory definition, such a home includes "a children's home, orphanage or any day nursery or other institution of a type determined by the secretary to require regulation under the provisions of this act." (Emphasis added.) Under subsection (b) of K.S.A. 65-503, the legislature has expressly declared that the term "boarding home for children" shall not include a "family day care home" as defined in K.S.A. 65-517. In 65-517(a), the term "family day care home" is defined to mean

"a place maintained for the purpose of providing children with food or lodging, or both, away from such children's home or homes, for less than twenty-four hours a day, if

"(1) Not more than six of the children cared for at such place are less than sixteen years of age; and

"(2) not more than three of the children cared for at such place are less than eighteen months of age."

Neither the term "child care center" nor the term "pre-school" is defined in K.S.A. 65-501 to 65-522, inclusive. However, these terms are defined in K.A.R. 1980 Supp. 28-4-200, which regulation was promulgated by the Secretary of Health and Environment, with the cooperation of the Secretary of Social and Rehabilitation Services, under the authority of K.S.A. 65-508. In that administrative regulation, the term "child care center" is defined to mean

"a day nursery providing care for seven (7) or more children, for part or all of a day or night, away from the home of the parent or legal guardian; and includes full day child care, nursery schools, play groups, head start, [sic] centers giving

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emphasis to programming for special children, kindergartens not operated by the public schools, and other establishments offering care to groups of children for part or all of the day or night. Centers for infants and toddlers or for handicapped children may have fewer than seven (7) children but be licensed as a center because the program meets child care center regulations."
(Emphasis added.) K.A.R. 28-4-200(a).

The term "pre-school" is defined in subsection (h) of this regulation to mean children two and one-half to six years of age. However, this definition obviously circumscribes an age group of children, but does not define a place at which "preschool-age" children are involved in educational activities appropriate for their age. In fact, if such a place is operated or maintained, and seven or more children are enrolled at such place, the Secretary classifies said place as a "child care center," under the definition of that term in subsection (a) of K.A.R. 1980 Supp. 28-4-200, quoted above.

The inclusion of such a place in the definition of "child care center" is not prohibited by statute. To the contrary, such inclusion is consistent with the provisions of subsection (b) of K.S.A. 65-503, and the definition of "family day care home" provided in K.S.A. 65-517. As previously noted, such a home is a place where not more than six of the children cared for are less than sixteen years of age. Thus, if seven or more children cared for at a place are less than sixteen years of age, the place is not a family day care home.

With the foregoing statutory and regulatory provisions in mind, we turn to a resolution of your specific inquiries. You have asked whether a "pre-school" is within the statutory definition of "boarding home for children" or "family day care home." By use of the term "pre-school," we assume you mean a place at which preschool-age children are involved in educational activities appropriate for their age. Based on this assumption, we believe such a place may be either a "boarding home for children" or a "family day care home," depending on the number of children "cared for." If the criteria set forth in K.S.A. 65-517(a), relating to the number and age of children, are met, then the place would be a family day care home. If those criteria are not met, such a place would be a boarding home for children under the provisions of K.S.A. 65-503(a)(2) and K.A.R. 1980 Supp. 28-4-200(a).

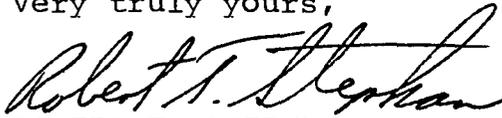
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Regardless of whether a pre-school is a family day care home or a boarding home for children, the Secretary of Health and Environment has the authority to "regulate" the pre-school. However, if the pre-school is a family day care home, the Secretary's authority is restricted to granting a certificate of registration and, thereafter, revoking said certificate or refusing to renew the certificate. See K.S.A. 65-519 and 65-521.

If, on the other hand, the pre-school is a boarding home for children, the Secretary, under K.S.A. 65-508, has the authority to adopt rules and regulations concerning the operation and maintenance of the pre-school, and the licensure of the person operating the same.

Finally, due to the extremely broad grants of authority to the Secretary of Health and Environment under both K.S.A. 65-503 and 65-508, we can discern no statutory prohibition which precludes the Secretary from classifying a pre-school as a day care center, and subjecting the pre-school to the same requirements as those imposed upon other boarding homes for children which come within the definition of "day care center" prescribed in K.A.R. 1980 Supp. 28-4-200(a).

Very truly yours,



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