

area to a future judicial determination which could be contrary to the intentions of your Commission. Therefore, as a matter of policy, you may desire to propose the deletion of such reference at the same time at which you propose the new article.

For your information, the following is a list of other provisions of the present Constitution which you may wish to examine before presenting your proposed resolution, although they do not necessarily conflict with the proposed article:

Art. 2, § 14 (General Assembly may provide by law for election of all judges at election for such officers only) ;

Art. 4, § 22 (prohibits special laws providing for changing venue in civil and criminal cases, summoning and empaneling grand and petit juries and providing for their compensation) ;

Art. 4, § 23 (requires general laws in cases enumerated in § 22 of Art. 4) ;

Art. 5, § 16 (Governor to fill vacancy in office of judge of any court by appointment to expire when a successor shall be elected and qualified) ;

Art. 6, § 7 (manner of removal from office of all "state officers").

OFFICIAL OPINION NO. 50

December 30, 1966

PUBLIC WELFARE—Day Nurseries—Bona Fide Educational Institutions—Licensing by Department of Day Nurseries.

Opinion Requested by Mr. Albert Kelly, Administrator, Department of Public Welfare.

Your recent letter requesting an Official Opinion reads as follows:

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“Section 1 of Chapter 185 of the Acts of 1945, the same being Burns 42-1305, provides the authority for the State Department of Public Welfare to license day nurseries.

Section 3, Chapter 185, Acts of 1945, the same being Burns 42-1307, defines a day nursery ‘as any institution operated for the purpose of providing care and maintenance to children separated from their parents or guardian or a person in loco parentis during a part of the day for two or more consecutive weeks excepting a school or other bona fide educational institution.’ This department desires your official opinion regarding the definition of what is a school or other bona fide educational institution?”

Generally a “school” has been defined in Indiana as follows:

“The word ‘school’ is a generic term, denoting an institution or place for instruction or education, or the collective body of instructors and pupils in any such place or institution. In the ordinary acceptation of its meaning, a school is a place where instruction is imparted to the young. It is an institution of learning of a lower grade, below a college or a university; a place of primary instruction. The term generally refers to the common or public schools, maintained at the expense of the public.”

11 I.L.E., *Education*, § 1, p. 74, citing *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E. 2d 256 (1940); *State v. Peterman*, 32 Ind. App. 665, 70 N.E. 550 (1904); *Black, Law Dictionary* (4th ed. 1951).

In the case of *Lakeside Day Care Center v. Board of Adjustment*, 121 So. 2d 335, 340 (La., 1960) it was necessary to differentiate between a school, a nursery school or prekindergarten school, and a day care center in order to apply in ordinance. The Court of Appeal of Louisiana at page 339 states the following:

“However, we are of the opinion that the Board of Adjustment has properly concluded that a ‘day care

center' is not the same as a 'nursery school' or 'pre-kindergarten school.' The primary purpose of a day care center is not education but instead the all day care of children of working mothers. To qualify under the terms of the Baton Rouge Zoning Ordinances for 'A-1' districts, the appellants would have to change their operation from one set up primarily to give all day care to children, to one set up primarily for the education of children."

The foregoing Louisiana case is cited because it is in harmony with the Indiana definition which asserts in essence that a school is primarily a place where children are taught and instructed by teachers, as contrasted to a place or "institution operated for the purpose of providing care and maintenance to children" as defined by the 1945 Act quoted in your question.

Acts 1945, ch. 185, § 12, as found in Burns IND. STAT. ANN., § 42-1316, provides that "the state department of public welfare shall be responsible for the development of adequate standards of child care, and . . . shall make, prescribe and publish such rules and regulations governing child welfare agencies and boarding-homes, consistent with the provisions of" the Act. Accordingly, the Department of Public Welfare may prescribe and adopt rules and regulations as guidelines to assist in the administration of this Act for the licensing of boarding-homes for children, day nurseries, child-caring institutions, children's homes and child-placing agencies.

It would seem to me that the problem confronting the Department of Public Welfare is one requiring its investigative resources in each case to ascertain that the "day nursery" sought to be licensed comes within the definition prescribed by the Act as an "institution operated for the purpose of providing care and maintenance to children separated from their parents or guardian or a person in loco parentis during a part of the day for two (2) or more consecutive weeks" and that the facility is not "a school or other bona fide educational institution" established primarily for instructional purposes.

The background material accompanying your inquiry indicates that many people "are calling their facilities 'kinder-

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gartens,' and as a result a rather substantial number of such institutions—are avoiding the purpose of the law." Such situations necessitate a careful analysis of the facts in each case and if the facts show the prime purpose of the institution to be the providing of care and maintenance to children rather than instruction, then licensing of the facility should be required in accordance with Acts 1945, ch. 185.

A "bona fide educational institution" should present little or no problem to the department inasmuch as the phrase implies an educational institution established in good faith. From the foregoing discussion such institution must be one established primarily for learning and instruction as contrasted to one intended simply for the care of children. Again, whether an establishment is a "bona fide educational institution" will depend upon the facts ascertained by your investigation and the application of the same standards and characteristics used for determining the existence of a "school."

OFFICIAL OPINION NO. 51

December 30, 1966

STATE HIGHWAY COMMISSION—REAL PROPERTY— So-Called "Utility Easements" as Licenses— Compensation to Utility in Eminent Domain Proceeding.

Opinion Requested by Mr. M. L. Hayes, Executive Director,
Indiana State Highway Commission.

This is in reply to your recent letter requesting an Opinion on whether a meter request form signed by a customer of a utility, which allows placement of equipment on the customer's property, constitutes a right or interest in land for the utility.

Your letter states that the request form includes the following statements: