Opinion No. 60-221

December 8, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Marshall S. Hester Superintendent New Mexico School for the Deaf 1060 Cerrillos Road Santa Fe, New Mexico

QUESTION

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Whether the members of the Board of Regents of the New Mexico School for the Deaf are personally liable for permitting boys and girls who are wards of the School, over the age of 16 years, to take minor excursions around Santa Fe without an escort from the School?

CONCLUSION

See analysis.

OPINION

*{*642}* **ANALYSIS**

The personal liability of the members of the Board in such an instance depends a great deal upon the facts in each situation. Section 13-3-1, N.M.S.A., 1953 Compilation, provides that the management and control of the School shall be vested in a Board of five trustees who shall constitute a body corporate with the right of suing and being sued, etc., and of causing all things to be done necessary to carry out the provisions of Article 3 of the Public Welfare Act. Under Section 13-3-2, N.M.S.A., 1953 Compilation, the Board may pass and enforce by-laws, rules and regulations for the government of the institution for the purpose of carrying out its objects or things necessary for its proper conduct and care, and the support and protection of the inmates when necessary.

In Attorney General Opinion No. 57-161 (Report of the Attorney General, 1957-58, p. 232), it was held that there was no liability on the part of the State for malpractice within the Miners' Hospital (the government of the Miners' Hospital is also controlled by Section 13-3-1, N.M.S.A., 1953 Compilation) by attending physician even where the injured party was a "paying patient". 49 Am. Jur. 289 is cited as authority as is **Vigil v. Penitentiary of New Mexico,** 52 N.M. 224, 195 P. 2d 1014. In the **Vigil** case, the court held that a suit against the institution itself was, in fact, a suit against the State and the statutory language "to sue and be sued" as applied to the penitentiary did not include

the right to sue the institution in a tort case. Comparably, there would be no liability for negligence on the part of the School.

This office held in Attorney General Opinion No. 4803 (Report of the Attorney General 1945-1946, p. 144) that the Board in discharging its duties to care for children in its custody could provide for a tonsillectomy for one of its wards, holding the Board vested with authority to provide food, clothing, quarters, medical attention and such other care as might be necessary to the well-being of the child.

Hence, in the promulgation of regulations, etc., members of the Board cannot be held individually liable for accidents resulting from an implementation of such regulations. 7 C.J.S., **Asylums,** § 9, p. 151.

However, should the members of the Board take it upon themselves to make individual determinations as to whether wards may take excursions and be found negligent in the making of such determinations, it is possible that they could be held personally liable, as officers of public institutions can be held liable for ministerial acts negligently done or done in excess of authority. **Idem.** Of course, employees of such institutions may be personally liable for negligence or malicious acts done with relation to inmates or wards, **idem,** and see **Johnson v. Hamilton County,** (S.C., Tenn.) 1 S.W. 2d 528, 529.

Therefore, while the members of the Board and the institution cannot be held liable for negligence in the promulgation of rules and regulations and ensuing misfortunes and accidents, if they make negligent or malicious determinations in individual cases and accidents result which are the sole, direct and proximate results of such determinations, it is possible that they may be held personally liable. The circumstances of each case will be the basis for ascertaining whether there has been negligence.

By: Mark C. Reno

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