October 23, 2006 Children, Youth and Families Department Regulations

Honorable Terry Marquardt
New Mexico House of Representatives
903 New York Avenue
Alamogordo, New Mexico 88310

RE: **Request for Opinion--Children, Youth and Families Department Regulations**

Dear Representative Marquardt:

You requested our advice on whether certain Children, Youth and Families Department ("Department" or "CYFD") regulations relating to licensing of pre-school childcare centers violate the United States Constitution or exceed the Department's scope of authority. The regulations in question are 8.16.2.21.B, 8.16.2.6, and 8.15.2.15 NMAC. These regulations deal with childcare centers and the provision for a minimum level of service regarding the health, safety, and well-being of children. Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us, we conclude that these regulations do not raise a constitutional issue or exceed the Department's authority.

The Department Secretary is given broad discretion and authority to "make and adopt such reasonable and procedural rules and regulations as may be necessary to carry out the duties of the department and its divisions." NMSA 1978, § 9-2A-7(D) (1993). This includes the authority to establish criteria for curriculum statements or minimum requirements for childcare centers. See NMSA 1978, §§ 24-1-3 (I) (2001) and 24-1-5 (2005) ("Public Health Act"). The statutory grant of authority in this case is plain and unambiguous and therefore there is no need for statutory construction. See State v. McHorse, 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973).

Pursuant to this grant of authority, the Department Secretary has enacted regulation 8.16.2.21.B NMAC, which states, "All licensed centers must have a curriculum statement which includes play as the primary mode of learning." Your letter expressed concern that the Department may be violating the First Amendment of the United States Constitution by requiring private church schools to adopt a curriculum statement that allows "play" as the primary mode of learning. This issue, however, is not ripe for review. The Department has noticed in the New Mexico Register a revision of the above regulation, whereby the phrase "play as the primary mode of learning", is removed in its entirety. 8.16.2.21(B) NMAC. When this revision becomes effective, a mission statement will be required, but no specific elements will be required.

Regulation 8.16.2.6 NMAC uses the phrase "to protect the health, safety, and development of the children." Your letter expressed concern that the Department's use of "development of the children" exceeded the scope of the Department's statute and was overly broad and vague. A canon of statutory or regulatory construction is that when a word is left undefined, it should be read according to its common meaning. See

Levario v. Ysidro Villareal Labor Agency, 120 N.M. 734, 736, 906 P.2d 266, 268 (Ct. App. 1995). Broad terms will be upheld if they are capable of reasonable application. See New Mexico Mun. League, Inc. v. New Mexico Envtl. Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App. 1975). The Department has the mandate to write regulations to provide licensing standards for these centers to provide a minimum level of service. One minimum service is the provision of a safe environment for the child. It is our understanding that the Department asserts that "development of the children" has a common meaning of "the process of natural, healthy growth," and we concur that is a reasonable interpretation of the questioned term. Therefore, it is reasonable to conclude that the "development of children" falls within the Department's statutory domain for establishing minimum licensing standards. The Department may thus use the phrase in the regulation, provided it is applied according to its common meaning.

Your final question focuses on whether regulation 8.15.2.15 NMAC exceeded the scope of the Department's statute. Your letter expressed concern that this regulation requires additional and excessive educational requirements for teachers of private church childcare centers. It is our understanding that this regulation requires "all registered homes receiving child care assistance subsidies who register after July 1, 2006 must complete, within six months of registration, an 18-hour course or an equivalent approved by the department." 8.15.2.15 NMAC. We also understand that "the 18-hour course will count toward the 6-hour annual training requirement during the year in which the course was completed and the following year…." Id.

The Department has the above-cited statutory authority to establish minimum standards. The Department's position is that these base-line training requirements are not excessive and are critical in ensuring quality childcare by way of well-trained staff. As a general rule, the "state must confine itself to secular objectives, and neither advance nor impede religious activity." Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 747 (1976). It is well settled law that any restrictions on engaging in business must apply to all. See State v. Collins, 61 N.M. 184, 297 P.2d 325 (1956). The requirements governing licensed childcare apply to all childcare centers, regardless of religious affiliation. This means if a regulation makes no arbitrary or unreasonable distinction within the sphere of its operation and accords substantially equal and uniform treatment to all persons similarly situated, it complies with the equality provisions of the state and federal Constitution. See Weiser v. Albuquerque Oil & Gasoline Co., 64 N.M. 137, 325 P.2d 720 (1958); State v. Thompson, 57 N.M. 459, 260 P.2d 370 (1953). This regulation deals solely with quality of care issues and has no disparate impact on church-related programs and therefore is permissible.

Your request to us was for a formal Attorney General's Opinion on the issues discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public. If there are any further questions that I can assist you with, do not hesitate to contact me.

Sincerely,

Lesley J. Lowe
Assistant Attorney General

Cc: Stuart Bluestone, Chief Deputy Attorney General