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The Honorable Gail Bray
State Senator, District 19
Statehouse
Boise, Idaho 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND
IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Proposed Day Care Licensing Act - House Bill 94

Dear Senator Bray:

You have requested our advice on matters pertaining to House Bill 94, the proposed Day Care Licensing Act. Specifically, your inquiry poses two questions:

- a) is there any issue of equal protection under the proposal, and
- b) will a county administered program have any force and effect within the limits of incorporated cities?

Short Answer

- a) There appear to be no equal protection problems, so long as objective standards are followed except for the questions noted on section 31-4606(c) in the discussion that follows.
- b) As a general rule, county ordinances have no force and effect within municipalities. Thus, so long as the program is a county program, it will only affect the unincorporated areas of the county.

Analysis

a) Equal Protection

Your first question asks whether HB 94 would deny equal protection of the laws in any manner.

Equal protection of the laws is guaranteed to all persons by virtue of Section 1 of the Fourteenth Amendment, United States Constitution and Article 1, Section 2, Idaho Constitution. In essence, the provisions stand for the proposition that all persons similarly situated shall be treated in a like manner. To treat persons differently who have the same status is to deny them equal protection of the law. However, reasonable classification of persons is not unlawful; only that which is discriminatory.

As an example, in the case of Weller v. Hopper, 85 Idaho 386, 392, 379 P.2d 792 (1963), the court considered a statute which prohibited known felons from ever renewing liquor licenses, but allowed them to acquire new licenses five years after completion of their sentence. In holding the classifications to be a denial of equal protection, the court said:

. . . The classification, attempted to be set up by such statutory provision, is unreasonable, arbitrary and discriminatory; it attempts discrimination against one who happened to hold a retail liquor license at the time of his conviction of a felony, as against one who did not hold such a license at the time of his felony conviction; no reasonable ground or basis for such a distinction between them, as prospective licensees, exists.

85 Idaho at 392.

A review of HB 94 in light of the foregoing discussion reveals no equal protection problems except for the problems noted at (c) below.

Those problems may exist in section 31-4604(c) which allows the county commissioners to issue licenses, at their discretion, even when persons may fail to meet all the standards set forth in the bill.

b) County/City Jurisdiction

Your second question asks whether county licensing of day care centers/providers creates any jurisdictional conflicts with cities; i.e., would those licenses have any force and effect within incorporated municipalities?

Article 12, § 2, Idaho Constitution provides that:

Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

The section is considered to be a constitutional grant of power to cities and counties at least in the area of the police power. "Home Rule For Idaho Cities", 14 IDR 143 (1977).

The police power is the authority of government to regulate or prohibit conduct for the protection of the public health safety, welfare or morals. Winther v. Village of Weippe, 91 Idaho 798, 430 P.2d 689 (1967). HB 94 purports to do just that by regulating day care.

The Idaho Supreme Court has had numerous occasions to reflect upon the meaning of Article 12, § 2 in relation to county jurisdiction within the limits of an incorporated city.

The first major case was State v. Robbins, 59 Idaho 279, 285, 81 P.2d 1078 (1938). There, the court opined that county ordinances were not "general laws" and thus, had no application within cities. The defendant in the case had secured a license from the City of Moscow to purvey beer but had no county license. He was convicted of violating the county ordinance. In reversing, the court stated:

Since, therefore, a municipality is a distinct governmental entity, entirely independent of the county as such, and is, consequently, subject to no local legislation which it is within the power of the governing board of the county to enact, it is wholly immaterial whether or not the municipal authorities exercise or put into operative effect all the powers conferred upon it by its charter and the Constitution. The county, in brief, has no legal right to legislate for a municipality located within its limits upon any subject which is within the scope of the powers granted to the municipality, and particularly upon any matters involving the police power of the state . . .

59 Idaho at 285.

The same proposition has been reinforced in subsequent decisions of the Supreme Court. In Clyde Hess Distrib. Co. v. Bonneville County, 69 Idaho 505, 512 210 P.2d 798 (1949), the

court prohibited the enforcement of a county ordinance within a city, even where the city had no conflicting enactment. In finding against the county, the court stated that:

. . . An attempt by the legislature to grant authority to a county to make police regulations effective within a municipality would be an infringement of such constitutional right of a municipality. A police regulation made by a county is not a general law for a municipality within the meaning of the constitution. Ex parte Knight, supra; State v. Robbins, supra. . . .

69 Idaho at 512. See also Boise City v. Blaser, 98 Idaho 789, 572 P.2d 892 (1977) (holding that county building permits are unnecessary and ineffective within a municipality).

Thus, county regulations and ordinances are ineffective and without force in duly organized Idaho cities. As the cases indicate, it makes no difference whether the county acts upon its own initiative or as a result of a legislative mandate; in either case, the result is the same.

Analogies can be drawn between HB 94 and other programs which may serve to better illustrate the foregoing legal principles. For example, Title 67, Chapter 65, the Local Planning Act, mandates the enactment of a comprehensive plan and zoning ordinances by counties. Exhaustive requirements are set forth which require county compliance. However, as a matter of law, county ordinances have no effect within cities. Boise City v. Blaser, supra. Instead, the city must enact its own plan and ordinances in compliance with the general (state) laws.

The same holds true for the liquor laws and a host of other state mandated programs and regulations. Where local governments are given discretion to act, even severely limited discretion, their ordinances have no effect within a coequal jurisdiction.

The only circumstances where a county operated program would have force and effect within a city is where the county has absolutely no discretion, but merely acts as an agent for the state. An example of this would be the issuance of driver's licenses. In that circumstance, the county merely gives the test and collects the fee. The Department of Law Enforcement exercises all discretion, such as license revocation.

In light of the foregoing, it is our opinion that any county ordinances adopted in response to HB 94, as proposed, will be without force and effect in cities.

c) Review of the Bill

As a courtesy, we have reviewed the proposed legislation, and have the following comments and suggestions:

Section 31-4601. The statement of policy clearly states that both cities and counties have jurisdiction to pass more stringent regulations. (lines 24 & 25) This should be deleted if local jurisdiction is not desired.

Section 31-4602. The definitions section fails to take into account "baby-sitters," i.e., the casual or occasional sitter who handles the children of more than one family for an evening out, etc.

Section 31-4604(1). The commissioners are given discretionary authority to establish the kind of information required for submission. This should be deleted or altered if local jurisdiction is not desired.

Section 31-4606. Same comment as Section 31-4604. In addition, reference should be made in sub-paragraph (3) to the name or description of Chapter 3, Title 66, Idaho Code.

Sub-paragraph (c) may present equal protection problems on the basis of insufficient standards for granting a license in spite of the absolute prohibition against such issuance. Furthermore, it is inconsistent to forever prohibit licensure on some basis and then allow it anyway at the government's discretion.

Section 31-4608. Again, discretion is allowed.

Section 39-1209. Parentheses should be used instead of periods if consistency of form is desired.

Section 39-1211. "DAY CARE HOMES AND DAY CARE CENTERS" should be deleted from the section title.

If you have further questions, please contact us.

Sincerely,

Robie G. Russell
Deputy Attorney General
Chief, Local Government Division

RGR/cjm