

ATTORNEY GENERAL

June 22, 1977

JOANNE E. FINLEY, *M.D., M.P.H.*
Commissioner of Health
Health and Agriculture Building
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 15.

Dear Dr. Finley:

You have asked for an opinion as to whether the Department of Health may include in its health care facility licensing standards a requirement that nursing homes accept and care for a certain number of indigent persons. It is our opinion that the Department of Health may include this requirement in its health care facility licensing standards.

In 1971, the Legislature enacted the Health Care Facilities Planning Act to assure that health care services ". . . of the highest quality, of demonstrated need, [are] efficiently provided and properly utilized at a reasonable cost . . ." *Borland v. Bayonne Hospital*, 72 N.J. 152, 158 (1977). It conferred upon the Department of Health the "central, comprehensive responsibility for the development and administration of the State's policy with respect to health planning [and] hospital and related health care services . . ." (N.J.S.A. 26:2H-1) and in part authorized the Commissioner of Health to issue certificates of need for new construction (N.J.S.A. 26:2H-9) and licenses to qualified health care facilities, including nursing homes (N.J.S.A. 26:2H-12). The powers conferred under the Act are to be liberally construed to permit the agency to achieve the assigned task. *Cooper River Convalescent Center v. Dougherty*, 133 N.J. Super. 226, 232 (App. Div. 1975).

We are informed that there is an acute shortage of nursing home beds available for indigent persons. At the present time, more than 1000 elderly persons, many of them eligible for Medicaid reimbursement, cannot obtain a nursing home bed. The approval of certificates of need for new construction of nursing homes by the Commissioner of Health has not alleviated this shortage because of a significant time lag between the issuance of a certificate and the actual construction of a nursing home. Consequently, it has been proposed that the Commissioner of Health require as a condition of licensure that existing nursing homes make a certain number of beds available for indigent persons. It has also been suggested that in the development of licensing standards for this purpose the Commissioner should consider the number of beds available for indigents in a particular area or region of the State, the period of time an eligible applicant must wait for placement and the ability of a licensed nursing home to make "a just and reasonable return on equity."

The Health Care Facilities Planning Act provides in pertinent part that:

"A license shall be issued by the department upon its findings that the premises, equipment, personnel including principals and management, finances, rules and bylaws, and standards of health care services are fit and adequate and there is reasonable assurance the health care facility will be operated in the manner required by this act and rules and regulations thereunder" N.J.S.A. 26:2H-12(b) (emphasis supplied).

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Thus, the Department is authorized to examine the rules and bylaws of a health care facility to ascertain that its rules are "fit and adequate" and that a licensee is in compliance with the Act.

It is instructive to note that since the enactment of the Health Care Facilities Planning Act the Department of Health, and before that, the Department of Institutions and Agencies (see N.J.S.A. 30:11-1 *et seq.*), has required that "[a]ll hospitals shall be expected to provide care for the needy sick . . ." (N.J.A.C. 8:43B-1.11(i)). Thus, for several years the agencies responsible for licensing health care facilities have required as a condition of licensure that certain facilities accept and treat indigents. This consistent administrative construction is entitled to considerable deference. *Service Armament Co. v. Hyland*, 70 N.J. 550, 561 (1976).

Moreover, nursing homes and other health care facilities have been afforded a "special status" under the Act. In order to avoid an unnecessary duplication of health care services, a new nursing home may not operate in an area of the State without first demonstrating to the Commissioner of Health the existence of a need for additional nursing care services. N.J.S.A. 26:2H-7. Nursing homes are therefore insulated by State regulation from the unfettered entry of new nursing homes into a given area or region of the State. It is, therefore, implicit under the Act that a nursing home must fully serve the public interest in its approved area or region. See *Greisman v. Newcomb Hospital*, 40 N.J. 389, 396 (1963) (a hospital which constituted a virtual monopoly in its area was ". . . in no position to claim immunity from public supervision and control because of its allegedly private nature"). Indeed, in connection with hospital rules and bylaws, our Supreme Court has specifically stated that such institutions ". . . must serve the public without discrimination. *Their boards of directors or trustees are managing quasi-public trusts and each has a fiduciary relationship with the public.*" *Doe v. Bridgeton Hospital Ass'n., Inc.*, 71 N.J. 478, 487 (1976) (emphasis supplied). *Cf. Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969) (upholding the Fairness Doctrine of the Federal Communications Commission which in part requires a broadcaster to make air time available at its own expense to individuals who have been the subject of personal attacks on the air); *In re Bd. of Fire Commr's., Fire Dist. No. 3, Piscataway Tp.*, 27 N.J. 192, 201 (1958) (" . . . a franchise holder who alone serves an important and essential public need in a limited area cannot pick and choose its customers solely on the basis of pecuniary advantage and refuse to supply those who constitute an integral part of the locality simply because, considered in isolation, their consumption of the product will not produce a profit . . ."); *Penna. R. Co. v. Bd. of Public Utility Commissioners*, 11 N.J. 43, 50-51 (1952) (obligation of a railroad to provide reasonably adequate facilities for serving the public which "cannot be avoided merely because it will be attended by some pecuniary loss"). In the present situation, therefore, it is clear that having obtained State approval to operate pursuant to the certificate of need and licensure provisions of the Act, a nursing home is obliged to provide "adequate and effective health care" in the public interest. A requirement for the provision of a certain number of beds for indigent persons is in our judgment consistent with this beneficial statutory purpose.

In conclusion, you are advised that the Commissioner of Health may require the rules and by-laws of a nursing home to provide for the care and treatment of a specified number of indigent persons as a condition of licensure. In the exercise of her discretion, the Commissioner may consider the number of beds available in a given area for indigent persons, the time of an individual must wait for placement and the ability of a licensee to make "a just and reasonable return on equity." These and

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other licensing standards should be adopted as rules and regulations with the approval of the Health Care Administration Board in accordance with the Administrative Procedure Act.

Very truly yours,
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Attorney General
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Deputy Attorney General

July 28, 1977

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FORMAL OPINION 1977—No. 16

Dear Dr. Finley:

You have asked for an opinion as to which government entities have authority to inspect food preparation and service areas of county government facilities. In particular, you have inquired about county government jails. Also, you have asked us to discuss the legal remedies available against recalcitrant county government facilities generally, and county government jails in particular, which refuse to close their food preparation areas despite the receipt of an unsatisfactory rating.

Pursuant to the State Department of Health Reorganization Act (N.J.S.A. 26:1A-1 *et seq.*), the Public Health Council, a citizen board within the Department of Health, is empowered to establish reasonable sanitary regulations "prescribing standards of cleanliness for public eating rooms and restaurants." N.J.S.A. 26:1A-7(m). In 1972, under this statutory grant, the Public Health Council promulgated Chapter XII of the State Sanitary Code (N.J.A.C. 8:24-1.1 *et seq.*) which specified sanitary requirements for various food establishments, including any "public or non-profit organization or institution serving food." N.J.A.C. 8:24-1.2. In order to enforce the public health laws and the State Sanitary Code, the Commissioner of Health is empowered to "exercise general supervision over all matters relating to sanitation and hygiene throughout the State." N.J.S.A. 26:1A-18. See N.J.S.A. 26:1A-15. To fulfill her responsibilities, the Commissioner is expressly authorized to "enter upon, examine and survey any . . . prison, public or private place of detention. . . ." N.J.S.A. 26:1A-18. See N.J.S.A. 26:1A-16; N.J.A.C. 8:24-9.2(a). Consequently, it is clear that the State Department of Health is authorized to enter and inspect the food preparation and service areas of county jails. Any inspection, however, should be coordinated with the legitimate operational and security requirements of the correctional institution.