

OFFICIAL OPINION NO. 77-83, Costs of patients in certain state facilities

September 28, 1977

The Honorable Mary McClure
The State Senate
Redfield, South Dakota 57469

Official Opinion No. 77-83

Costs of patients in certain state facilities

Dear Senator McClure:

You have requested an opinion from this office based on the following factual situation:

FACTS:

SDCL 27B-9-3 requires that the Board of Charities and Corrections make a periodic determination of individual maintenance costs, exclusive of education costs, for all residents at the Redfield State Hospital and School.

SDCL 28B-9-4 requires the Board of Charities and Corrections to charge full per diem to residents of Redfield State Hospital and School who are able to pay. SDCL 27B-9-8 provides for an annual application by parent or resident to pay less than full per diem and SDCL 27B-9-9 gives the board the responsibility for making a determination of an amount to be paid by the parent or resident.

However, SDCL 13-61-4 provides that persons over five years of age and under 21 years who are entitled to admission to the School for the Visually Handicapped be received and taught free of charge.

The federal rules and regulations implementing Section 504 of the Rehabilitation Act of 1973 state that if placement is necessary to provide a free appropriate public education to a handicapped person, as that term is defined in said act, it shall be provided at no cost to the parents.

Based on the above factual situation, you have asked the following specific questions:

QUESTIONS:

1. Can the Board of Charities and Corrections under the laws of this state make a charge to the parents of child for the cost, exclusive of the cost of education, for care, support, maintenance and treatment of the child?
2. Does charging the parent for the cost, exclusive of the cost of education, for care, support, maintenance and treatment under SDCL 27B-9-4 provide for unequal treatment of the child whose handicap is mental retardation as compared to treatment of those children whose handicap is visual impairment and receive treatment under SDCL 13-61-14 with no charge to the parent?
3. In the light of the equal protection clauses of the Fourteenth Amendment to the United States Constitution and to article VI, § 18 of the South Dakota Constitution, are SDCL 27B-9-3 and SDCL 13-61-4 inconsistent and incompatible, and do they unfairly treat the parents and their handicapped minor children affected by those statutes?
4. Since recent federal rules implementing section 504 of the Rehabilitation Act of 1973 state that if placement is necessary to provide a free appropriate public education to the handicapped person, it shall be provided at no cost to the person, or to his/her parents or guardian, are the statutes under SDCL 27B-9 still operable and valid?

IN RE QUESTION NO. 1:

It is a generally accepted principle that the power of the Legislature is plenary. It may enact any law not expressly or inferentially prohibited by the state or federal constitutions. In order to determine that the Legislature has exceeded its authority, there must be some provision that prohibits or limits the enactment of a statute rather than one which grants such power. *In re Heartland Consumers Power District*, 180 N.W.2d 398 (S.D. 1970).

I am not aware of any state or federal constitutional prohibitions either on the establishment of a state facility for the mentally retarded or the billing of certain costs to

the patients. Therefore, it is my opinion that the Legislature can provide for a procedure for charging the costs to a legally responsible relative. The answer to your first question is yes; however, the answers to the rest of your questions are also important to consider in regard to whether or not the board can ultimately make this charge.

IN RE QUESTION NO. 2 AND 3:

Your questions number 2 and 3 both relate to the constitutional rights of the residents of South Dakota to equal treatment and protection under the laws of the state and will be considered together.

The statutes in question provides as follows:

SDCL 27B-9-4. A patient (at a state facility for mentally retarded) who shall be judged by the board of charities and corrections, subject to the provisions for the method of investigation used by the board as set down in § § 27B-9-8 and 27B-9-9, to be financially able to pay the per diem rate on an indefinite basis, shall continue to charge the per diem for each day of continuous patient status.

SDCL 13-61-4. All persons, residents of this state, over three years of age and under twenty-one years of age, who by reason of blindness or deaf-blindness, either partial or total, have not received and are unable to receive the full benefits of the public schools, and who shall be capable of receiving instruction, and who are free from contagious diseases and physically fit to attend such school shall be eligible for programs provided by the South Dakota school for the visually handicapped and, when necessary, shall be received and taught, free of charge, at such school and shall be entitled to receive an education in such institution until completion of the secondary level program or attainment of the age of twenty-one years, whichever shall come first, at the expense of the state.

The precise issue is whether the above provisions create a situation violative of article VI, § 18 of the South Dakota Constitution wherein it states:

No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.

The function of this office in declaring an act of the Legislature constitutional or unconstitutional is the subject of Official Opinion 74-34. A relevant portion of that opinion states:

My predecessors [sic] have consistently stated that it is the function of the courts and not the Attorney General to declare that a properly enacted legislative enactment is unconstitutional. No legislative act should be declared unconstitutional unless the conflict between its provisions and some principle of constitutional law is so plain and palpable as to leave no reasonable doubt of its validity. In general it is not the function or responsibility of the Attorney General to render an opinion on the validity of an enacted legislative statute. Unconstitutionality generally must be established by a judicial determination.

However, since the question you raise is a legitimate concern to a number of persons throughout the state, I feel obligated to briefly discuss the relationship between legislative classification and equal protection under the state constitution.

In general, a state may pass legislation classifying persons and objects for any number of legitimate state purposes. A most common classification is for purposes of taxation or for obtaining revenue in some other manner. A classification, in order to meet the constitutional requirements, must not be capricious or arbitrary, but must be reasonable and natural, and must have a rational basis. 16 Am.Jur.2d *Const. Law* § § 498 *et seq.* A statutory classification which rests upon real differences of situation and circumstances surrounding the members of the class is generally found to be reasonable and valid.

Case law in South Dakota on this specific issue is very limited. The 1900 case of *Bon Homme County v. Berndt*, 13 S.D. 309, 83 N.W. 333, held constitutional a statute imposing liability against the estate of those insane persons who had no dependent heirs within the United States. The court found this classification to be reasonable so long as all persons within the designated class were subject to the law. The fact that the pure number of persons within the class may be small in comparison to the population of the whole state does not create inequality under article VI, § 18.

On the other hand, I believe it is a fair analysis to state that the trend in more recent case law is to deviate from this rather strict standard of presumption of constitutionality and to more closely scrutinize the rationale for the classification. In a rather recent North Dakota decision, *Hospital Services v. Brooks*, 229 N.W.2d 69 (N.D. 1975), that state's highest court

declared unconstitutional a state statute making the children of persons involuntarily committed to a state hospital or school financially responsible for their care. In a 4-1 decision the court concluded:

We believe that the classification inherent in Section 25-0904, N.D.C.C., is arbitrary and oppressive, that there exists no reasonable relationship between the legislative purpose, that of reducing the financial burden upon the state of caring for those who have been involuntarily committed to the State Hospital for the mentally ill, and the selection of the class of "responsible relatives" designated in that section to accomplish that purpose and that this section therefore denies that equal protection of the laws that is guaranteed under Sections 11 and 20 of our State Constitution.

There is also a large number of decisions, based on similar factual situations, from the State of California. A rather common underlying consideration in those decisions is the "social reality" test of "whether the poor, disadvantaged and handicapped are to be the burden and responsibility of the public at large or the burden of a smaller class of persons which, in many instances, may also be poor." *Swoap v. Superior Court of Sacramento County*, 516 P.2d 840 (Cal. 1973).

The above-cited cases are obviously distinguishable from your factual situation and certainly cannot be considered dispositive of the issue. I have merely referred to them to indicate the apparent transition in interpretation which has occurred over the past 75 years.

As I have earlier stated, this office cannot ultimately determine the constitutionality of a statute. Therefore, I must respectfully decline to specifically answer your questions number 2 and 3.

IN RE QUESTION NO. 4:

The specific federal rule which you reference provides:

§ 84.33

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall

be provided at no cost to the person or his or her parents or guardian.

The term "handicapped person" is broadly defined to include any individual with a rehabilitable physical or mental disability. 29 U.S.C. § 706(6).

Pursuant to Executive Order No. 11914, dated April 8, 1976, President Ford mandated the following:

Sec. 3. (a) Whenever the appropriate department or agency determines, upon all the information available to it, that any recipient of, or applicant for, federal financial assistance is in non-compliance with the requirements adopted pursuant to this order, steps to secure voluntary compliance shall be carried out in accordance with standards and procedures established pursuant to this order.

(b) If voluntary compliance cannot be secured by informal means, compliance with section 504 [this section] may be effected by the suspension or termination of, or refusal to award or continue, federal financial assistance or by other appropriate means authorized by law, in accordance with standards and procedures established pursuant to this order.

Therefore, disregarding for the moment the constitutional and other issues hereinbefore discussed, it is my opinion that the provisions of SDCL 27B-9 are not rendered inoperative or invalid by the federal rules. However, the potential effect of the failure to comply with the appropriate federal regulations could be the withholding of federal funds. The decision in *South Dakota v. Volpe*, 353 F.Supp. 335 (1973), regarding noncompliance by the state with the Highway Beautification Act of 1965, certainly supports that proposition.

Respectfully submitted,

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Attorney General

WJJ:LLV:pk