STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 99-F-10

Date issued: July 23, 1999

Requested by: Carol Olson, Executive Director, North Dakota Department of Human Services

- QUESTION PRESENTED -

Whether N.D.C.C. § 50-09-29(1)(l) and North Dakota Administrative Code § 75-02-01.2-35.1, regarding Temporary Assistance for Needy Families (TANF) benefits for families who have resided in North Dakota for less than 12 months, are unconstitutional in light of the United States Supreme Court decision in Saenz v. Roe, 119 S.Ct. 1518 (1999).

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a court would conclude N.D.C.C. § 50-09-29(1)(l) and certain portions of North Dakota Administrative Code § 75-02-01.2-35.1 are unconstitutional based on the reasoning in Saenz v. Roe.

- ANALYSIS -

N.D.C.C. § 50-09-29 establishes requirements for the Department of Human Services in providing TANF benefits. Generally, North Dakota provides benefits to eligible households for up to 60 months. N.D.C.C. § 50-09-29(1)(b). This is the maximum period allowed by federal law. 42 U.S.C. § 608(a)(7). However, among the program requirements set by the Legislature is the limitation that, for "otherwise eligible households that have resided in this state less than twelve months," the benefits provided by the Department are "subject to the lifetime limit of the household's immediately previous state of residence." N.D.C.C. § 50-09-29(1)(l). N.D. Admin. Code § 75-02-01.2-35.1 provides in part:

> Except as otherwise provided in this section, no temporary assistance for needy families filing unit may be provided a training, education, employment, and management benefit that includes a temporary assistance for needy families

> benefit if that filing unit includes an adult who has received assistance under a temporary assistance for needy families program provided by any state or Indian tribe for sixty months, whether or not consecutive, after the date that program commenced, or, in the case of such a filing unit with an adult member who has resided in North Dakota less than twelve months, if that adult member formerly resided in a state, or received benefits under a tribal temporary assistance for needy families program, that imposes a limit of less than sixty months, such lesser number of months as provided for in the state or tribal service area in which that adult member formerly resided.

The underlined language implements the requirement of N.D.C.C. § 50-09-29(1)(1).

Although North Dakota generally provides benefits for the maximum period allowed by federal law, federal law does not prohibit other states from imposing a shorter lifetime limit for receiving benefits. 42 U.S.C. § 608(a)(7)(E). Under N.D.C.C. § 50-09-29(1)(l), if a household includes an adult member who moved to North Dakota in the last 12 months from a state which imposes a 36 month lifetime limit, and if the member had already received benefits for 36 months (and thus would no longer be eligible for benefits in the member's prior state of residence), the household would not be eligible for benefits in North Dakota for 12 months after the member began residing in North Dakota. Similarly, if the member received benefits for 35 months in the other state before moving to North Dakota, the household would receive benefits from North Dakota for one additional month but would be ineligible for further benefits until the member had resided in this state for 12 months. By contrast, an eligible household in which all adult members have lived in North Dakota for at least 12 months could receive benefits for up to 60 months.

We recently addressed the position of this office on reviewing the constitutionality of a state statute:

> Traditionally, this office has been very reluctant to question the constitutionality of a statutory enactment. E.g., 1980 N.D. Op. Att'y Gen. 1. This is due, in part, to the fact that in North Dakota the usual role of the Attorney General is to defend statutory enactments from constitutional attack and because "[a] statute is presumptively correct and valid, enjoying a conclusive presumption of constitutionality unless clearly shown to contravene the state or federal constitution." Traynor v.

> Leclerc, 561 N.W.2d 644, 647 (N.D. 1997) (quoting State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996)). Further, Article VI, Section 4 of the North Dakota Constitution provides that "the supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide."

1998 N.D. Op. Att'y Gen. L-197, L-200 [Nov. 24 letter to Mattson]. Nevertheless, I must conclude that a court considering a challenge to N.D.C.C. § 50-09-29(1)(l) and N.D. Admin. Code § 75-02-01.2-35.1 would determine that those provisions are unconstitutional based on the recent United States Supreme Court decision in Saenz v. Roe, 119 S.Ct. 1518 (1999).

In Saenz v. Roe, the United States Supreme Court declared unconstitutional a California statute which, for households that included an adult member who resided in California for less than 12 months, awarded TANF benefits in the amount the household would have received in the member's prior state of residence. 119 S.Ct. at 1524, 1528. Since California's benefit levels were the sixth highest in the nation, the frequent result of the law would be that eligible households which included an adult who recently became a resident of California would receive less assistance than households consisting exclusively of long-term California residents. Id. at 1523. The Supreme Court held that the California statute violated the Privileges and Immunities clause of the Fourteenth Amendment to the United States Constitution because it classified eligible California residents based on two improper criteria: length of residence (more or less than 12 months) and the prior state of residence. Id. at 1528. The Court found there was no compelling need for California to treat its residents differently based on how long they lived in California and in which state the person previously resided. Id.

Federal law, 42 U.S.C. § 604(c), does not prohibit states from applying the rules of another state if a household includes a member who previously resided in the other state and has resided in the current state for less than 12 months. In reaching its conclusion in Saenz v. Roe, the Court held that 42 U.S.C. § 604(c) did not "resuscitate[]" the constitutionality of the California statute because Congress may not authorize states to violate the Fourteenth Amendment. 119 S.Ct. at 1528.

The California statute incorporated the benefit levels of other states; the North Dakota statute incorporates the durational limits for receiving benefits of other states. Thus, there is a distinction between the two statutes. However, I believe it is a distinction

without a difference. The North Dakota statute makes the same two classifications that were struck down in Saenz v. Roe: a household's eligibility for benefits may be adversely affected solely because of how long one of its adult members has resided in North Dakota and in which state the member previously resided.

The best argument for upholding the constitutionality of N.D.C.C. § 50-09-29(1)(l) and the portion of N.D. Admin. Code § 75-02-01.2-35.1 which was underlined earlier in this opinion is that they merely impose bona fide residence requirements, similar to requiring students to live in North Dakota for 12 months before they are eligible for in-state tuition rates. See N.D.C.C. § 15-10-19.1. The two dissenting justices in Saenz v. Roe would have upheld the California law on that basis. 119 S.Ct. at 1533 (Rehnquist, C.J., dissenting). However, the majority opinion of the Court expressly rejected that argument because, unlike a college education, welfare benefits will be consumed entirely in the household's current state of residence. Id. at 1527.

In the eyes of the United States Supreme Court, California could not offer a legitimate, compelling reason for the classification in its statute, and I do not believe a court could be persuaded that a sufficient reason exists for the same classifications in N.D.C.C. § 50-09-29(1)(l) and the underlined portion of N.D. Admin. Code § 75-02-01.2-35.1. Accordingly, it is my opinion that a court would conclude those provisions are unconstitutional based on Saenz.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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