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ATTORNEY GENERAL OPINION NO. 87- 165

John Badger
Acting Chief Counsel
Kansas Department of Social and
Rehabilitation Services
Docking State Office Building, 6th Floor
Topeka, Kansas 66612

Re: Mentally Ill, Incapacitated and Dependent Persons;
Social Welfare--Social Welfare--Durational
Requirements

Synopsis: The state must show a compelling state interest to
justify a durational residency requirement for
participants of the general assistance program. If
such an interest exists, it would justify the
disparate treatment between those receiving ADC
and those receiving GA benefits. Cited herein:
K.S.A. 39-720; K.A.R. 30-4-34; 30-4-50; 30-4-70
through 75; 30-4-90; 45 C.F.R. §223.40.

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Dear Mr. Badger:

As counsel for the State Department of Social and
Rehabilitation Services, you have requested our opinion
concerning eligibility for public assistance. Specifically
you inquire whether SRS may implement a thirty day residency
requirement for applicants who wish to receive general
assistance.

An initial distinction must be made between a requirement of
bona fide residency and a requirement of residency for a

specified duration. A state may require that services it provides for its residents be enjoyed only by its residents. A bona fide residency requirement does not deny equal protection as guaranteed by the Fourteenth Amendment of the United States Constitution. Martinez v. Bynum, 461 U.S. 321, 328 (1983).

Freedom to travel is a basic constitutional right. That freedom includes the right to enter and abide in any state of the union. Dunn v. Blumstein, 405 U.S. 330, 338 (1972). Durational requirements which create a penalty for exercising that right must be the least drastic means to achieve a compelling state interest. Id. at 343. Such is required in light of the Fourteenth Amendment. Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

While we have not been informed as to exactly what state interest would be furthered by a proposed regulation which imposes a thirty-day durational requirement, we feel compelled to comment on two arguments which have been rejected by the United States Supreme Court. First, a state may not use a durational requirement to save money. Memorial Hospital v. Maricopa County, 415 U.S. 250, 263 (1973). Secondly, administrative convenience is not an interest which is sufficiently compelling to justify a durational requirement. Id. Under the heading of administrative convenience, the court in Memorial Hospital noted that the durational requirement is overbroad as a means to determine bona fide residency. Id., at 267. Finally, budget predictability has been rejected as a sufficient justification. Id., at 268-69.

The state has a valid interest in preventing fraud. Shapiro, 394 U.S., at 637. Whether or not that interest is sufficiently compelling may depend on whether less drastic means would achieve the same result. In Memorial Hospital, it was noted that criminal statutes specifically made it unlawful to file an untrue statement to obtain hospitalization at county expense, and therefore the one-year durational requirement was excessive. 415 U.S., at 268. In K.S.A. 39-720, similar acts are defined as theft and thus criminal prosecution is an available means of dealing with fraud. However, we are unable to determine whether that penal section adequately achieves the same objective as would a 30 day durational residency requirement.

While Memorial Hospital and Shapiro both dealt with durational requirements of one year, we believe that the rules

laid down in those cases still obtain. The state must show a compelling state interest to overcome the penalty for exercising the right to travel when a durational requirement is imposed, whether the length of the requirement is one month or twelve months. Further, the method used to achieve a compelling state interest must be as unobtrusive as possible.

Our opinion thus far has been limited to a durational requirement for General Assistance (GA). That category of assistance is funded only by the state. Federal law prohibits a state from imposing a durational requirement for receipt of Aid to Families with Dependent Children (ADC) benefits. 45 C.F.R. §233.40. Assuming a compelling state interest exists which would justify a durational requirement, the question then arises whether requiring durational residency for programs funded solely by the state, but not for programs funded by the federal government, creates unequal treatment between identifiable classes such that the Equal Protection Clause of the Fourteenth Amendment would be violated.

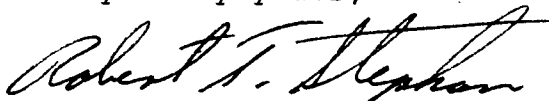
Regulations for public assistance programs are found in K.A.R. 30-4-34 et seq. Eligibility requirements for ADC are listed in K.A.R. 30-4-70, and requirements for GA are listed in K.A.R. 30-4-90. The requirements of K.A.R. 30-4-50 must be met to participate in either program. In addition to the above, the eligibility factors in K.A.R. 30-4-70 through 30-4-75 must be met in order to participate in the ADC program. Those factors are not required for GA. Rather, GA is available to those who meet the basic requirements of K.A.R. 30-4-50, are not eligible for a federal program, have not been eligible for and refused vocational rehabilitation services, and do not refuse authorization for the department to file a claim for reimbursement from the social security administration for the amount of assistance provided.

We believe that the distinctions between the two programs do not create suspect classifications, nor do they involve fundamental interests of participants. Disparate treatment as to the proposed durational residency requirement would be created by a federal condition for the state to receive funds, not by the state's distinction between classes of recipients. Since no suspect classifications or fundamental interests are involved in the differential treatment, the requirement would be presumed constitutional, and the classification would have to be unreasonable, arbitrary, or lacking a legitimate state interest to be displaced on equal protection grounds. Farley v. Engelken, 241 Kan. 663, 667-68 (1987). We believe that if the state has an interest sufficiently

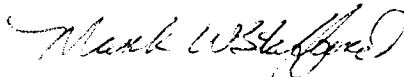
compelling to overcome the penalty for exercising the right to travel, then such an interest would justify discrepancies between ADC and GA recipients.

In conclusion, in our opinion the state must show a compelling state interest to justify a durational residency requirement for recipients of the general assistance program. If such an interest exists, it would justify the disparate treatment between those receiving ADC and those receiving GA benefits.

Very truly yours,



ROBERT T. STEPHAN
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RTS:JLM:MWS:jm