Opinion No. 77-19

June 10, 1977

OPINION OF: Toney Anaya, Attorney General

TO: Fernando E. C. de Baca, Executive Director, Health and Social Services Department, PERA Building Santa Fe, New Mexico 87501

WELFARE ELIGIBILITY-The Health and Social Services Department must make Financial Assistance payments in the AFDC Program on behalf of eligible persons who are 18, 19, or 20 years old and who are attending school.

QUESTIONS

Does the Health and Social Services Department have authority, under State Law, to make Financial Assistance payments in the AFDC Program on behalf of "children" who are 18, 19, or 20 years old and who are attending school?

CONCLUSIONS

Yes, see analysis.

ANALYSIS

Section 406(a) of the Social Security Act, 42 U.S.C. § 606(a), defines a "dependent child" as ". . . a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with [a specified relative] in a place of residence maintained by one or more of such relatives as his or their own home and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and . . . a student regularly attending a school, college, or university or regularly attending a course of vocational or technical training designed to fit him for gainful employment. . ."

OPINION

There have been cases holding that where a state had elected not to participate in the program authorized under 42 U.S.C. § 606(a)(2)(B), it was not required to extend AFDC benefits to children up to the age of 21, the program being optional with the states. Cheley v. Burson, 324 F. Supp. 678 (DC Ga), app. dism 404 U.S. 878, 159 S. Ct. 219 30 L. Ed. 2d 159 (1971); McClellan v. Shapiro, 315 F. Supp. 484 (DC Conn 1970); Horace v. McGinnis, 494 P.2d 534 (Alaska 1972). However, once a state has chosen to provide such benefits, eligibility requirements under the state program must conform to the federal standards or to the extent of the variance, they would be invalid under the supremacy clause. Townsend v. Swank, 404 U.S. 282, 92 S. Ct. 502, 30 L.Ed 2d 448

(1971); Frye v. Lukehand, 361 F. Supp. 60 (DC Va 1973); Lawson v. Brown, 349 F. Supp. 203 (DC Va 1972).

New Mexico has chosen to participate in the program authorized under 42 U.S.C. 606(a)(2)(B) since Section 13-17-9, NMSA, 1953 Comp., provides in pertinent part that:

Public assistance shall be provided to or on behalf of eligible persons:

A. Who are under the age of eighteen [18] years . . . or who are over the age of eighteen [18] years and under the age of twenty-one [21] years and are regularly attending high school, college or a university or are regularly pursuing a course of vocational or technical training designed to prepare them for gainful employment; and

B. Who have been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent. . .

Thus, pursuant to Section 13-17-9, supra, a person between the ages of 18 and 21 who is attending school and who is deprived of parental support would be eligible for AFDC benefits. In addition, 42 U.S.C. § 602(a) mandates that aid "shall be furnished . . . to all eligible individuals." The federal regulation pertaining to this subject also requires this result since it provides that:

If a state elects to include in its AFDC program children 18 and over, it must include all children 18 years of age and under 21 who are students *{*130}* regularly attending a school, college, or university, or a course of vocational or technical training designed to fit them for gainful employment. 45 CFR § 233.90(b)(3) [Emphasis added]

Another factor which must be considered is whether those persons over 18 are owed a state-imposed legal duty to support since King v. Smith, 392 U.S. 309, 88 S. Ct. 2128, 20 L.Ed 2d 1118 (1968), held that the term "parent" as used in 42 U.S.C. § 606(a) includes only those persons who owe the child a state-imposed legal duty of support. The age of majority in New Mexico is specified in Section 13-13-1(A), NMSA, 1953 Comp. which provides:

Except as provided in subsection B or otherwise specifically provided by existing law, any person who has reached his eighteenth birthday shall be considered to have reached his majority as provided in Section 1-2-2, NMSA, 1953 Comp., and is an adult for all purposes the same as if he had reached his twenty-first birthday.

Prior to its amendment, Section 13-13-1, supra, had been applied in two divorce cases. Phelps v. Phelps, 85 N.M. 62, 509 P.2d 254 (1973); Mason v. Mason, 84 N.M. 720, 507 P.2d 781 (1973). In each case, it was held that, for purposes of paying support for minor children in a divorce action, support is terminated when the children reach eighteen years of age. However, neither case dealt with a specific statute, like 13-17-9(A), supra, authorizing the payment of benefits beyond age 18. Therefore, the enactment of Section

13-13-1, supra, as interpreted by these cases does not necessarily mean that Section 13-17-9(A), supra, was repealed or amended by that statute.

Repeal or amendment of statutes by implication are not favored and courts will resort to any reasonable and fair interpretation under which two acts can be reconciled. Morton v. Mancuri, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed 2d 290 (1974); Alvarez v. Board of Trustees of La Union Townsite, 62 N.M. 319, 309 P.2d 989 (1957); Johnston v. Board of Education of Portales Municipal School District, 65 N.M. 147, 333 P.2d 1051 (1959). In this case, we have a specific statute, Section 13-17-9, supra, which deals with a definition of what is a "dependent child" for purposes of AFDC eligibility, the definition of which includes, among others, persons falling in certain age categories, e.g. persons between 18 and 21 who attend school. In addition, we have a general statute, Section 13-13-1, supra, which deals with the age of majority of children. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. Morton v. Mancuri, supra; New Mexico Bureau of Revenue v. Western Elec. Co., 89 N.M. 468, 553 P.2d 1275 (1976); Lopez v. Barreras, 77 N.M. 52, 419 P.2d 251 (1966).

By applying these principles of statutory construction, we must conclude that Section 13-13-1, supra, does not repeal or amend Section 13-17-9(A), supra, since there is no clear or obvious legislative intent to do so. This is especially true since Section 13-13-1 provides that any eighteen year old person shall be considered to have reached his majority "[e]xcept as . . . otherwise specifically provided by existing law." It should be also noted that Section 13-13-1, supra, was amended to its present form by Laws 1973, Ch. *{*131}* 138, § 12 while Section 13-17-9, supra, was enacted by Laws 1973, Ch. 376, § 9, or in other words, both statutes were passed by the same legislature. Lastly, it should be remembered that the purpose of Section 13-17-9(A), supra, is to enable eligible students "to take advantage of educational opportunities to improve their preparation for self support" and "become better prepared to enter the labor market." HEW, Handbook of Public Assistance Administration, Part IV, G 3220 (1965) (interpreting 42 U.S.C. § 606(a)). The statute should be construed, if at all possible, in a manner consistent with that objective unless the legislature has clearly demonstrated an intent to the contrary.

In summary, it is our conclusion that consistent with both federal and state law, the Health and Social Services Department must make Financial Assistance payments in the AFDC Program on behalf of eligible persons who are 18, 19, or 20 years old and who are attending school. However, we see no impediment, at this time, to a change in the statute by the Legislature to, in effect, "opt out" of the AFDC program which provides AFDC benefits for persons 18 and over.

ATTORNEY GENERAL

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