LETTER OPINION
2013-L-02

February 14, 2013

Ms. Claire J. Holloway
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600 E. Boulevard Ave. Dept. 215
Bismarck, ND 58505-0230

Dear Ms. Holloway:

Thank you for your January 31, 2013, letter requesting an opinion as to whether the Eighth Circuit Court of Appeals, in Valley Family Planning v. State of N.D., 661 F.2d 99 (8th Cir. 1981), struck down North Dakota Century Code § 14-02.3-02 completely, or invalidated only the portion of the statute pertaining to family planning funds allocated to entities or persons who provide referrals for abortions or encourage abortions. It is my opinion that the decision rendered by the Eighth Circuit Court of Appeals, in Valley Family Planning, 661 F.2d 99, completely invalidated N.D.C.C. § 14-02.3-02.

ANALYSIS

At issue is a section of law in North Dakota's "Limitation of Abortion" Act,[1] which provides:

> No funds of this state or any agency, county, municipality, or any other subdivision thereof and no federal funds passing through the state treasury or a state agency may be used as family planning funds by any person or public or private agency which performs, refers, or encourages abortion.[2]

This statute was challenged on the grounds it conflicted with various federal statutes, including Title X of the Public Health Service Act.[3]

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[1] N.D.C.C. ch. 14-02.3.
[2] N.D.C.C. § 14-02.3-02 (emphasis added).
[3] It was also challenged on the grounds it conflicted with Title V and XIX of the Social Security Act, and that it violated the First and Fourteenth Amendments. Valley Family Planning v. State of N.D., 661 F.2d 99, 100 (8th Cir. 1981).

The plaintiff in the case, Valley Family Planning, is a private, nonprofit corporation. The district court found that Valley Family Planning "'neither performs abortions nor encourages its clients to obtain abortions,'" however, it did, at least at that time, offer "'abortion referral services to its clients.'"[4]

The opinion of the Eighth Circuit Court of Appeals (hereafter, "Court") is quite short. The Court stated that Title X authorizes "grants to . . . entities to assist in the establishment and operation of voluntary family planning projects."[5] Federal regulations provide that Title X grantees must "'(p)rovide for medical services related to family planning . . . and necessary referral to other medical facilities when medically indicated.'"[6]

The Court indicated that Congress has authorized federal funds to be used to perform abortions under certain circumstances, "particularly when the life of the woman is at stake."[7]

The Court concluded:

> The conflict between Title X and N.D.Cent.Code § 14-02.3-02 is clear. Even under the most aggravated circumstances, such as where a woman's life would be endangered if she carried the pregnancy to term, the North Dakota provision prohibits Title X grantees from making an abortion referral. This runs afoul of Title X's mandate that comprehensive health care be provided, including referrals to other services when medically indicated. Accordingly, the North Dakota statute is invalid under the Supremacy Clause.[8]

The Court did not qualify or restrict its finding. It purposefully declined to rewrite the statute "to cure the invalidity," because to do so would be "legislative enactment clearly beyond its judicial role" and that the legislative history and intent would not support the Court amending the statute.[9]

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[4] Valley Family Planning, 661 F.2d 99, 100 (8th Cir. 1981), quoting the district court's findings.
[5] Id. at 101.
[6] Id. at 101, citing 42 C.F.R. § 59.5(b)(1).
[7] Id. at 102.
[8] Id. at 102 (emphasis added).
[9] Id. at 102.

In conclusion, the Court ruled "the North Dakota statute is invalid under the Supremacy Clause" and did not qualify or restrict its ruling.[10] Therefore, it is my opinion that the Court in Valley Family Planning, 661 F.2d 99 invalidated N.D.C.C. § 14-02.3-02 in its entirety.

Sincerely,

Wayne Stenehjem
Attorney General

las/slv/vkk

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.[11]

[10] Id. at 102.
[11] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).