



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-070

October 13, 2014

The Honorable Debra M. Hobbs
State Representative
3901 Arnold Avenue
Rogers, Arkansas 72758-1640

Dear Representative Hobbs:

I am writing in response to your request for my opinion on several questions relating to state provision of health insurance to public school employees. As preface to your specific questions, you have offered the following summary of state statutory law and of various opinions issued previously by this office:

The Attorney General has opined on numerous occasions that public school employees are not state employees (see Attorney General Opinions 91-244, 99-028 and 2010-049). However, public school employees are provided health insurance through the State and Public School Life and Health Insurance Board, A.C.A. § 21-5-401 *et seq.*

Based upon your understanding of the recited opinions and subchapter of the Code, you have posed the following questions:

1. If the state provides health insurance for public school employees, who are deemed not state employees, can the state provide insurance for other special interest groups of non-state employees or Arkansas taxpayers generally?
2. Does providing health insurance for public school employees, who are deemed not state employees, expose the state to a lawsuit from other special interest groups of non-state employees

or Arkansas taxpayers generally for not providing health insurance for them?

RESPONSE

With respect to your first question, the fact that the state has extended health-care subsidies to school-district employees neither empowers nor forecloses it from extending similar benefits to other groups. In each case, the operative inquiry will be whether the proposed expenditure would serve a public purpose, as distinct from only benefitting private individuals or entities. If a trier of fact determines that the expenditure would indeed serve a primarily public purpose, the expenditure will be deemed permissible. I take your second question to be whether the state's provision of health benefits to public-school employees would invite an equal-protection challenge from other groups claiming to be similarly situated. Needless to say, nothing keeps a member of a purportedly similar class from alleging that he has been denied equal protection in not having been provided such benefits. I strongly question, however, that such a challenge would succeed. Under the applicable rational-basis standard of review, which courts employ to test all classifications that involve neither a suspect class nor a fundamental right, the state could successfully defend itself against such a claim merely by establishing that the classification is reasonably related to a legitimate governmental end. In my opinion, the state's singling out for health-care subsidies individuals engaged in the crucial task of educating the state's children – a clear state obligation under Ark. Const. art. 14 – would almost certainly pass muster under this test.

Question 1: If the state provides health insurance for public school employees, who are deemed not state employees, can the state provide insurance for other special interest groups of non-state employees or Arkansas taxpayers generally?

In my opinion, the legislature may expend public funds to any group so long as doing so serves a legitimate public purpose. Only a finder of fact, based upon a careful review of the surrounding circumstances, could determine in any particular case whether an expenditure meets this test. I will note, however, that, under what is generally known as the “public-purpose doctrine,” the state cannot expend its funds in a manner that exclusively benefits private entities or individuals.

Implicit in your question is a suggestion that it might be inherently objectionable for the state to “provide[] health insurance” to public-school employees because such individuals are not “state” employees. You imply that the state's practice of

providing such limited subsidies might open the door to automatically permit funding *all* groups comprising individuals “who are deemed not state employees,” including any “other special interest groups” or “taxpayers generally.” In my opinion, this suggestion is unwarranted.

You cite three Attorney General opinions, Ops. Att’y Gen. 91-244, 99-028 and 2010-049, as acknowledging that public-school employees are not state employees. None of these opinions, however, either (a) calls into question the propriety of the state’s providing health-care subsidies to public-school employees; or (b) even remotely suggests that providing such subsidies to one group will automatically open the door to providing them to all other groups.

In the earliest of these opinions, my predecessor indeed opined that “school employees are generally not considered state employees.”¹ Based upon this characterization, however, he concluded only that a school-district employee would not fall within the range of a statute exclusively applicable to state employees. He never suggested that the legislature would be foreclosed from directing state resources to school-district employees in pursuit of a public purpose. In Opinion 99-028, another of my predecessors, while acknowledging that the legislation at issue in your request distinguishes between state and public-school employees, *approved* the legislature’s grouping these two categories together under one or more health-insurance programs for purposes of making available “multiple benefit options.” In Opinion 2010-049, I likewise acknowledged the distinction between state and public-school employees, opining only that, given this distinction, the Uniform Attendance and Leave Policy Act,² which applies only to specified state employees, does not apply to the school-district employees.³

¹ In support of this conclusion, my predecessor cited *Muse v. Prescott School District*, 233 Ark. 789, 349 S.W.2d 329 (1961) (holding that a public school teacher did not fall within the coverage of the Workers’ Compensation Act, which at the time provided coverage only for employees of the state, its agencies, departments and institutions, for injuries incurred in the course of employment); *see also Dermott Special School District v. Johnson*, 343 Ark. 90, 95, 32 S.W.3d 477 (2000) (declaring that “a school district and its employees are different from state employees” for “sovereign immunity purposes” under Ark. Const. art. 5, § 20); *Corbin v. Special School District of Fort Smith*, 250 Ark. 357, 362, 465 S.W.2d 342 (1971) (declaring that the Uniform Administrative Procedure Act does not apply to local school districts, which “are political subdivisions of the state and are not state agencies within the meaning of the Act”).

² A.C.A. § 21-4-201 through -217 (Repl. 2004 & Supp. 2013).

³ *Accord* Op. Att’y Gen. 88-099.

The common conclusion in these opinions is not that school-district personnel either are or should be precluded by their status from receiving state benefits; rather, it is that specific statutes will control in determining whether they are entitled to receive such benefits in particular instances. These opinions at no point suggest that the legislature would be precluded from extending state funding to school-district personnel – or, for that matter, to any other group – upon finding that doing so would serve a public purpose.

These opinions, then, are in all respects consistent with the accepted proposition that a state expenditure will be warranted so long as it serves a “public purpose.” The Arkansas Supreme Court has defined the public-purpose doctrine as follows:

No principle of constitutional law is more fundamental or more firmly established than the rule that the State cannot, within the limits of due process, appropriate public funds to a private purpose. A century ago the basic doctrine was simply stated in the leading case of *Brodhead v. City of Milwaukee*, 19 Wis. 624: “The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It cannot in the form of a tax take the money of the citizens and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well[-]being of the community required to contribute.”⁴

The doctrine restricts public expenditures to those that serve primarily public purposes, with any benefit to a private individual or entity being merely incidental.⁵

⁴ *Chandler v. Board of Trustees*, 236 Ark. 256, 258, 365 S.W.2d 447 (1963). See also generally, Ops. Att’y Gen. 2007-161 and 2004-311 (exploring the scope of the public-purpose doctrine) and Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 St. Louis U. Pub. L. Rev. 143 (1993).

⁵ See Op. Att’y Gen. 2005-102 (“An incidental private benefit, however, will not automatically invalidate an expenditure of public funds. See, e.g., Op. Att’y Gen. 2004-319.”). For an elaborate discussion of consideration bearing on the question of when an expenditure might be deemed to impermissibly confer private benefits, see Op. Att’y Gen. 2001-180.

The determination and declaration of a public purpose supporting a state expenditure is normally the role of the legislature. As one of my predecessors has stated:

The determination of whether a particular expenditure is for a “public purpose” is to be made by the legislature. Although ultimately the propriety of a particular expenditure is resolved by the judiciary, great weight must be given legislative declarations of public purposes. *Turner v. Woodruff*, 286 Ark. 66, 698 S.W.2d 527 (1985).⁶

Purely by way of illustration, applying the public-purpose doctrine to test the health-care subsidy for school-district employees is relatively straightforward, as are the contours of the subsidy program itself. The legislature has created “a single board to select health insurance and life insurance plan coverages for state and public school employees and retirees.”⁷ It has further provided that any “state agency or school district” may accept state funding “to partially defray the cost of health and life insurance for state employees or public school employees,” subject to the condition that the recipient “[u]se those funds only for the program.”⁸ The Code obligates the state, through the Department of Education, to contribute a specified monthly amount “for each eligible employee electing to participate in the public school employees’ health insurance program administered by the State and Public School Life and Health Insurance Board.”⁹

The terms of this funding regime, whose constitutionality has not been judicially challenged since its adoption in 1995,¹⁰ must be tested in light of the following principles:

⁶ Op. Att’y Gen. 91-410.

⁷ A.C.A. § 21-5-401(1) (Supp. 2013). *See also* Op. Att’y Gen. 2001-289 (opining that, based upon this provision, “state law . . . contemplates only one publicly sponsored public school employee health insurance program, and that is the one instituted pursuant to § 21-5-401 *et seq.*, which created the State and Public School Life and Health Insurance Board to set policy and select plans and coverages for such a program”).

⁸ A.C.A. § 21-5-405(b)(4)(B) (Supp. 2014), as amended by Acts 2014, Nos. 3 and 6 (2nd Ex. Sess.).

⁹ A.C.A. § 6-17-1117(b)(1)(A) (Supp. 2013).

It is well settled that the “Legislature is clothed by the constitution with plenary power over the management and operation of the public schools. It is for the Legislature to declare the policy with reference to the schools. . . .” *Wheels v. Franks*, 189 Ark. 373, 377, 72 S.W.2d 231 (1934). The Arkansas Constitution provides that the “supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly.” Arkansas Constitution art. 14, § 4.¹¹

Based upon these principles, my predecessor concluded that “it is well within the General Assembly’s powers to have the State Board of Education set the employer insurance contribution rate.”¹² In my opinion, it is equally clear that legislature has the power to mandate, as a matter of public policy, that the state contribute directly to the health-care coverage of school-district employees who help fulfill the state’s obligation to “maintain a general, suitable and efficient system of free public schools.”¹³ It is likewise clear, in my estimation, that the General Assembly had the power to direct the State and Public School Life and Health Insurance Board to “[u]tilize the combined purchasing power of the state employee and public school personnel programs to foster competition among vendors and providers for the programs”¹⁴ and to “[w]ork in a concerted effort toward a common goal of parity between public school and state employee insurance programs.”¹⁵

I cannot in the abstract opine regarding the propriety under this standard of extending similar subsidies to “other special interest groups of non-state employees” and “Arkansas taxpayers generally.” In each instance involving a

¹⁰ See Acts 1995, No. 1206 (creating and empowering the State and Public School Life and Health Insurance Board to administer the regime at issue in your request).

¹¹ Op. Att’y Gen. 98-197.

¹² *Id.*

¹³ Ark. Const. art 14, § 1.

¹⁴ A.C.A. § 21-5-405(b)(4)(A) (Supp. 2013).

¹⁵ A.C.A. § 21-5-403(3)(B) (Supp. 2013) (contained within a list of public purposes to be served by the measures set forth in the subchapter at issue in your request).

challenge to any such subsidy, a finder of fact must first delineate the recipient group and then test the public purpose allegedly served by the proposed expenditure. I am neither authorized nor situated to conduct any such factual investigation. I will repeat, however, that the state's providing a benefit exclusively to private individuals necessarily offends the public-purpose doctrine.

Question 2: Does providing health insurance for public school employees, who are deemed not state employees, expose the state to a lawsuit from other special interest groups of non-state employees or Arkansas taxpayers generally for not providing health insurance for them?

In my opinion, any state classification-by-group in theory exposes the state to a lawsuit alleging an equal-protection violation. Although determining whether any such violation had occurred would ultimately turn upon the facts of any particular challenge, I question that the state's extension of health-insurance benefits to school-district employees would subject it to liability in the face of an equal-protection challenge brought by members of other groups.

Any discrimination of the sort at issue in your question implicates the constitutional guarantee of "equal protection" under the 14th Amendment to the United States Constitution and Article 2, §§ 2 and 3 of the Arkansas Constitution. The equal protection doctrine as set forth in both constitutions prohibits certain types of "classifications." A classification is the disparate treatment of those who are similarly situated. Classifications, however, do not in and of themselves violate the equal protection doctrine. In order to establish an equal protection violation arising out of a classification that does not affect a suspect class (such as a particular racial group¹⁶) or a fundamental right (such as the right to vote¹⁷), a challenger must show that the disparity is arbitrary. Stated differently, the disparity must be shown to have no rational basis – i.e., no rational relation to a legitimate governmental end.¹⁸ In reviewing the constitutionality of a classification that does not affect a suspect class or a fundamental right, a court must not only presume the constitutionality of the challenged classification; it

¹⁶ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁷ See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972).

¹⁸ *Fitzgerald v. Racing Assn. of Central Iowa*, 541 U.S. 1086 (2004); *Vacco v. Quill*, 521 U.S. 793 (1997); *Romer v. Evans*, 517 U.S. 620 (1996); *Clements v. Fashing*, 457 U.S. 957 (1982); *Seagrave v. Price*, 349 Ark. 433, 79 S.W.3d 339 (2002); *Craft v. City of Fort Smith*, 335 Ark. 417, 984 S.W.2d 22 (1998).

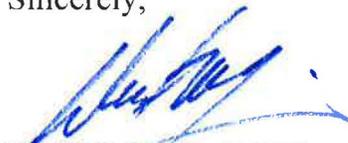
must also uphold the classification even without requiring a showing of an actual rational basis, so long as any conceivable rational basis for the scheme can be adduced – even a hypothetical one.¹⁹

The classifications at issue in your request are not invidious examples of discrimination directed against a suspect class or abridging a fundamental right. It follows that a reviewing court would apply the extremely broad “rational basis” test, under which the challenged program would be upheld so long as any conceivable basis exists for its implementation.

With respect to state health-care subsidies, various rationales might be proposed as possibly having prompted the legislature to single out school-district employees for receipt of such benefits. Perhaps prime among these is the impulse to provide such a benefit to individuals crucially involved in fulfilling the state’s educational obligation. Nothing precludes the government from creating a classification in pursuit of such a policy priority.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,



DUSTIN McDANIEL
Attorney General

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¹⁹ *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Ester v. National Home Ctrs., Inc.*, 335 Ark. 356, 981 S.W.2d 91(1998); *Reed v. Glover*, 319 Ark. 16, 889 S.W.2d 729 (1994); *Arkansas Hospital Assoc. v. State Board of Pharmacy*, 297 Ark. 454, 763 S.W.2d 73 (1989). See Ark. Ops. Att’y Gen. 2007-059 and 2006-027 (generally discussing this standard).