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DEPT. OF JUSTICE

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Date: March 22, 1990

Subject: Constitutional Law. Construction of LB 688, as amended, in relation to Article III, section 18, of the Nebraska Constitution.

Requested by: Senator Jacklyn J. Smith

Written by: Robert M. Spire, Attorney General
Marilyn B. Hutchinson, Assistant Attorney General

You have asked whether LB 688, as amended, violates Article III, section 18, of the Nebraska Constitution. We have concluded that depends on whether different treatment for the persons exempted from the general law is warranted under the circumstances as discussed below.

Article III, section 18, of the Nebraska Constitution prohibits the Legislature from passing any special law granting to any individual any special privileges where a general law can be made applicable.

LB 688, as amended, would permit unlicensed persons to practice a limited scope of medicine to assist persons with developmental disabilities in special educational settings specified in the bill. See, LB 688, sections 1 and 2(f) and Committee Hearing on LB 688 (February 9, 1989), pp. 70, 74, 76, 80, 85 and 86.

The general rule is that no person may practice medicine and surgery in this state without a license to do so issued by the Department of Health. Neb.Rev.Stat. §71-102 (Supp. 1989).

> There exists no vested right to practice medicine; rather, it is a conditional right subordinate to the police power of the state to protect and preserve the public health.

State v. Hinze, 232 Neb. 550, 555, 441 N.W.2d 593 (1989). Thus protection and preservation of the public health is the justification for the general rule.

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> Exemptions [from a general rule] are allowed where they are made applicable to all persons of the same class similarly situated.

Casey's General Stores v. Nebraska Liquor Control Commission, 220 Neb. 242, 243, 369 N.W.2d 85 (1985). It must be possible for others to come within the classification after it is defined. State ex rel. Campbell v. Gering Irrigation District, 114 Neb. 329, 207 N.W.2d 525 (1926). It must operate uniformly and alike on every member of the class designated. Creigh v. Larsen, 171 Neb. 317, 106 N.W.2d 187 (1960).

> "[T]he classification must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or propriety of different legislation in respect to them."

Low v. Rees Printing Co., 41 Neb. 127, 142, 59 N.W. 362 (1894).

Thus, exceptions from the general rule are possible without violating Article III, section 18. However, too many exceptions may undermine the justification for the general rule.

1. The Legislature has previously exempted classes of persons from the need to be licensed by the Department of Health as physicians and surgeons in order to practice medicine.

The classes of persons who may lawfully practice medicine and surgery without a license issued by the Department of Health are identified in Neb.Rev.Stat. §71-1,103 (Supp. 1989). Those exceptions from the general rule include the classes of unlicensed persons identified in subsections (1) - (4) and (8), the classes of persons licensed elsewhere and identified in subsections (5) - (7) and (15), and the classes of persons licensed in this state to practice a limited scope of medicine and surgery and identified in subsections (9) - (14). The practice of nursing as defined in Neb.Rev.Stat. §71-1,132.05 (Supp. 1989) for which licensure is required by Neb.Rev.Stat. §71-1,132.04 (Reissue 1986) comes within the exception in subsection (14). The exceptions from nursing licensure in Neb.Rev.Stat. §71-1,132.06 (Supp. 1989) include exceptions for classes similar to the classes exempted under Neb.Rev.Stat. §71-1,103.

Thus, there is precedent for exempting unlicensed persons from the general rule requiring licensing by the Department of Health to practice medicine and surgery in this state.

2. The exemption proposed in LB 688, as amended, does not violate Article III, section 18, if different treatment for those providing routine medical care for the developmentally disabled in specified situations is warranted under the circumstances.

LB 688 as amended would authorize an unlicensed person to:

> perform routine health care maintenance procedures for a person with developmental disabilities when such procedures are performed in an early childhood program, a center for the developmentally disabled, a special education setting, a medicaid waiver facility, or a foster care setting under the supervision of the attending physician. . .

LB 688, section 1.(1). "Routine health care maintenance procedures" are defined in section 1.(2)(f) to limit the procedures to those the person with developmental disabilities could do himself or herself if such person were not developmentally disabled. "In essence, we're trying to provide a way to provide some protections for the public, while not overly restricting and regulating this area." Floor Debate on LB 688 (Feb. 20, 1990), Senator Wesely, pp. 9602, 9603. (The fear that the scope of practice was too broad and that there would be difficulty in enforcing it against an unlicensed person had been raised at the public hearing. Committee Hearing on LB 688 (Feb. 9, 1989), pp. 85 and 86.)

Assuming that such procedures do come within the practice of medicine, LB 688, as amended, creates an exception to the general rule that persons engaged in such practice must be licensed by the Department of Health.

The classification of "special care provider" applies to all persons of the same class similarly situated and operates uniformly and alike on every member of the class designated, i.e., persons trained at least two hours per procedure by the attending physician or a registered nurse who has demonstrated the necessary competency to such trainer, and who performs such procedures under the direction of a registered nurse in centers for the developmentally disabled and in special education settings. LB 688, section 1.(1) and (2)(g). Thus the exemption is permissible under the rule cited from Casey's General Stores, above, and Creigh v. Larsen, above.

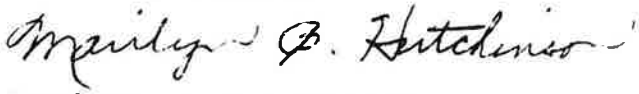
It is possible for others to come within the classification after the legislation is passed. Thus the exemption is permissible under the rule cited from State ex rel. Campbell, above.

The classification is based on a philosophy to get developmentally disabled persons into less-restrictive settings and provide those 50 to 100 developmentally disabled persons needing routine medical care with such care in those settings without incurring the expense of hiring licensed nurses to provide it. Committee Hearing on LB 688 (February 9, 1989), pp. 65-68, 70, 71 and 74. To the extent those facts suggest a difference in the situation and circumstances of persons providing routine medical care for the developmentally disabled in special education settings which requires different legislation in respect to them, the classification is permissible under the rule cited from Rees Printing Co., above.

In conclusion, the validity of LB 688, as amended, under Article III, section 18, of the Nebraska Constitution depends on whether it is necessary or proper to treat differently the persons who give routine medical care to the developmentally disabled in specified situations under the circumstances. This is a judgment that must be made first by the Legislature, subject to judicial review.

Sincerely yours,

ROBERT M. SPIRE
Attorney General



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cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved:

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16-187-13