

**OPINION
73-408**

September 25, 1973 (OPINION)

The Honorable Arthur A. Link
Governor
State Capitol
Bismarck, ND 58501

Dear Governor Link:

This is in reply to your letter of August 31, 1973, relative to certain questions involving P.L. 93-66 and the ability of the state of North Dakota to comply therewith. You state the following facts:

"Title III of Public Law 92-603, approved October 30, 1972, amended Title XVI of the Social Security Act and federalized the adult categorical assistance programs (Aid to the Aged, Blind and Disabled) effective January 1, 1974. The program, entitled 'Supplemental Security Income for the Aged, Blind, and Disabled,' establishes payment levels to eligible individuals financed entirely through federal funds. Section 1616 of the Act authorizes the states to supplement the Supplemental Security Income (SSI) payments on an optional basis.

"The Social Service Board of North Dakota in its budget request for the 1973-1975 biennium included a request for funds to supplement the SSI Program in order to provide payments to persons in homes for the aged and inform for whom the SSI payment would be insufficient to meet the cost of their custodial care requirements. This request was deleted in the Executive Budget and the Legislature did not restore the item. State supplementation was addressed, however, by the Forty-third Legislative Assembly through a declaration of legislative intent contained in section 6, chapter 33, 1973 Session Laws:

'SECTION 6. LEGISLATIVE INTENT. It is the intent of the Legislative Assembly that:

1. * * *
2. Since counties will be receiving revenue sharing funds to assist counties in making payments to the ineligible spouse or supplemental payments to those in homes for the aged and infirmed;'

"The President signed into law Public Law 93-66 on July 12, 1973. Section 212 of the enactment imposes mandatory minimum state supplementation of certain SSI benefits. In order for states to be eligible for federal financial participation in the 'Medicaid Program (Title XIX, Social Security Act), the states must agree to supplement SSI benefits to all persons who receive less money under the SSI Program than they received through the state's adult programs during the month of December, 1973. Such agreement, to be made with the Secretary

of health, Education, and Welfare, must be in effect on January 1, 1974.

"North Dakota's adult categorical assistance program is established pursuant to North Dakota Century Code chapter 50-24, 'Aid to the Aged, Blind, or Disabled' (AABD). Many of the state's AABD recipients residing in custodial care facilities will receive less financial assistance under the SSI Program in January, 1974, than they will have received under the state program in December, 1973. Except as provided in subsection (f) of section 212 of Public law 93-66, the state must supplement the SSI payment to these individuals or become ineligible for federal payments pursuant to Title XIX of the Social Security Act. Subsection (f) of section 212 of Public Law 93-66 establishes conditions under which the provisions requiring mandatory state supplementation contained in subsection (a) of section 212 of the law are inapplicable.

"This office is anxious to avoid the loss of federal financial participation in the state's Medical Assistance Program (North Dakota Century Code chapter 50-24.1) and the ensuring hardship to those dependent upon the program for their medical needs. This office desires to comply with the federal mandate if such compliance is by law authorized. Your opinion in response to the following questions is hereby requested:"

Based on the above facts, you ask certain questions. The questions, and our replies thereto, will be considered in the order listed in your letter.

Question one: "Is there any prohibition or impediment contained in the North Dakota Constitution, particularly section 25 and section 186, which renders it impossible for the state to enter into and commence carrying out (on January 1, 1974) an agreement with the Secretary of Health, Education, and Welfare to the effect that the state will supplement SSI program benefits to such an extent as to guarantee that no AABD recipient receives less money in January, 1974, than was received in December, 1973, under the state AABD Program?"

Subsection f of section 212 of Public Law 93-66 provides as follows:

"The provisions of subsection (a)(1) shall not be applicable in the case of any state:

- 1) The Constitution of which contains provisions which make it impossible for such state to enter into and commence carrying out (on January 1, 1974) an agreement referred to in subsection (a), and
- 2) The Attorney General (or other appropriate state official) of which has, prior to July 1, 1973, made a finding that the State Constitution of such state contains limitations which prevent such state from making supplemental payments of the type described in section 1616 of the Social Security Act."

The sections of the North Dakota Constitution to which you refer (sections 25 and 186) provide insofar as is pertinent, as follows:

Section 25. "The legislative power of this state shall be vested in a Legislature consisting of a senate and house of representatives. * * * "

Section 186. "(1) All public moneys * * * shall be paid out and disbursed only pursuant to appropriation first made by the Legislature; * * * "

The problem arises in view of section 6(2) of chapter 33 of the 1973 Session Laws of North Dakota, containing the appropriation for the Social Service Board. This section provides:

"LEGISLATIVE INTENT. It is the intent of the legislative assembly that:

* * *

2. Since counties will be receiving revenue sharing funds, the appropriation to the social service board does not include funds to assist counties in making payments to the ineligible spouse or supplement payments to those in homes for the aged and informed;

* * * "

In view of the working of the appropriation bill, it is our opinion that the Executive Branch of State Government, including the Department of Social Services, cannot enter into an agreement with the Secretary of HEW to guarantee that the state will, from state appropriated funds, supplement SSI program benefits to such an extent that no AABD recipient receives less money in January, 1974, than was received in December, 1973. The above quoted constitutional provisions are clear and precise. They do not permit the use of moneys appropriated to the Social Services Department to guarantee such payments. While the Legislature may guarantee such payments, they have not done so and, in fact, have specifically limited the use of moneys which might be available to the executive for such purposes.

Question two: "In the event the response to question number one is in the affirmative, does any Attorney General's Opinion dated prior to July 1, 1973, including an opinion rendered October 21, 1964, and addressed to the director of the Department of Accounts and Purchases, constitute a finding that the State Constitution contains limitations preventing the state from providing optional SSI supplementation of the type described in section 1616 of the Social Security Act?"

The opinion to which you refer was primarily concerned with section 186 of the North Dakota Constitution and the requirement of the appropriation of public moneys by the Legislature before they could be expended. Insofar as the opinion is concerned with the authority of the executive to expend or commit funds without legislative appropriation, the opinion does constitute a finding that the North

Dakota Constitution contains limitations preventing the executive branch of the state from providing optional SSI supplementation of the type described in section 1616 of the Social Security Act without legislative appropriation therefore, and particularly in view of the fact that the Legislature has specifically provided in the current biennial appropriation for the social services department that such appropriation does not include funds to assist counties in making payments to the ineligible spouse or supplement payments to those in homes for the aged or informed.

You also ask the following questions in the event the response to question one or question two is in the negative. The response to the questions may be considered in the affirmative, in view of the current legislation and the fact the North Dakota Legislature does not meet in regular session until January, 1975. However, in view of the fact the current circumstances do not constitute a continuing prohibition or impediment insofar as the legislative action which, if the Legislature were in session, could be taken, we believe the questions should be considered.

Question three: "In light of the declaration of legislative intent contained in chapter 33, Session Laws 1973, as state statutory provisions, and the provisions of the North Dakota Constitution, is it legally permissible for the Social Service Board, of its own initiative, to allocate a portion of its appropriated funds to supplement SSI benefits received by individuals in custodial care facilities?"

We believe the answer to this question is adequately set forth in our response to the first two questions. In view of the specific language used by the Legislature in chapter 33 of the 1973 Session Laws of North Dakota, it is clear that the appropriated funds are not to be used for such purpose. Were the board to attempt to use the funds for such purpose at this time, it would constitute a violation of section 186 of the North Dakota Constitution.

Question four: "In the event the response to question three is in the affirmative, can the Social Service Board agree in writing with the Secretary of Health, Education, and Welfare to the supplementation mandated in section 212 of Public Law 96-666?"

Since question three was not answered in the affirmative, no answer is required to this question.

Question five: "Under the circumstances as outlined, is it legally permissible for the Emergency Commission to allocate funds to the Social Service Board from the state contingency fund for the purposes of supplementing SSI program benefits as mandated in section 212 of Public Law 93-66?"

We do not believe it proper, at this time, to attempt to direct the activities of the State Emergency Commission. That commission has not requested the advice of this office and we believe it would be an infringement on the authority of that board to circumscribe their functions in this matter. We would note that section 54-16-04 of the North Dakota Century Code, as amended, provides that in order to

direct the expenditure of moneys from the State Contingency Fund, an emergency must exist. The term "emergency" is limited by definition in that section to "calamities or unforeseen happenings subsequent to the time such appropriation was made and which were clearly not within the contemplation of the legislative assembly and the governor." The fact of subsidizing such payments was obviously not unforeseen in view of the statement by the Legislature in the appropriation for the social services board. The action of the federal government finalized in July, 1973, some three plus months after the adjournment of the legislature, might possibly be considered to be unforeseen. While all the basic facts are known, there still remains an evaluation of all the pertinent facts which is primarily a function assigned by legislative action to the Emergency Commission. Even though we would express reservations as to whether or not the situation discussed here constitutes a statutorily defined emergency, the administrative decision of the commission would be entitled to weight.

Question six: "Under the circumstances as outlined, is it legally permissible for the Emergency Commission to transfer money from a line item in the Social Service Board's appropriation to an item considered by the Legislature but for which an appropriation was specifically declared not made?"

The rationale of the response to question five must also apply to this question. The requisite for a transfer of funds within an appropriation to a specific agency is the same as the requisites for an order to expend funds from the contingency fund. See section 54-16-04 of the North Dakota Century Code, as amended.

Question seven: "Is the Emergency Commission legally authorized to empower the Social Service Board to accept and expend an advance from the federal government for the purposes of supplementing SSI program benefits, assuming that repayment of such advance be contingent upon legislative appropriation?"

While the Emergency Commission may, under the provisions of section 54-16-04.1 of the North Dakota Century Code, as amended, authorize the board to accept and expend federal funds for programs which the legislative assembly has not indicated an intent to reject, one of the conditions of such authorization is the fact that "the program shall not commit the legislative assembly for matching funds for future bienniums unless the program has first been approved by the legislative assembly." In view of such language there must be considerable doubt as to the ability of the Emergency Commission to authorize the Social Services Board to accept federal funds which must be repayed by legislative appropriation in the future.

Question eight: "Can the Social Service Board legally accept and expend an advance of federal funds in order to provide SSI supplementation contemplated in section 212 of Public law 93-66, assuming there may be a reduction in future federal matching funds in other Social Security Act programs for which the state qualifies?"

Since the funds in question are federal funds, we assume the federal government may expend them within the legal limitations imposed by

Congress. We find no legal objection to the Social Service Board accepting and expending federal funds to provide SSI supplementation even if there may be a reduction in future federal matching funds in other Social Security Act programs for which the state qualifies. In this respect board is authorized to "take such action and make such rules and regulations as may become necessary to entitle the state to receive aid from the federal government for assistance for the aged, blind, and disabled in North Dakota." See section 54-24-02(1) of the North Dakota Century Code, as amended, see also subsections 4 and 9 of said section. This general provision is subject to special provisions such as found in section 6 of chapter 33 of the 1973 Session Laws of North Dakota. However, that provision merely states the legislative appropriation contains no matching funds to assist counties in making payments to the ineligible spouse or supplement payments to those in the homes for the aged and infirmed. It does not prohibit the expenditure of other funds which might legally be available to the board for this purpose.

Question nine: "Is it legally permissible for the Social Service Board pursuant to the rule making authority vested in said board under North Dakota Century Code chapter 50-24.1 to impose an obligation upon the counties, as contemplated in subsection 2 of section 6, chapter 33, 1973 Session Laws, to supplement certain SSI program benefits in order that the state may continue to qualify for federal Title XIX payments?"

Subsection 3 of section 50-24-02 of the North Dakota Century Code, as amended, provides the board shall: "Take such action, give such directions, and promulgate such rules and regulations as may be necessary or desirable to carry out the provisions of this chapter, including the adoption and application of suitable standards and procedures to ensure uniform and equitable treatment of all applicants."

We cannot, of course, determine whether such procedure would satisfy the federal requirements. That matter must be determined by the federal government. We also hesitate to comment on the possibility of such a rule without having a specific proposal presented to us. However, it does appear the board may well have certain authority in this regard. We are cognizant of the provisions of sections 50-24-20 through 50-24-23 of the x, as amended, relating to the county share of assistance and the manner in which the county's share is paid. We are also cognizant of chapter 50-24.1 of the of the North Dakota Century Code which governs the medical assistance for needy persons. This chapter governs the program for which the state would be ineligible for federal financial participation should it not be able to agree to supplement SSI benefits as required by Public law 93-66. In this respect we note section 50-24.1-03 of the of the North Dakota Century Code, as amended, provides:

"COUNTY SHARE OF MEDICAL ASSISTANCE. Each county in this state shall reimburse the state department for amounts expended for medical assistance in such county in excess of the amount provided by the federal government, in the amount of fifteen percent."

It takes no great explanation to determine that if the federal funds

are not forthcoming the cost of administering this program by the state will be greater and the amount each county must reimburse the state will also be greater. Thus, it would be to the advantage of the county to guarantee the supplement SSI benefits. This was also obviously contemplated by the legislature in the enactment of chapter 33 of the 1973 Session Laws. In view of these facts we believe it is legally permissible for the social Service Board to impose an obligation upon the counties to supplement the SSI program benefits. However, in guaranteeing the supplemental benefits to the federal government it must be made clear that such guarantee is not to be paid from state appropriations but rather from the appropriation of the individual counties.

Question ten: "in the event the response to question nine is in the affirmative, in what manner could the state proceed in order to enforce such county supplementation?"

If the rule is adopted and approved and if the county refuses to comply with same, we assume the procedure for enforcement would be similar to that which would be used if the county refused to reimburse the state as required by sections 50-24-20 and 50-24.1-03 of the of the North Dakota Century Code, as amended, i.e., legal action to require compliance. In addition, resort to administrative requirements and penalties might be appropriate.

Question eleven: "In the event the response to question nine is in the affirmative, is it legally permissible for the Social Service Board to enter into an agreement with the Secretary of Health, Education, and Welfare whereby the Social Service Board agrees to guarantee county supplementation of SSI program benefits required in section 212 of Public law 93-66?"

This question is, in part, answered in question nine. We believe the board may enter into such an agreement but such agreement must specify that the guarantee is not to be paid from state appropriations but rather from the appropriations of the individual counties.

Sincerely yours,

Allen I. Olson

Attorney General