

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-20

Date issued: September 7, 1990

Requested by: Patricia L. Burke
Burleigh County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether counties are obligated to fund social service programs under N. D. C. C. tit. 50 or related federal laws.

II.

Whether there is a limit to the extent to which counties are obligated to fund required social service programs.

III.

Whether the state of North Dakota is obligated to fund social service programs under N. D. C. C. tit. 50 or related federal laws.

IV.

Whether any presently existing social service programs created either under state or federal statute are optional as to county participation.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that counties are obligated to fund all social service programs where N. D. C. C. tit. 50 prescribes a county social service board duty or responsibility.

II.

It is my further opinion that counties are obligated to fund any required social service programs except to the extent that funding may be made available from state or federal sources.

III.

It is my further opinion that although the state of North Dakota is not obligated to fund any social service programs, a failure to do so will result in a significant loss of federal funding.

IV.

It is my further opinion that existing social service programs created under state or federal statute are optional as to county participation only if county participation is neither required nor implied in law.

- ANALYSES -

"Social service programs," a phrase used in each area of your inquiry, is not defined in law. For the purposes of this opinion and, in particular, given the nature of your inquiry, the phrase is used to refer to programs and programmatic duties mentioned in N.D.C.C. tit. 50 or implied in that title, and bearing some relationship to the county social service board. The phrase may properly be given other meanings in other contexts, and it is not the purpose of this opinion to limit the meaning of the phrase.

I.

There is no common law liability imposed upon a county for support of the poor. Weber v. Weber, 42 N.W.2d 67 (N.D. 1950); Mandan Deaconess Hospital v. Sioux County, 248 N.W. 924 (N.D. 1933). The statutes providing for social services are thus in derogation of the common law, and are to be "construed liberally." N.D.C.C. ' 1-02-01. Any discussion concerning county funding obligations must necessarily begin with an understanding of the nature of a county. Counties are creatures of the constitution and may act only in the manner and matters authorized by the Legislature by statute. Dornacker v. Olson, 248 N.W.2d 844, 849-50 (N.D. 1976). Furthermore, "[a] municipality is merely a department of the state, a political subdivision created as a convenient agency for the exercise of such governmental powers as may be entrusted to it." Ferch v. Housing Authority of Cass County, 59 N.W.2d 849, 865 (N.D. 1953) (quoting Monaghan v. Armatage, 218 Minn. 108, 112, 15 N.W.2d 241, 243 (1944)). The constitutional provisions discussed by the Dornacker and Ferch courts have since been repealed and replaced, in relevant part, by N.D. Const. art. VII, " 2 and 8. In particular, current N.D. Const. art. VII, ' 8, provides, in relevant part: "Each county shall provide for law enforcement, administrative and fiscal services, recording and registration services, educational services, and any other governmental services or functions as may be provided by law." (Emphasis supplied.) Simply put, the county may be required by the Legislature to provide any governmental service or function which the Legislature deems appropriate.

While North Dakota case law in the subject area is very limited, other jurisdictions have concluded that counties must conform to state requirements that they attend to county social service needs. See St. Joseph's Hospital and Medical Center v. Maricopa County, 635 P.2d 527 (Ariz. 1981) (statute imposing duty to provide medical care to indigents upheld); St. Thomas Hospital v. Schmidt, 62 Ohio St. 439, 406 N.E.2d 819 (1980) (county ordered to pay necessary medical costs for indigents despite county commissioners' failure to appropriate funds). North Dakota statutes impose many social service duties upon counties.

The county is generally required "[t]o supervise and direct all relief and welfare activities conducted by the county" N.D.C.C. ' 50-01-09(1).

The county is specifically required to administer the food stamp program (N.D.C.C. ' 50-01-09(4)), the low income home energy assistance program (N.D.C.C. ' 50-01-09 (5)), aid to families with dependent children program and related programs under Title IV of the Social Security Act (N.D.C.C. ' 50-09-03), and medical assistance for needy persons (N.D.C.C. ' 50-24.1-03.1). Other programs which impose specific statutory duties on county social service boards include those enumerated in N.D.C.C. ' 50-06.2-03(5), services related to children in foster care (N.D.C.C. ' 50-09-06.1), crippled children's services (N.D.C.C. ' 50-10-09), inspection of foster care homes (N.D.C.C. ' 50-11-06.2), licensing of early childhood facilities (N.D.C.C. ' 50-11.1-04 and ' 50-11.1-06), child abuse and neglect reporting and investigations (as the Department of Human Services' designee) (N.D.C.C. ch. 50-25.1 generally), child protective services (N.D.C.C. ' 50--25.1-06), and vulnerable adult protection services (N.D.C.C. ch. 50-25.2 generally). To the extent that the Legislature has imposed a duty upon the counties, a county must fund the program.

II.

The duties of the county social service board are generally set forth in N.D.C.C. ' 50-01-09, with respect to "relief and welfare activities," and in N.D.C.C. ' 50-06.2-04, with respect to "human service programs." The phrase "relief and welfare activities" is not defined, but contemplates any activity in the county "as may be financed in whole or in part by or with funds allocated or distributed by the department of human services." N.D.C.C. ' 50-01-09(2). The phrase "comprehensive human services" is defined to mean "services included in the comprehensive human services plan published by the state agency and human services required by state law or state agency regulation or federal law or regulation as a condition for the receipt of federal financial participation in programs administered under the provisions of . . . title [50]." N.D.C.C. ' 50-06.2-02(1).

The description of the counties' obligation to fund social service programs varies considerably. In some programs there are specific formulas for calculation of the counties' funding obligation. In others the county is to accomplish specified objectives with no mention of how the required activities are to be funded.

Poor Relief:

The county is responsible, upon receipt of a proper application, "to relieve and support persons who are residents of the county and who are in need of poor relief." N.D.C.C. ' 50-01-01. This responsibility is limited to the amount in the county poor relief appropriation. N.D.C.C. ' 50-01-01.

Food Stamp Program:

Specific county social service board duties are identified at N.D.C.C. ' 50-01-09(4). The county is obliged to "appropriate and make available to the poor relief fund an amount sufficient to pay the local expenses of administration of the food stamp program" N.D.C.C. ' 50-03-07. There is no statutory limit on funding this program, although N.D.C.C. ' 50-06-05.1 (18) describes circumstances under which the program could be terminated.

Low Income Home Energy Assistance Program:

N. D. C. C. ' 50-01-09(5) requires the county social service board to administer the energy assistance program. There is no statutory limit on funding of this program, although N. D. C. C. ' 50-06-05.1(20) describes circumstances under which the program could be terminated.

Comprehensive Human Service Programs:

N. D. C. C. ' 50-06.2-05 provides:

The board of county commissioners of each county shall annually appropriate and make available to the poor relief fund an amount sufficient to pay the local expenses of administration and provision of the human services required by state law and by federal law or regulation as a condition for the receipt of federal financial participation in programs administered by county agencies under the provisions of . . . title [50]. For purposes of this section, the board of county commissioners may levy an annual tax for poor relief purposes not exceeding the limitation in subsection 34 of section 57-15-06.7 [twenty mills], and if this amount is not sufficient, may levy for deficiency purposes under chapter 50-03.

(Emphasis supplied.) Because the county is required to appropriate a "sufficient" sum, a county unable otherwise to do so must make a deficiency levy. The word "may" is therefore used in a mandatory sense in this section.

Chapter 50-06.2 elsewhere requires counties to provide services, some specified, and some to be determined by state or federal requirements, some subject to legislative appropriations, and some not. See generally N. D. C. C. " 50-06.2-03 and 50-06.2-04. However, there is no statutory limit on the costs which might be incurred under the human services plan, which must include "[a]n agreement to make available those human services required by state law and by federal law or regulation as a condition for the receipt of federal financial participation in programs administered by county . . . [social service boards] under the provisions of . . . title [50]." N. D. C. C. ' 50-06.2-04(2)(e). This funding requirement is not limited to the services described in the comprehensive human services plan, but implicates all services described in title 50. Some title 50 county service requirements are not limited. It follows that a funding requirement which is inclusive of unlimited funding requirements, is itself unlimited.

Ability to pay determinations:

Specified persons are liable to pay the cost of care rendered to state hospital patients. N. D. C. C. ' 50-06.3-04. Those persons can apply for a fee waiver. If they do, the county social service board must determine their ability to pay pursuant to N. D. C. C. ' 50-06.3-06. This duty arises only upon application for a fee waiver and a direction from the Department of Human Services to make the determination, but there is no statutory limit on funding of this service.

Aid to Families with Dependent Children:

The aid to families with dependent children program, and related programs, are governed by N. D. C. C. ch. 50-09. The related programs include:

1. Early childhood services program (N. D. C. C. ' 50-09-21);
2. Transportation program (N. D. C. C. ' 50-09-21);
3. Case management services (N. D. C. C. ' 50-09-21);
4. Cooperative services rendered to juvenile courts and licensed children's agencies (relating to foster care (N. D. C. C. ' 50-09-03(4)));
5. Child support enforcement (N. D. C. C. ' 50-09-03(5));
6. Foster care for children (N. D. C. C. ' 50-09-06.1);
7. Early and periodic screening, diagnosis, and treatment (N. D. C. C. ' 50-09-03(1) (by implication));
8. Work incentive program (N. D. C. C. ' 50-09-03(1) (by implication)).

The funding requirements imposed upon the county for aid to families with dependent children, and related programs, are tightly circumscribed by statute. Four sections of chapter 50-09 address the fiscal relationship between the counties and the state. See N. D. C. C. " 50-09-20 through 50-09-22.

Section 50-09-20 provides:

50-09-20. Appropriation of county funds. For the purpose of carrying out the provisions of this chapter, the board of county commissioners of each county annually shall appropriate and make available an amount sufficient to pay:

1. Local expenses of administration and the county's share of assistance payments as specified in section 50-09-21;
2. Local expenses of administration of the child support enforcement program; and
3. Local expenses of administration and the county's share of program costs of the early childhood services program, job opportunity and basic skills training program, transportation program, and case management program as specified in section 50-09-21.

If the financial condition of any county is such that it cannot make an appropriation or levy a tax for aid to dependent children or cannot issue warrants legally in an amount sufficient to provide the necessary funds to comply with the provisions of this chapter, the board of county commissioners shall report such fact to the state agency. After a hearing before the state agency, and such investigation as the state agency may make, the state agency may increase the amount to be supplied from state funds and adjust accordingly the amount to be supplied from county funds.

(Emphasis supplied.)

Section 50-09-21 provides:

50-09-21. Amount county liable for - Reimbursement by county.

1. Each county shall reimburse the state agency, upon claim being made therefor by the state agency, for one-fourth of the amount expended, in the county, for aid to dependent children, and program costs of the early childhood services program, job opportunity and basic skills training program, transportation program, and case management program, in excess of the amount provided by the federal government for assistance payments to dependent children and for the program costs.

2. Each county shall reimburse the state agency, upon claim being made therefor by the state agency, for an amount equal to one-half of that county's share of all counties' shares based upon the combined percentage average of the four-year period beginning November 1983 and ending October 1987, and the one-year period beginning November 1986 and ending October 1987, plus one-half of that county's share of all counties' shares allocated according to each county's percentage of population of persons under age eighteen according to the 1980 census, in excess of any amount provided by the federal government, for payments for children approved and granted foster care for children or subsidized adoption.

Section 50-09-20 concludes with a provision for a county to demonstrate that due to its financial condition it is not able to make the necessary appropriations, levy the necessary taxes, or issue warrants legally. However, even if the necessary showing of financial condition is made, the state agency (Department of Human Services) is not required to increase the amount of state funds. The state agency is to reimburse the county for 50% of those county expenses not paid by the federal government, for the administration of the child support enforcement program, the early childhood services program, the job opportunity and basic skills training program, the transportation program, and the case management program. N. D. C. C. ' 50-09-20.1. There is no statutory limit on funding these programs.

Medical Assistance:

Specific county social service board duties are identified at N. D. C. C. " 50-24.1-03.1 and 50-24.1-03.2. Each county is required to "reimburse the department of human services for amounts expended for medical assistance in that county in excess of the amount provided by the federal government, in the amount of fifteen percent." N. D. C. C. ' 50-24.1-03. An exception is created for services furnished by regional human service centers or intermediate care facilities for developmentally disabled persons. There is no statutory limit on funding this program.

Aid to Crippled Children:

Specific county social service board duties regarding aid to crippled children are identified at N.D.C.C. ' 50-10-09. There is no statutory limit on funding of these services.

Foster Care:

Specific county social service board duties with respect to licensure of foster care homes are identified at N.D.C.C. ' 50-11-06.2. Foster care service duties are identified in N.D.C.C. ch. 50-09. There is no statutory limit on the funding of these services except the limit described in the discussion of aid to families with dependent children and related programs.

Early Childhood Services:

Specific county social service board duties concerning the investigation of applicants for licensure and applicants for registration certificates are identified, respectively, at N.D.C.C. " 50-11.1-04 and 50-11.1-06. There is no statutory limit on funding of these services.

Child Abuse and Neglect:

The county social service board is required to provide protective services for abused or neglected children and other children under the same care as may be necessary for their well-being, and also to provide other appropriate social services, as the circumstances warrant, to the parents, custodian, or other person serving in loco parentis with respect to the child or other children. N.D.C.C. ' 50-25.1-06. N.D.C.C. ' 50-25.1-02(5.1) refers to the creation of a local child protection team "with the consent of the director of the county social service board." Similarly, the "department's designee" is referred to in N.D.C.C. ' 50-25.1-05, concerning interviews on school property. These references reflect the regular and active participation of county social service boards in the investigation of reports of abuse or neglect. Consistent with that activity, N.D.C.C. ' 50-25.1-06.1 requires the Department of Human Services to adopt caseload standards establishing minimum staff to client ratios for the investigation of reports of child abuse or neglect and the provision of investigative services, and (within the limits of appropriation) to reimburse each county for 75% of additional staff costs caused by the imposition of caseload standards. Thus, the county is obliged by N.D.C.C. ch. 50-25.1 to furnish protective and investigative services. There is no statutory limit on the funding of these services.

Vulnerable Adult Protection Services:

The statutory provisions concerning vulnerable adult protection services refer in many places to "the department or the department's designee." See, *i.e.*, sections 50-25.2-01(3), 50-25.2-03 (1), 50-25.2-04, 50-25.2-05, and 50-25.2-06. The county social service board is specifically authorized to advise and cooperate with the Department of Human Services to "develop, administer, and cause to be implemented a program of protective services for vulnerable adults consistent with . . . chapter [50-25.2]." N.D.C.C. ' 50-25.2-02. However, N.D.C.C. ' 50-25.2-08 makes the vulnerable adult primarily responsible for the cost of providing adult protective services: "The department or the department's designee is not responsible for the cost of providing adult protective services unless the provision of the services is specifically

provided by law and funding exists to provide the services." N. D. C. C. ' 50-25.2-08. This provision is reinforced by N. D. C. C. ' 50-25.2-14, which provides: "The department and county social service boards are not required to implement or enforce this chapter . . . if the legislative assembly does not provide an appropriation to support the implementation and enforcement of this chapter within that region, area, or county."

General:

Two subsections of N. D. C. C. ' 50-01-09 describe broad and general duties of the county social service board:

1. To supervise and direct all relief and welfare activities conducted by the county including the investigation of applications for poor relief or other public assistance.
2. To supervise and administer, under the direction and supervision of the department of human services, such relief and welfare activities in the county as may be financed in whole or in part by or with funds allocated or distributed by the department of human services.

N. D. C. C. ' 50-01-09(1) and (2). There is no statutory limit on the funding of services under these subsections.

The actual amount of the county's funding obligation may vary depending upon the availability of federal and state funds. In addition, it may vary depending upon a determination of the board of county commissioners to transfer money for poor relief purposes pursuant to N. D. C. C. ' 50-03-04 or to make emergency expenditures for the purpose of replenishing the poor relief fund pursuant to N. D. C. C. ' 50-03-05. The duty to supervise and administer relief and welfare activities in the county which are financed in whole or in part by funds allocated or distributed by the Department of Human Services (N. D. C. C. ' 50-01-09) envisions, by reference to the department, funding sources at a state level. N. D. C. C. ' 50-06-05.1(1) and (2) generally envision the receipt of funds from the federal government. A determination of the extent of available federal and state funds requires review of state appropriations, as well as federal statutes governing some of the programs. The federal provisions vary greatly. Both state and federal appropriations may vary with each fiscal period. State appropriations may also vary during a fiscal period due to an insufficiency of revenue. It is, thus, beyond the scope of this opinion to describe the actual funding outcomes with respect to any program. The county's responsibility to provide social service programs does not abate because of limitations in federal or state funding.

III.

The social service programs discussed in parts I and II of this opinion involve statutory duties to be carried out by the North Dakota Department of Human Services. Numerous other statutory duties are imposed upon that department. See generally N. D. C. C. ' 50-06-05.1. However, there is no concomitant obligation, on the part of the state of North Dakota, to fund the statutorily required activities. Rather, N.D. Const. art. X, ' 12, provides, with exceptions not here relevant, "All public moneys . . . shall be paid out and disbursed only pursuant to appropriation first made by the Legislature . .

. . ." N. D. C. C. ' 54-44. 1-09 provides that:

All expenditures of the state and of its budget units of moneys drawn from the state treasury must be made under authority of biennial appropriations acts . . . and no money may be drawn from the treasury, except by appropriation made by law as required by section 12 of article X of the Constitution of North Dakota.

A failure to appropriate sufficient state funds will disable the state from receipt of federal funds in the most costly single program operated by the department, the medical assistance program. Federal statutes require that a state furnish at least half of the nonfederal share of the program costs from state sources, as distinguished from local sources. 42 U. S. C. ' 1396(a)(2) (1976). Other federal programs typically permit a state to certify the expenditure of necessary matching funds from governmental sources other than revenues paid into the state general fund. However, in at least two programs, food stamps and aid to families with dependent children and related programs, N. D. C. C. " 50-03-07 and 50-09-21 specifically describe the county funding requirements. A failure of the state to appropriate the difference between the county share and the federal share would inevitably lead to a termination of federal financial participation or federal payment of program benefits.

IV.

The county must participate in existing social service programs except to the extent that the Legislature has provided an option for the county to refrain or withdraw from participation. See generally the discussion in parts I and II of this opinion. The Legislature has provided options, of a sort, only with respect to the poor relief program and vulnerable adult protection services.

The county is required to "relieve and support persons who are residents of the county and who are in need of poor relief." N. D. C. C. ' 50-01-01. However, this obligation is limited by "the county poor relief appropriation therefor" N. D. C. C. ' 50-01-01. The board of county commissioners is not required to fund county poor relief at any specific amount. The statutes anticipate that an appropriation may be insufficient and authorize, but do not require, a transfer of moneys from other funds to the poor relief fund. See N. D. C. C. ' 50-03-04. In the event that "the unexpended balance of any fund or funds of the county which may be transferred to the county poor relief fund is insufficient to meet an emergency created by unusual and unanticipated demands for the relief of the poor," the county commission may, but is not required to, "authorize the expenditure of an amount in excess of budget appropriations and may obligate the county in excess of such appropriations for the purpose of replenishing the poor relief fund." N. D. C. C. ' 50-03-05. Such an emergency expenditure must be included in the appropriations made by the county for the following year, but are not included within the appropriation subject to the tax levy limitations for general county purposes. N. D. C. C. ' 50-03-06. Thus, the county is authorized, but not required, to "deficit spend" in excess of its original appropriation for poor relief purposes.

N. D. C. C. ch. 50-25.2 concerns itself with the vulnerable adult protection services, and is the codification of House Bill No. 1058, passed by the 1989 Legislative Assembly. Section 15 of House Bill No. 1058, as introduced, provided for an appropriation out of the general fund in the amount of

\$787,160. The House amended the bill to include a new section 14 which, as eventually amended and passed, is codified at N.D.C.C. ' 50-25.2-14, and provides:

The department [of human services] and county social service boards are not required to implement or enforce this chapter with respect to any region, area, or county of this state if the legislative assembly does not provide an appropriation to support the implementation and enforcement of this chapter within that region, area, or county.

Section 15 of House Bill No. 1058, as passed, stated the intent of the Legislative Assembly that \$150,000 of the appropriation to the Department of Human Services shall be used to continue the adult protective services demonstration program in Cass County and the multi-county region served by the Lake Region Human Service Center. Thus, there is no general statewide duty on the part of the Department of Human Services, or the county social service boards, to undertake the provision of vulnerable adult protection services.

- EFFECT -

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 questions presented are decided by the courts.

Nicholas J. Spaeth
Attorney General

Assisted by: Blaine L. Nordwall
Assistant Attorney General

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