

LETTER OPINION
96-L-21

February 22, 1996

Honorable Wayne G. Sanstead
Superintendent of Public Instruction
600 East Boulevard Avenue
Bismarck, ND 58505-0440

Dear Dr. Sanstead:

Thank you for your memorandum concerning a computer programming error which caused six school districts to receive lower foundation aid payments than they should have received during the previous biennium. You ask whether your department may use 1995-1997 appropriations to reimburse these school districts for the error which occurred in the 1993-95 biennium.

The North Dakota Constitution requires that "[a]ll public monies . . . shall be paid out and disbursed only pursuant to appropriation first made by the legislature." N.D. Const. art. X, § 12(1). Legislative appropriation acts are limited to a two-year period referred to as a biennium, unless specifically provided otherwise. City of Fargo, Cass County v. State, 260 N.W.2d 333, 338 (N.D. 1977). In 1993, the Legislature provided an appropriation to the Department of Public Instruction for, among other things, grants for foundation aid and transportation. The enactment provided that:

The funds provided in this section, or so much of the funds as may be necessary, are hereby appropriated out of any monies in the general fund in the state treasury, not otherwise appropriated, and from special funds derived from federal funds and other income, to the Department of Public Instruction . . . for the purpose of defraying the expenses of their various divisions, for the biennium beginning July 1, 1993, and ending June 30, 1995, as follows:

1993 N.D. Sess. Laws ch. 3, § 1.

All expenditures of state budget units must be made under authority of biennial appropriations acts, which must be based upon a budget as provided by law, and no payment may be made and no obligation may be

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incurred against any appropriation unless the payment or obligation has been authorized as provided by law. N.D.C.C. §§ 54-44.1-09 and 54-44.1-10. With certain exceptions not relevant here, the Office of Management and Budget is required to cancel all unexpended appropriations or balances of appropriations remaining after the expiration of each biennial period.

The 1995-1997 appropriation for foundation aid grants is to provide financial aid to school districts under N.D.C.C. ch. 15-40.1 based upon numbers of students and reports filed thereon during the 1995-1997 biennium. 1995 N.D. Sess. Laws ch. 35, § 1. Certain adjustments are authorized under N.D.C.C. § 15-40.1-09 for differences between student fall enrollments and average daily membership for the immediately preceding year. No authorization appears in the 1995-1997 Department of Public Instruction appropriations bill for paying obligations incurred due to computer programming errors in the 1993-1995 biennium. Appropriations for foundation aid are not continuing appropriations, and the Department of Public Instruction may spend the appropriations only for the purposes provided by law and fulfillment of obligations occurring during the relevant biennium. See City of Fargo, Cass County v. State, supra, and Oesterle v. Lavik, 52 N.W.2d 297 (N.D. 1952). See also 1994 N.D. Op. Att'y Gen. L-265, Letter from Attorney General Nicholas J. Spaeth to State Treasurer Robert E. Hanson (November 4, 1991), and 1988 N.D. Op. Att'y Gen. 83. See, generally, Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 910 (N.D. 1988) (statutes dealing with state agency administration of school district foundation aid payments do not constitute a contract between the State and the school district).

Because 1993-1995 appropriations for foundation aid purposes have been either spent or cancelled, and because 1995-1997 appropriations for foundation aid purposes do not allow additional payment to correct erroneously low foundation aid payments from the 1993-1995 biennium, it is my opinion that the Department of Public Instruction does not have authority to use 1995-1997 appropriations to make payment adjustments due to the computer programming error occurring during the 1993-1995 biennium.

You also inquire about the authority of the Emergency Commission to authorize use of state funds to pay school districts which were underpaid due to the computer error. Under the circumstances, the problem involved is not a shortage of funds giving rise to the need to transfer funds between line items or from the state contingency appropriation to an agency line item for fulfilling an obligation. The problem in the instant case is the authority to use

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appropriations from one biennium to pay for obligations that occurred during a previous biennium. If the Emergency Commission determines an emergency exists, as defined by statute (N.D.C.C. § 54-16-00.1(1)), the Commission may order spending authority transferred from one fund or line item to another fund or line item of the same agency, order a transfer of spending authority from the state contingencies appropriation, authorize the expenditure of federal funds, or, in an extremity, authorize money to be drawn from the treasury to meet the emergency until the Legislative Assembly can make an appropriation available. N.D.C.C. § 54-16-04. The money drawn from the state treasury is drawn from the state contingencies appropriation and placed in an existing line item or fund of the agency in question in order to carry out an authorized function of that agency. N.D.C.C. §§ 54-16-08 and 54-16-10. The statutes do not authorize the Emergency Commission to create a new fund or a new appropriation and does not authorize the transfer of funds to a nonexisting line item. Backman v. Guy, 126 N.W.2d 910, 914-916 (N.D. 1964). See 1993 N.D. Op. Att'y Gen. 107.

Because the issue at hand does not relate to a shortage of funds in an existing appropriation to fulfill a current obligation, and because no line item exists in the current appropriations to fulfill obligations incurred during previous biennia, it is my opinion that the Emergency Commission may not authorize the transfer of funds to resolve this issue.

Seeking legislation during the 1997 Legislative Assembly to provide a specific appropriation for reimbursing any shortages from the 1993-1995 biennium due to the computer error could resolve this problem. Because 1993 N.D. Sess. Laws ch. 3, § 13 caused distribution of all of the unspent portions of the foundation aid line item to school districts before the end of the 1993-1995 biennium, it appears that the districts which were underpaid because of the computer error may have been partially reimbursed by the distribution of otherwise unspent appropriations. Also, because the six districts at issue were underpaid due to the computer error, all remaining districts were potentially overpaid beyond what they would normally have received under N.D.C.C. ch. 15-40.1 and 1993 N.D. Sess. Laws ch. 3, § 13. The 1997 Legislative Assembly may wish to analyze these issues and any perceived hardship on the districts involved when determining whether to reimburse any underpayment to the affected school districts.

Sincerely,

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ATTORNEY GENERAL

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