N.D.A.G. Letter to Graham (June 30, 1992)

June 30, 1992

Mr. John A. Graham
Executive Director
ND Department of Human Services
State Capitol - Judicial Wing
600 E Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Graham:

Thank you for your June 10, 1992, letter regarding correspondence you have received from Eunice S. Thomas, Director, Office of Community Services, Administration for Children and Families, United States Department of Health and Human Services. Ms. Thomas asks that you secure an interpretation from this office concerning the requirements of federal law governing the Low Income Home Energy Assistance Program (LIHEAP). You have included a copy of Ms. Thomas's April 29, 1992, letter to you as well as a copy of an August 30, 1991, letter which your department sent to Ms. Thomas.

The issue raised is whether the LIHEAP statute supports the practice of categorizing as non-administrative those activities associated with helping households complete their applications for LIHEAP assistance. Related to this is whether the place at which the performance of the tasks occurs affects the categorization of the tasks as administrative or non-administrative.

The federal statute does not define the phrase "administrative costs" nor any variation of that phrase. See 42 U.S.C.A. § 8622 (1983), Definitions. The statute first refers to "administrative costs" in 42 U.S.C.A. § 8623(a)(1)(B) (1992), which provides, in relevant part:

> [I]f for any period a State has a plan . . . [for LIHEAP], the Secretary shall pay to such State an amount equal to 100 percent of the expenditures of such State made during such period in carrying out such plan, including administrative costs (subject to the provisions of section 8624(b)(9)(B) of this title). . . .

42 U.S.C.A. § 8624(b)(9) (1992) requires that the state LIHEAP agencies' certifications to the United StatesDepartment of Health and Human Services provide that, in each fiscal year:

> (A) the State may use for planning and administering the use of funds under this subchapter an amount not to exceed 10 percent of the

> funds payable to such State under this subchapter for a fiscal year and not transferred pursuant to section 8623(f) of this title for use under another block grant; and
>
> (B) the State will pay from non-Federal sources the remaining costs of planning and administering the program assisted under this subchapter and will not use Federal funds for such remaining costs;
>
> . . . .

The federal statute does not otherwise explain or define the phrase "administrative costs." Relevant legislative history or definitive judicial interpretation does not offer assistance in discerning the meaning Congress intended for the phrase "administrative costs." An appropriate meaning may be determined by review of federal rulemaking activities.

As of the beginning of federal fiscal year 1988 (October 1, 1987), applicable federal regulations had been unchanged since Part 96 was added to Title 45 of the Code of Federal Regulations effective July 6, 1982. 47 Fed. Reg. 29472 (1982). At that time, Part 96 was adopted as a final rule to implement seven block grant programs established by the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35). The Department of Health and Human Services then stated:

> A basic purpose of the block grant legislation is to simplify State grant administration and minimize Federal involvement by placing far greater reliance on State government. . . . [T]he block grants will be exempted from the usual Departmental grant administration requirements found in 45 C.F.R. Part 74. . . . Because a Federal requirement for the use of the Part 74 rules would be inappropriate for block grants, . . . [United States Department of Health and Human Services is] establishing a fiscal and administrative standard providing maximum discretion to the States and placing full reliance on State law and procedures. . . . [T]he State's laws and procedures covering the administration and expenditure of its own funds will govern. . . . Any expenditures in violation of the State's own laws and procedures would be unauthorized and subject to disallowance. 47 Fed. Reg. 29476-77 (1982).

After that general and preliminary statement, the federal agency addressed the subject of administrative costs in the following manner:

> We received many requests for a detailed definition of 'administrative costs.' . . . We decline to restrict the States with a definition of this term. In the final analysis, the State must determine which expenses constitute administrative costs chargeable to grant funds on a case-by-case basis, subject to review on the same basis as other State interpretations of the block grant statutes. 47 Fed. Reg. 29477 (1982).

In discussing the federal enforcement activities which would apply to block grants, the Department of Health and Human Services explained:

> The fundamental check on the State's use of block grant funds is the State's accountability to its citizens, which is implemented by public disclosure within the State of information concerning use of the funds. Accordingly, when an issue arises as to whether a State has complied with its assurances and the statutory provisions, the regulations provide that the Department will ordinarily defer to the State's interpretation of its assurances and the statutory provisions. Unless the interpretation is clearly erroneous, State action based on that interpretation will not be challenged by the Department. 47 Fed. Reg. 29478 (1982).

Consistent with the observations of the preamble, 45 C.F.R. § 96.50(e) had the following language included:

> The Department recognizes that under the block grant programs the States are primarily responsible for interpreting the governing statutory provisions. As a result, various States may reach different interpretations of the same statutory provisions. This circumstance is consistent with the intent of and statutory authority for the block grant programs. In resolving any issue raised by a complaint or a Federal audit, the Department will defer to a state's interpretation of its assurances and of the provisions of the block grant statutes unless the interpretation is clearly erroneous. 47 Fed. Reg. 29490 (1982).

Effective November 12, 1987, shortly after the beginning of federal fiscal year 1988, Part 96 of Title 45 of the Code of Federal Regulations was amended. However, these amendments made no change to the provisions of 45 C.F.R. § 96.50(e) (1991). While the United States Department of Health and Human Services did elect to create an explanation (but not a definition) of the phrase "costs of planning and administration," at 45 C.F.R. § 96.88(a) (1991), that explanation provides only:

> Costs of planning and administration. Any expenditure for governmental functions normally associated with administration of a public assistance program must be included in determining administrative costs subject to the statutory limitation on administrative costs, regardless of whether the expenditure is incurred by the State, a sub-recipient, a grantee, or a contractor of the State.

As proposed, 45 C.F.R. § 96.88(a) would have defined "administrative costs" so as to include those expenditures normally associated with the administration of a public assistance program, "such as taking applications, determining eligibility and benefits, and monitoring the assistance provided." 51 Fed. Reg. 24409 (1986). But, as adopted, this

second clarification was dropped. The preamble states:

> While we are not including the list of specific functions in the final rule, nonetheless, we believe that the costs associated with those functions, i.e., taking applications, determining eligibility and benefit levels, and monitoring the assistance provided, are normally administrative in a predominantly cash assistance program such as LIHEAP. Consequently, we will carefully assess any other categorization of these costs in our compliance reviews and in our reviews of audit findings.

In determining the meaning of these federal provisions, they should be read together to give meaning to all of them to the extent practicable. This is consistent with statutory analysis. An analysis which considers the entire regulation leads to the conclusion that states are the entities that determine which expenses constitute administrative costs, and that the state's determinations are entitled to deference and will not be challenged unless the state's interpretation is clearly erroneous. Thus, even though a careful assessment is made by federal reviewers, a state's categorization must be deferred to unless it is clearly erroneous.

NDDHS Manual Section 415-05-60 includes North Dakota's definition of "administrative costs" as "those relative to taking or receiving a completed application, including documentation and necessary verifications, or computing eligibility and benefit levels, completing notification and other forms, entering data into the computer system, providing clerical support, and other activities not specifically included under service costs." This definition conforms to 45 C.F.R. § 96.88(a) (1991), and closely follows the "guidance" found at 42 Fed. Reg. 37962 (1987). The North Dakota practice should not even be subjected to any heightened scrutiny under the "guidance" which provides for careful assessment of other categorizations of administrative costs in federal compliance reviews.

After analyzing the federal statutes and rules noted above, and reviewing the relevant portions of your department's August 30, 1991, letter, I conclude that your interpretation of "administrative costs" for the LIHEAP program is not clearly erroneous and is within the authority granted to states under the applicable law and rules.

Whether the place at which the performance of the tasks occurs affects the categorization of the tasks as administrative or non-administrative is predominantly a factual question. Factual questions are not readily susceptible to resolution with a legal opinion. Obviously, some tasks are more readily accomplished in an office, and others more readily accomplished in the applicant's home. Unless the nature of the task is such that it can only be accomplished in one location, the location is not determinative of the categorization. Therefore, it is my opinion that it is the type of task, rather than the location at which the task is accomplished, which is determinative of the categorization of the tasks as administrative or non-administrative.

Concerning Ms. Thomas' recommendation that you consult with this office on future

categorizing of monitoring costs, I am sure you know that the assistant attorney general assigned to the North Dakota Department of Human Services will be available if needed.

I hope this responds adequately to your inquiries.

Sincerely,

Nicholas J. Spaeth

bln/krb