

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

GCH

10,699

FILE: B-1945⁴8

DATE: JUL 10 1979

MATTER OF: Use of "Borrowing" authority ^{of HEW} to meet AFDC and Medicaid entitlements

- DIGEST:
1. Provisions in HEW 1979 Appropriation Act provide HEW with authority to make entitlement payments to States in final quarter of 1979 fiscal year for both AFDC and Medicaid and charge corresponding 1980 HEW appropriation if, for any reason, 1979 appropriations to meet entitlements in those programs are insufficient. This includes insufficiency caused by HEW's implementation of section 201 of its 1979 Appropriation Act, which reduced HEW's budget authority for fiscal 1979 by \$1 billion to be achieved by reducing fraud, abuse, and waste, since HEW's \$831 million reduction of AFDC and Medicaid was based on past State error rates and did not correct, identify, or eliminate improper payments.
 2. Statutory language and legislative history of section 201 of 1979 HEW Appropriation Act, which reduced HEW's budget authority for fiscal 1979 by \$1 billion, clearly indicate that \$1 billion reduction was to be achieved solely by reducing fraud, abuse, and waste, and was not intended, in any way, to affect legitimate entitlements. Therefore, HEW can use its authority to "borrow" from its 1980 appropriation to replace funds cut from 1979 appropriation for AFDC and Medicaid in HEW's attempt to comply with section 201, if such additional funds are needed to make entitlement payments to States for those programs during final quarter of 1979 fiscal year.

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This decision is in response to a request from the Acting Secretary of Health, Education, and Welfare (HEW) for our opinion on HEW's authority to "borrow" from its appropriation for fiscal year 1980 (not yet enacted) to meet entitlements in the final quarter of the present fiscal year in the Medicaid and Aid For Dependent Children (AFDC) programs. As explained by HEW--

a. Belkin 7/9/79
Sedrick 7/9/79
L. S. Taylor 7/9/79

R. L. Jones 7/9
R. A. Higgins
7/8/79

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"[t]he need for such borrowing arises from the reductions to be made by HEW in the grant awards for these programs for the fourth quarter of FY 1979 in order to comply with the requirements of section 201 (referred to as the 'Michel Amendment') of the Act [Departments of Labor and Health, Education, and Welfare Appropriation Act, 1979, Pub. L. No. 95-480, 92 Stat. 1567.]"

The Michel Amendment to the HEW Appropriation Act, 1979, reads as follows:

"Notwithstanding any other provision in this Act, the total amount of budget authority provided in this Act for the Department of Health, Education, and Welfare is hereby reduced in the amount of \$1,000,000,000: Provided, That this reduction shall be achieved by the reduction of fraud, abuse, and waste as defined and cited in the annual report, dated March 31, 1978, of the Inspector General of the Department of Health, Education, and Welfare: Provided further, That this section shall not be construed to change any law authorizing appropriations or other budget authority in this Act."

Initially, HEW took the position that the Michel Amendment did no more than restate HEW's "preexisting legal obligation" to avoid expenditures for unauthorized purposes. Under this view, the Amendment set a goal of at least \$1 billion in "savings" to be achieved by reducing fraud, abuse, and waste, but did not actually reduce the amount of budget authority available to HEW. As a result, for the first three quarters of FY 1979, HEW permitted its programs to spend at a rate consistent with their full line item amounts.

In April, this Office was asked by both the Chairman and the Ranking Minority Member of the House Subcommittee on Labor-HEW Appropriations for its interpretation of the Michel Amendment. ~~We concluded~~ that the Michel Amendment did reduce HEW's 1979 budget authority by \$1 billion (B-194548, May 7, 1979.) We also held that HEW had to realize the reduction by eliminating that amount of fraud, abuse, and waste in the programs specified in the Inspector General's report for which budget authority was provided by the 1979 Act. (AFDC and Medicaid are among those programs.)

The Office of Legal Counsel, Department of Justice, responding to a request by HEW, also issued an opinion, dated June 15, 1979, on the meaning of the Michel Amendment. Although the Justice Department agreed with our conclusion that the Michel Amendment did effect a \$1 billion reduction in budget authority which had to be realized from programs identified in the Inspector General's report, it further concluded that HEW was legally required to make the \$1 billion reduction whether or not, as a practical matter, it could do so solely by cutting fraud, waste, and abuse, even if "the reduction in appropriations should force cuts in legitimate programs."

After HEW received the Justice Department opinion, the Acting Secretary advised the Chairman of the Senate Committee on Labor-HEW Appropriations of HEW's decision--

"to reduce by \$1 billion the amounts that the Department would otherwise obligate during the fourth quarter of fiscal year 1979, in order to assure HEW's full compliance with section 201, as it has now been definitively interpreted within the executive branch."

As specified in HEW's submission to us--

"[HEW] will withhold \$169 million in obligational authority not required for the Basic Educational Opportunity Grants program in FY 1979. This saving is a result of approved management actions instituted in 1978 to reduce the number of ineligible students.

"[HEW] will reduce the total fourth quarter 1979 grant awards to states for Medicaid by approximately \$421 million and for AFDC by approximately \$410 million, for a total of \$831 million. These reductions are based on past payment error rates reported by the states for those programs."

Having decided on these actions, HEW now proposes, if we approve, to replace the \$831 million in Medicaid and AFDC payments by use of its so-called borrowing authority to make such payments to States in fiscal year 1979 from funds to be charged against its appropriation for fiscal year 1980. The specific question before us is whether it may do so.

For AFDC, the specific "borrowing" language in the 1979 Appropriation Act is as follows:

"For making, after June 30 of the current fiscal year, payments to States under titles I, IV, X, XIV, and XVI, respectively, of the Social Security Act for the last three months of the current fiscal year; and for making after July 31 of the current fiscal year, payments for the first quarter of the succeeding fiscal year; such sums as may be necessary, the obligations incurred and the expenditures made thereunder for payments under each of such titles to be charged to the subsequent appropriations therefor for the current or succeeding fiscal year.

"Such amounts as may be necessary from this appropriation shall be available for grants to States for any period in the prior fiscal year subsequent to June 30 of that year."

A similar provision is contained in the act for Medicaid.

Although referred to for convenience as "borrowing authority", the provisions in question are rather appropriations that make available to HEW in the final quarter of the current fiscal year such amounts, in addition to the amounts specifically appropriated therefor, as are needed by HEW to make AFDC and Medicaid payments to the States to which the States are entitled but for which there are insufficient funds in the appropriation. These provisions authorize "borrowing" only in the sense of requiring HEW ultimately to charge all such expenditures to the corresponding appropriation for the succeeding fiscal year.

We have been advised informally by HEW that it has often so used similar "borrowing" authority in earlier appropriation acts. (In fact, the last sentence in the quoted provision specifies that funds for AFDC for fiscal 1979 are available to make grants to States for the final quarter of fiscal 1978.)

However, HEW's proposed use of its "borrowing" authority in the circumstances described here raises an issue not previously encountered. HEW recognized in a news release dated June 28, 1978 that "the existence of such authority to do with 1980 funds what we cannot do with 1979 funds is a difficult and as yet undetermined question."

AFDC and Medicaid are entitlement programs by which the Federal Government is obligated to make payments to States, on the basis of a statutory formula, representing reimbursement for a portion of the payments the States make to eligible recipients in the two programs. (See 42 U.S.C. §§ 603 and 1396(b)(1976).) We do not dispute HEW's contention that the reductions it otherwise intends to make in State AFDC and Medicaid payments in the fourth quarter of the current fiscal year" will undoubtedly lead to a short-fall in the amounts available to most, if not all, States for meeting their obligations under these programs." If the entire \$831 million reduction in reimbursements to the States resulted from the elimination of fraud, abuse, and waste (in accordance with our May 7, opinion), and therefore affected only ineligible recipients, it would be difficult to justify the use of funds "borrowed" from HEW's 1980 appropriation to make assistance payments for such obviously improper purposes.

However, it seems apparent that the relationship between the actions HEW has taken--in cutting grant awards to States on the basis of past State error rates in the AFDC and Medicaid programs--and reducing identifiable fraud, abuse, and waste is marginal at best, since such an approach does nothing to correct, identify, or eliminate payments to specific individuals that might fall into those categories. In fact, the Secretary's authority to assess fiscal sanctions, on the basis of error rate statistical data is of questionable legal validity. In an opinion to the Oversight Subcommittee, House Ways and Means Committee in connection with its hearings on AFDC Quality Control Programs, October 31-November 3, 1975, we stated:

"* * * we agree with HEW that it has the right to disallow Federal participation in specific erroneous State payments, which errors were disclosed through sample audits but not on the basis of errors imputed from the quality control system but not actually identified." Emphasis added.

In making the \$831 million reduction, HEW may have been attempting to comply with the opinion of the Justice Department that the \$1 billion reduction had to be made whether or not attributable to reduced fraud, abuse, and waste. In any event, HEW has recognized that its action "is an unjust and ineffective remedy to the problem of fraud and waste in federally-assisted programs, and until receipt of the Justice Department's opinion, "* * *[it had] steadfastly resisted its adoption."

As recognized in our May 7 opinion, Congress did not intend or expect that the Michel Amendment would adversely affect any statutory entitlement programs or cause any recipient legally entitled to receive assistance from HEW to be denied such assistance. The second proviso was evidently intended to protect legitimate entitlements. The debates on the Michel Amendment are replete with statements to this effect by numerous Members, including Congressman Michel, the sponsor of the Amendment. (See 124 Cong. Rec. H5172-75 (daily ed. June 8, 1978); also see 124 Cong. Rec. S15984 (daily ed. September 25, 1978); and 124 Cong. Rec. S18443 (daily ed. October 12, 1978).)

Since the language of the Michel Amendment does not specifically address the "borrowing authority" question, the conclusion that such authority could not be used in these circumstances would have to rest on legislative intent. As suggested above, the language and the legislative history of this provision strongly support the view that implementation of the \$1 billion reduction was not intended to affect legitimate entitlements. The use of the "borrowing" authority would therefore be justified as a means of complying with the intent to protect those entitled to payments from cuts which could not be identified as required to eliminate fraud, abuse, or waste.

Our May 7, opinion recognized the difficulty facing HEW in complying with the Michel Amendment as we interpreted it, if HEW were unable to reduce expenditures by \$1 billion solely through the elimination of identifiable waste, fraud, and abuse: We said:

"* * * In that case HEW would presumably be in violation of either the initial clause of section 201 or the provisos therein. Entering into or satisfying obligations in excess of the \$53.1 billion total of budget authority provided in the Act would be a violation of the initial clause, while reducing obligations below the line item amounts appropriated for the specified programs for any reason other than the elimination of fraud, abuse, or waste would be a violation of the provisos.

"In this connection, the Conference Report directs the Secretary to report his progress in achieving the \$1 billion reduction to the Congress. Similarly, any lack of progress or inability in achieving the required reduction as specified should also be reported to Congress, so that any further congressional action deemed necessary can be taken."

In light of HEW's genuine dilemma in this regard, HEW's use of the "borrowing authority offers a reasonable alternative under the circumstances (albeit an imperfect one in the long run since the problem may only be deferred until next year.)

Finally, we are aware that Congressional action has been taken in regard to this matter. On June 26, 1979, the Senate adopted an amendment to the Supplemental Appropriations bill for the current fiscal year setting forth the "sense of the Senate" that HEW should "borrow" funds to be repaid from its 1980 appropriation in order to comply with the provisions of the Michel Amendment. 125 Cong. Rec. S8496-8505 (daily ed. June 26, 1979). The new section 304 of the Supplemental Appropriations bill was adopted by the Senate in apparent affirmation of a colloquy on the previous day among the Chairman of the Appropriations Committee and several Senators in which the participants agreed that HEW could use its "borrowing" authority in these circumstances so that "anyone who is legitimately entitled to payments" should get them. 125 Cong. Rec. S8367 (daily ed. June 25, 1979). Similar views were expressed shortly thereafter in the House of Representatives by Congressman Michel, the sponsor of the original amendment. 125 Cong. Rec. H5223 (daily ed. June 27, 1979).

Accordingly, if the funds for the AFDC and Medicaid programs in fiscal 1979 are inadequate to make entitlement payments to States in the final quarter of the 1979 fiscal year, due to HEW's attempts to implement the Michel Amendment, it is our opinion that HEW does have legal authority pursuant to the cited provisions to make such payments for that period and to charge such obligations to the corresponding HEW appropriation for the 1980 fiscal year.

Comptroller General
of the United States