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Garland Pinkston, Jr., Esq.
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Washington, D.C. 20001

Dear Mr. Pinkston:

This responds to your July 7, 1995 request for an expedited opinion on whether the District of Columbia government may exceed its appropriation in order to make obligations and expenditures for the Aid to Families with Dependent Children (AFDC) and Medicaid programs without violating the Antideficiency Act. You suggest that there would be no Antideficiency Act violation because the obligations and expenditures are mandatory and thus covered by an exception to the Act. You also asked a similar question regarding obligations and expenditures the District makes for its child abuse-and-neglect/foster care program to comply with court orders in LaShawn A. v. Kelly, C.A. No. 89-1754 (D.D.C.)

The Antideficiency Act prohibits officers and employees of the District of Columbia from incurring obligations or making expenditures in an amount exceeding that made available by an appropriation unless the District is authorized to do so by law. Under the caption "Division of Expenses", the fiscal year 1995 appropriation act for the District of Columbia appropriates out of the general fund of the District of Columbia amounts for specific categories of expenses. The activities encompassed by your inquiry are generally charged against the appropriated category entitled "Human Support Services". The District of Columbia Appropriations Act, 1995, appropriated over $898 million for Human Support Services. Pub. L. No. 103-334, 108 Stat. 2579 (1994).

We understand that the District has not yet exceeded the Human Support Services appropriation and, therefore, your inquiry is prospective and not to determine whether a specific Antideficiency Act violation has occurred. As discussed below,

the AFDC and Medicaid statutes, and the court orders you reference, do not authorize the District to obligate and expend funds without regard to the amounts provided in the Human Support Services appropriation. Accordingly, should the District exceed its Human Support Services appropriation during fiscal year 1995, it must report an Antideficiency Act violation in accordance with 31 U.S.C. § 1351.

ANTIDEFICIENCY ACT

The Antideficiency Act is derived from legislation first enacted in 1870 and is one of the major statutes by which Congress exercises its constitutional control of the public purse. The Congress' inclusion of the District in the Antideficiency Act is incident to its constitutional power to exercise exclusive legislation over the District under Article I, section 8, clause 17 of the Constitution, and reflects Congress' decision, in light of that relationship, to expressly limit District spending to amounts Congress appropriates.

The provision of the Antideficiency Act relevant to your inquiry is 31 U.S.C. § 1341(a)(1):

> "(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not–
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> "(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation . . . unless otherwise authorized by law."

Enactment of the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act), Public Law 93-198, conferring limited autonomy to the District over its local affairs, did not diminish the applicability of the Antideficiency Act to the District. When enacted in 1974, the Home Rule Act confirmed the Antideficiency Act's continuing application to the District by stating that "nothing in this Act shall be construed as affecting the applicability to the District government of §§ 1341 . . . of Title 31, United States Code." D.C. Code § 47-313(e).

ANTIDEFICIENCY ACT EXCEPTION

Under the Home Rule Act, Congress retains the authority to authorize spending for the District. While the District enacts its budget for submission by the President to Congress, the District's authority to spend is conferred by acts passed by Congress. Specifically, section 446 of the Home Rule Act, as amended, D.C. Code § 47-304, provides that except as provided for in certain provisions relating to District borrowing, no amount may be obligated or expended by an officer or employee of the District unless such amount has been approved by an act of Congress and then

according to such act. The issue you present goes to the scope of the "unless otherwise authorized by law" exception contained in the Antideficiency Act, and whether Congress has provided the requisite authority with respect to AFDC, Medicaid and other programs.[1]

AFDC and Medicaid

You believe that the "unless otherwise authorized by law" exception applies to any District government expenditure or obligation for AFDC or Medicaid which is subject to federal cost-sharing because "the AFDC and Medicaid programs are based on federal statutory law and authorize the District government to make expenditures and obligations to assist the needy using funds governed by its annual Congressionally-approved appropriations act."

The "unless authorized by law" exception in the Antideficiency Act requires more than the legal authority merely to obligate or spend appropriated funds.[2] Authority to incur obligations or make expenditures in excess of the amounts appropriated encompassed by this exception to the Antideficiency Act may fall into one of two categories. The Congress may expressly state that an agency (or the District of Columbia) may obligate funds in excess of the amount appropriated, e.g., 22 U.S.C. § 2210(j) (1988); 41 U.S.C. § 11, or it may implicitly authorize an agency do so by virtue of a law that necessarily requires such obligations. For example, the Department of Education did not violate the Antideficiency Act when, as a result of loan guarantees Congress required it to issue under the Student Loan Guarantee Program, the Department incurred obligations for payments due to lenders in excess of available resources. 65 Comp. Gen. 4 (1985). Similarly, the Veterans

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[1]Although not discussed in your letter, there is in the Antideficiency Act another limited exception. Section 1342 of title 31, United States Code, permits an officer or employee of the District to accept voluntary services or employ personal services exceeding that authorized by law in an emergency involving the safety of human life or the protection of property. An "emergency" under section 1342 "does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." We are not presently aware of any facts or circumstances that would make this limited exception available to the District. See, 5 Op. O.L.C. 1, 7-11 (1981).

[2]All expenditures of public funds must be authorized by law. United States v. MacCollom, 426 U.S. 317, 321 (1976). See GAO, Principles of Federal Appropriations Law at 1-2 (1991).

Administration (VA) did not violate the Antideficiency Act by incurring obligations for statutorily required compensation and pension benefits in excess of available appropriations.[3] B-226801, Mar. 2, 1988.

Our review of the AFDC and Medicaid programs, court cases, and the District's budget and appropriation process does not support a conclusion that Congress has either expressly authorized the District in its capacity as AFDC and Medicaid program grantee to obligate funds in excess of the amounts appropriated to the District for Human Support Services, or required the District to incur obligations in excess of the amounts appropriated for those programs. AFDC and Medicaid are federal grant programs. 42 U.S.C. Chapter 7, Subchapters IV (Grants to States For Aid and Services To Needy Families With Children and For Child-Welfare Services) and XIX (Grants to States For Medical Assistance Programs). The District is a state for purposes of receiving grants under these programs. 42 U.S.C. § 1301(a). As a grantee, the District chooses to submit a plan and have it approved by the Secretary of the Department of Health and Human Services in order to participate in and receive federal funds for the AFDC and Medicaid programs. 42 U.S.C. §§ 601, 1396. The District's participation is, as a matter of law, voluntary. The characterization of AFDC and Medicaid programs as entitlement or mandatory programs describes not whether a state participates in the programs, but whether qualified persons are entitled to receive benefits--it describes the responsibilities of the Federal and state governments after the discretionary decision to participate in the programs has been made. Federal and state court cases concerning AFDC[4] and Medicaid[5] have

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[3]The authority to obligate does not mean there is also authority to pay those obligations. There must also be sufficient funds remaining in the applicable appropriation or fund to cover payments. B-208985, Oct. 29, 1982. Accordingly, even though VA could incur fiscal year 1986 obligations for statutorily required compensation and pension benefits in excess of its available appropriation without violating the Antideficiency Act, VA violated the Antideficiency Act by paying the fiscal year 1986 obligations with fiscal year 1987 appropriations. Instead, VA should have requested a supplemental appropriation to pay the obligations. B-226801, Mar. 2, 1988.

[4]E.g., King v. Smith, 392 U.S. 309, 316 (1968); Pratt v. Wilson, 770 F. Supp. 539 (E.D. Cal. 1991) ("While state participation in [AFDC] program is voluntary, state's election to participate obligates it to comply with federal statutes and regulations which govern program."); Todd v. Norman, 840 F.2d 608 (8th Cir. 1988) ("Although state participation in [AFDC] program is not mandatory, states which elect to participate must follow federal law when administering their AFDC programs.").

[5]Rye Psychiatric Hosp. Center, Inc. v. Surles, 777 F. Supp. 1142 (S.D.N.Y. 1991) ("While participation in Medicaid is optional, when state elects to take part in Medicaid program, it must comply with federal statutory requirements.").

recognized this principle.

The District is in the same position as any of the 50 states participating in the program. As a program grantee, the District is responsible for complying with the terms of the program, including providing the necessary funds out of the amounts requested of, and appropriated by, the Congress. The District's decision to participate in the AFDC and Medicaid programs and the responsibilities that accompany that decision no more authorize the District to obligate funds in excess of appropriations than does the District's decision to participate in any other federal grant program.

To the extent the District faces the possibility of incurring AFDC and Medicaid obligations in excess of its currently available appropriation, it does so not as a result of a federal statutory scheme that contemplates such excess,[6] but because of a combination of factors that were within the District's control. The District's fiscal year 1995 lump sum appropriation for Human Support Services substantially exceeded the amount the District needed for AFDC and Medicaid.[7] The District has and is making discretionary judgments that affect the level of obligations charged to its Human Support Services appropriation, including the level of its participation in various federal programs. The District has chosen to participate in the Medicaid

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[6]In some cases the Congress has explicitly recognized that appropriated amounts may not be adequate to cover obligations and that supplemental appropriations would be necessary. 65 Comp. Gen. 4, 9 at n. 5 (the Guaranteed Student Loan Program). Congress also has enacted statutes explicitly authorizing agencies to enter into contracts and incur obligations without regard to available appropriations. E.g., 25 U.S.C. § 99 (1988); 41 U.S.C. § 11a (1988).

[7]We note that the District's original and revised forecasts for fiscal year 1994 under-budgeted for Medicaid. After fiscal year 1994 spending exceeded forecasted amounts for each of the first six months of the year, the District's monthly forecasts for fiscal year 1995 remained lower than the actual fiscal year 1994 spending for those months. See pages 14, 74-77 of FINANCIAL STATUS: District of Columbia Finances (GAO/AIMD/GGD-94-172BR, June 1994). The District's initial fiscal year 1995 appropriation request for Medicaid was less than actual expenditures for fiscal year 1993. After the District acknowledged in the first half of fiscal year 1995 that total spending for the District generally and Human Support Services in particular would exceed appropriated levels, the District "did little to effectively reduce spending" and requested significant increases first in federal revenue and later in additional spending authority for Medicaid. H.R. Rep. No. 96, 104th Cong., 1st Sess. 10-13 (1995) (Report on H.R. 1345, the District of Columbia Financial Responsibility and Management Assistance Act of 1995); H.R. Doc. No. 89, 104th Cong., 1st Sess. (1995) (Message from the President of the United States transmitting the District of Columbia's proposed fiscal year 1995 supplemental budget request).

program at a level greater than the federal scheme requires by including in its Medicaid plan a wide range of optional benefits. The District has elected to provide 25 of 31 optional Medicaid benefits, which approximate 25% of District Medicaid payments and result in a benefit package that is exceeded in scope only by five states.[8]

Courts have told states faced with inadequate appropriations that they have two options under AFDC and Medicaid: (1) to cancel their plans and participation in the programs or (2) to provide the money needed to carry out the plans. E.g., Welfare Rights Organization of Allegheny County v. Shapp, No. 77-913 (W.D. Pa. 1977) (Medicare and Medicaid Guide (CCH) para. 28,597, at 10,075). The District has before it now the same financing avenues for addressing its problem it had earlier in the year. It can reprogram within its Human Support Services appropriation in order to use the appropriation Medicaid and AFDC rather than for other purposes; it can seek legislation transferring amounts appropriated for other expense categories to the Human Support Services category; and it can seek legislation increasing the Human Support Services appropriation. If the District is unsuccessful in obtaining additional funds for Medicaid and AFDC through a combination of these actions, obligations or expenditures in excess of the current appropriation would be a violation of the Antideficiency Act.

Court Orders on Foster Care

You also ask whether the Antideficiency Act "unless authorized by law" exception applies to District obligations and expenditures to implement court orders issued in LaShawn A. v. Kelly, C.A. No. 89-1754 (D.D.C.). In general terms, the United States District Court for the District of Columbia has issued orders requiring the District Department of Human Services to, among other things, comprehensively reform the District's child welfare system. Hearings at 2125-34. The court also has required the District to hire additional social workers to handle foster care cases. Hearings at 672.

Your submission and our research does not establish the court orders in LaShawn as independent authority for the District to spend in excess of the amounts provided in the District's appropriation act. Operating the child welfare program is a normal function of the District, annually funded by appropriations. While the court since 1991 has required the District to take various actions to correct program deficiencies, Hearings at 2125-34, those actions essentially reflect no more than the responsibilities the District already has under its own statutes and regulations.

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[8]District of Columbia Appropriations for 1995: Hearings before a Subcommittee of the House Committee on Appropriations, 103rd Cong., 2d Sess. 2125-86, 2125-101 (1994) (hereafter Hearings).

LaShawn A. ex. rel. Moore v. Kelly, 990 F. 2d 1319, 1326 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 691 (1994). The District annually includes in its Human Support Services budget amounts needed to implement LaShawn orders. Hearings at 2054. In some respects, the District's responsibilities under the court order to operate the program in the manner provided by District law is not materially different than the District's responsibility to implement other statutorily-based programs.

Accordingly, the presence of a court order requiring the District to take certain actions in operating a District program does not convert spending authority governed by the District's appropriations act into spending that is "otherwise authorized by law" within the meaning of the Antideficiency Act. Thus, we see no basis to conclude based on the present facts and circumstances that the District may incur obligations and make expenditures to implement LaShawn orders without regard to the amount Congress has appropriated. In the final analysis, the observations we made about the District's options for addressing the AFDC and Medicaid funding issues are applicable here as well.

We trust this responds to your inquiry.

Sincerely yours,

Robert P. Murphy
General Counsel