LETTER OPINION

2021-L-02

November 3, 2021

Chancellor Mark Hagerott
North Dakota University System
600 East Boulevard Ave., Dept. 215
Bismarck, ND 58505-0230

Dear Chancellor Hagerott:

Thank you for your letter asking for clarification about the legality and the interpretation of Senate Bill 2030. You asked whether S.B. 2030 was unenforceable considering prior court decisions, whether it violated separation of powers, and whether it was unconstitutionally vague. Finally, you asked how the State Board of Higher Education (SBHE) and the institutions under its control should interpret N.D.C.C. § 15-10-48, the Challenge Grant statute, as amended by S.B. 2030, along with how such an institution could verify and certify its compliance with S.B. 2030's new requirement. It is my opinion that S.B. 2030 is not facially unenforceable based on the cited court decisions. I will not opine that a duly enacted statute is unconstitutional unless it is clearly and patently unconstitutional; S.B. 2030 is not facially unconstitutional under all circumstances. Instead, it is my opinion that S.B. 2030 should be read to carry out the purpose of the Legislative Assembly in enacting it, while avoiding constitutional conflicts.

BACKGROUND

The Higher Education Challenge Grant Fund was established by the 63rd Legislative Assembly as part of the North Dakota University System (NDUS) appropriations bill.[1] The Challenge Grant fund was established to support "projects dedicated exclusively to the advancement of academics."[2] The enrolled bill

[1] S.B. 2003, 2013 N.D. Leg., § 2 (appropriating $29,000,000 in matching funds for the 2013-2015 biennium); S.B. 2013, 2013 N.D. Leg., §§ 5-10 (establishing the Challenge Grant Committee and the terms for the disbursement of matching funds).
[2] S.B. 2003, 2013 N.D. Leg., § 5; S.B. 2003, 2013 N.D. Leg., § 6.

permitted the Challenge Grant Committee to award matching funds for:

> investments in research, scholarships, technology, endowed chairs, and investments in educational infrastructure, including new capital construction projects that conform with the university system campus master plan and space utilization study.[3]

The Higher Education Challenge Grant Fund and the Associated Committee were eventually codified in N.D.C.C. §§ 15-10-48 through 15-10-53. Each subsequent legislative assembly has reenacted the Challenge Grant Fund, while providing differing levels of funding and changing some of the conditions to receive funds.[4] However, the funding for the Challenge Grant matching funds has traditionally remained part of the NDUS's appropriations bills.

During the 67th Legislative Assembly, Senate Bill 2030 was introduced at the request of the Higher Education Committee, starting as a simple appropriation of $9.65 million to fund the Challenge Grant Fund.[5] The Senate Appropriations Committee subsequently increased the amount of funding to $20 million, and proportionately increased the statutory caps located in N.D.C.C. § 15-10-48 and 15-10-49 that govern the amount of matching grants each institution may receive.[6] This version was given a "Do Pass" recommendation by the Senate Appropriations Committee, and was sent to the Senate floor.

On the Senate floor, two amendments were proposed, one of which forms the basis for this opinion request. The amendment was proposed by Senator Myrdal, and would have added the following language to N.D.C.C. §§ 15-10-48 and 15-10-49:

> The institution is not sponsoring, partnering with, applying for grants with, or providing a grant subaward to any person or organization that performs, or promotes the performance of, an abortion unless the abortion is necessary to prevent the death of the woman, and not participating or sponsoring any program producing, distributing, publishing, disseminating, endorsing, or approving materials of any type or from any organization, that between normal childbirth and abortion, do not give preference, encouragement, and support to normal childbirth.[7]

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[3] S.B. 2003, 2013 N.D. Leg., § 10.
[4] *See* N.D.A.G. 2020-L-01 (discussing, inter alia, the addition of language barring the use of matching funds for scholarships intended solely for the benefit of athletics).
[5] S.B. 2030, 2021 N.D. Leg., version 21.0144.01000.
[6] S.B. 2030, 2021 N.D. Leg., version 21.0144.02000.
[7] S.B. 2030, 2021 N.D. Leg., version 21.0144.02002.

Senator Myrdal's floor amendment passed on a voice vote and S.B. 2030, as amended, was passed by the Senate by a 29-18 margin.[8, 9]

Subsequently, S.B. 2030 was introduced in the House and referred to the Appropriation Committee's Education and Environment Division for consideration.[10] The Education and Environment Division held eight separate hearings on S.B. 2030, heard several hours of testimony, and considered many proposed amendments.[11]

Debate over the language added by Senator Myrdal's amendment was extensive, with testimony from representatives of the North Dakota University System, its institutions, and groups opposing the amendment as well as testimony from legislative sponsors and groups in support. Through this debate, it became clear that the centerpiece of the concerns mentioned by Senator Myrdal during her floor speech was a federal grant, the "C-PREP" grant, awarded to a North Dakota State University nursing professor, which included a subaward to Planned Parenthood of Minnesota, North Dakota, and South Dakota (PPMNNDSD) to conduct certain programs aimed at preventing pregnancy in at-risk youths. During multiple hearings, NDSU officials indicated that the grant would expire at the end of September 2021 and would not be renewed.[12] Additional concerns were raised regarding academic freedom, student free speech, and accreditation.[13]

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[8] 2021 S.J. 615; S.B. 2030; 2021 N.D. Leg., version 21.0144.04000.

[9] You refer to the amendment added by Senator Myrdal's floor amendment as the "third eligibility requirement." This opinion will use that terminology in the interest of clarity.

[10] *See*, *e.g.*, Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 15).

[11] *See* Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 15); Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 23); Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 24); Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 25); Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 26); Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 29); Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 30); Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Apr. 1).

[12] Hearing on S.B. 2030 before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 29) (Statement of Dean Bresciani).

[13] *Id.*

On April 5, 2021, the House Committee on Appropriations, Education and Environment adopted a new proposed amendment to S.B. 2030, which retained Senator Mrydal's requirement regarding abortion prohibitions, but added a limited exemption:

> This paragraph does not apply to agreements entered into with medical hospitals and clinics by the [U]niversity of North Dakota school of medicine and health sciences or by any nursing education program at an institution under the control of the state board of higher education.[14]

The bill as amended was subsequently passed by the House Appropriations Committee and on the House floor.[15] While the Senate initially refused to concur with the House Amendments to S.B. 2030, a conference committee recommended that the Senate accede to the House Amendments,[16] the Senate passed the House version on April 26, 2021.[17] As a result, in order to qualify for a challenge grant, an institution must certify that:

> The institution is not sponsoring, partnering with, applying for grants with, or providing a grant subaward to any person or organization that performs, or promotes the performance of, an abortion unless the abortion is necessary to prevent the death of the woman, and not participating in or sponsoring any program producing, distributing, publishing, disseminating, endorsing, or approving materials of any type or from any organization, that between normal childbirth and abortion, do not give preference, encouragement, and support to normal childbirth. This paragraph does not apply to agreements entered into with medical hospitals and clinics by the university of North Dakota school of medicine and health sciences or by any nursing education program at an institution under the control of the state board of higher education.[18]

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[14] S.B. 2030, 2021 N.D. Leg., version 21.0144.05000.
[15] 2021 House Journal at 1431 (Apr. 5, 2021); 2021 House Journal at 1447 (Apr. 6, 2021); 2021 House Journal at 1478 (Apr. 7, 2021).
[16] 2021 Senate Journal at 1677-1678 (Apr. 26, 2021).
[17] 2021 Senate Journal at 1678 (Apr. 26, 2021). This version also included language which would have imposed a criminal penalty and a reduction in funding of $2.8 million for violating the new language from Senator Myrdal's Floor Amendment. *Id.* However, both penalties were vetoed on May 20, 2021. *See* 2021 Senate Journal at 1927 (May 20, 2021).
[18] N.D.C.C. §§ 15-10-48(1)(b)(3); 15-10-49(1)(b)(3).

DISCUSSION

Your letter asks a number of questions about the legality and interpretation of N.D.C.C. §§ 15-10-48 and 15-10-49, as amended by S.B. 2030. I will address these questions separately, including questions about the application of prior court decisions, questions regarding the constitutionality of the statutes, and questions regarding the interpretation of the statutes.

1. Questions Regarding Application of Prior Court Decisions

As discussed above, the language of the eligibility requirement added by S.B. 2030 functionally mirrors language already included in statute as N.D.C.C. § 14-02.3-01(2), (3). As you note in your letter, chapter 14-02.3, N.D.C.C., has been the subject of several legal challenges. You ask whether the decisions in these legal challenges would apply to block the application of the new eligibility requirement. Based on a review of the decisions, and the purpose and function of the requirement added by S.B. 2030, it is my opinion that neither of these decisions would preclude the application of the requirement.

In 1981 a family planning clinic filed suit, asserting, among other arguments, that N.D.C.C. § 14-02.3-02 conflicted with Title X of the federal Medicaid statute.[19] The United States Court of Appeals for the Eight Circuit agreed, holding that:

> The conflict between Title X and [N.D.C.C. §] 14-02.3-02 is clear. Even under the most aggravated circumstances, such as where a woman's life would be endangered if she carried the pregnancy to term, the North Dakota provision prohibits Title X grantees from making an abortion referral. [. . .] Accordingly, the North Dakota statute is invalid under the Supremacy Clause."[20]

The Court also declined to read an exception into section 14-02.3-02, N.D.C.C., holding that to do so would be "legislative enactment clearly beyond its judicial role."[21] Subsequently, my office clarified, in response to a request from the NDUS, that the entirety of section 14-02.3-02, N.D.C.C., had been invalidated.[22]

However, *Valley Family Planning* does not invalidate the S.B. 2030 requirement. The holding in *Valley Family Planning* was based on section 14-02.3-02, N.D.C.C., which expressly prohibits the use of state family planning funds to provide or promote the provision of an abortion, which, the court determined directly conflicts with Title X of the federal Medicaid statute.[23] There is no obvious conflict with respect to the requirement added in S.B. 2030, which does not prohibit the use of

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[19] *Valley Fam. Plan. v. N.D.*, 661 F.2d 99 (8th Cir. 1981).
[20] *Id.*
[21] *Id.*
[22] N.D.A.G. 2013-L-02.
[23] *Valley Fam. Plan.*, 661 F.2d at 102.

state Medicaid funds to provide or promote the provision of an abortion, but instead renders NDUS institutions ineligible to receive a matching grant from the state if they cannot meet the terms of the requirement.[24]

Similarly, in *Fargo Women's Health Organizations, Inc. v. Wessman*,[25] the United States District Court for the District of North Dakota held that N.D.C.C. § 14-02.3-01 violated the Supremacy Clause of the United States Constitution because it is inconsistent with Title XIX of the Social Security Act of 1965. In doing so, the court held that North Dakota may not continue to enforce section 14-02.3-01, N.D.C.C., while still accepting federal Medicaid funds.[26] However, the District Court went on to clarify in a subsequent order that the "court did *not* invalidate the North Dakota Statute; it simply declared that section 14-02.3-01 was inconsistent with Title XIX . . . and enjoined defendant from enforcing this statute."[27] As a result, section 14-02.3-01, N.D.C.C., remains on the books, and could be enforced under the right circumstances (i.e., the state ceased its acceptance of federal funds under Title XIX).[28]

As with *Valley Family Planning*, in *Fargo Women's Health Organization, Inc.* the court's determination dealt with a North Dakota statute's conflict with a specific federal law. Here, while the language of the new requirement is like that of section 14-02.3-01, N.D.C.C., the effect is entirely different. If a NDUS institution does not meet the new eligibility requirement, it does not receive additional state funding for the purposes set forth in N.D.C.C. § 15-10-53, such as investments in research, scholarships, technology, endowed chairs, and educational infrastructure. This does not act to prevent funds from flowing to entities which would otherwise be entitled to state funding under Title XIX of the Social Security Act of 1965.[29] In summary, because the circumstances that resulted in Section 14-02.3-01 being enjoined are not present with respect to the S.B. 2030 requirement, it is my opinion that the prior court decisions do not categorically bar the enforcement of the new eligibility requirement.

2. Constitutional Questions

Your letter also asks whether the S.B. 2030 requirement violates several provisions of the state and federal constitutions. Section 1-02-38, N.D.C.C., provides that, when enacting a statute, it is presumed that the Legislature was intending to comply with the state and federal constitutions. As a result, it is presumed when construing a statute that the Legislature intended to comply with the constitutions

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[24] N.D.C.C. §§ 15-10-48; 15-10-49.
[25] *Fargo Women's Health Org., Inc. v. Wessman,* No. A3-94-36, 1995 WL 465830 at *11-12 (D. N.D. Mar. 15, 1995).
[26] *Id.* at *12.
[27] *Fargo Women's Health Org., Inc. v. Wessman*, No. A3-94-36, 1995 WL 498936 (D. N.D. Apr. 13, 1995).
[28] *Id.*
[29] *See id.*

of North Dakota and of the United States and any doubt must be resolved in favor of a statute's validity.[30] This presumption is conclusive unless the statute clearly contravenes the state or federal constitution.[31] As a result, only where the statute is clearly and patently unconstitutional, for example, when the United States Supreme Court has clearly spoken on the precise issue, will this office deviate from this presumption of constitutionality.[32] Moreover, because it is the Attorney General's role to defend statutory enactments from constitutional attacks, this office has been reluctant to issue an opinion questioning the constitutionality of a statutory enactment.[33] Accordingly, absent controlling case law to the contrary, this office will not opine that a bill, if enacted, would be unconstitutional.[34] As discussed above, the cases cited in your letter are not controlling, and will not prompt this office to call the constitutionality of the requirement into question.

3. Interpretation of the requirement added by S.B. 2030

The primary goal when interpreting a statute is to determine the legislative intent by first looking at the language of the statute.[35] It is only appropriate to look beyond the words of the statute where the language is ambiguous.[36] When interpreting a statute, the words are to be understood according to their ordinary meaning,[37] based on their context.[38] Statutes must be interpreted "to give meaning and effect to every word, phrase, and sentence," thus avoiding "constructions which would render part of the statute mere surplusage."[39]

"Generally, the law is what the Legislature says, not what is unsaid."[40] "It must be presumed that the Legislature intended all that it said, and that it said all that it

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[30] *Haney v. N.D. Workers Comp. Bureau*, 518 N.W.2d 195, 197 (N.D. 1994); *Snortland v. Crawford*, 306 N.W.2d 614, 626 (N.D. 1981); *State ex rel. Johnson v. Baker*, 21 N.W.2d 355, 359 (N.D. 1945).

[31] *State v. Hagg*, 410 N.W.2d 152, 154 (N.D. 1987).

[32] N.D.A.G. 2003-L-54.

[33] N.D.A.G. 2003-L-21. Additionally, because a legislative enaction will only be found unconstitutional upon concurrence of four of five justices of the North Dakota Supreme Court, (N.D. Const. art. VI, §4) "[o]ne who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely." *S. Valley Grain Dealers Ass'n v. Bd. of Cnty. Comm'rs of Richland Cnty.*, 257 N.W.2d 425, 434 (N.D. 1977).

[34] N.D.A.G. 2003-L-21.

[35] *Nesdahl Survey'g & Eng'g, P.C. v. Ackerland Corp.*, 507 N.W.2d 686, 688 (N.D. 1993) (citing*, e.g.*, *Kim-Go v. J.P. Furlong Enters., Inc.*, 460 N.W.2d 694, 696 (N.D. 1990)).

[36] *Nesdahl*, 507 N.W.2d at 689; N.D.C.C. § 1-02-39; *see also* N.D.C.C. § 1-02-05. ("When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

[37] *Kim-Go*, 460 N.W.2d at 696 (citing N.D.C.C. §§ 01-02-02, 01-02-03).

[38] N.D.C.C. § 01-02-03.

[39] *Sorenson v. Felton*, 793 N.W.2d 799, 803 (N.D. 2011) (quoting *State v. Laib*, 644 N.W.2d 878, 882 (N.D. 2002)).

[40] *Little v. Tracy*, 497 N.W.2d 700, 705 (N.D. 1993).

intended to say [and] that it made no mistake in expressing its purpose and intent."[41] It is therefore inappropriate to "indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it."[42]

At base, it appears that the eligibility requirement added by S.B. 2030 is intended to discourage the institutions under the control of the SBHE from taking certain disfavored actions.[43] Nothing about this motive is inappropriate or violative of constitutional norms. However, there are multiple plausible readings of the statutory language, as your letter indicates. There are two primary elements of the third eligibility requirement: 1) not to sponsor, partner with, apply for grants with, or provide a grant subaward to a person that performs or promotes the performance of abortion; and 2) not to participate in or sponsor any program producing, distributing, publishing, disseminating, or approving materials which do not promote normal childbirth over abortion.

Both elements are susceptible to multiple interpretations and are thereby ambiguous. The requirement could plausibly be read to restrict multiple levels of engagement between NDUS institutions and organizations which provide or promote the provision of abortions, including those you noted: 1) the payment of funds from NDUS institutions to such organizations; 2) joint venturing between NDUS institutions and such organizations; 3) educational relationships between NDUS institutions and such organizations; 4) student engagement with such organizations; 5) staff, faculty, or student advocacy in support of such organizations; or even 6) donor relationships with entities or persons who advocate in favor of or financially support such organizations. The statute is also ambiguous with respect to what organizations might be subject to the statute: 1) abortion providers; 2) entities, such as hospitals, that refer patients for abortion-related services; 3) organizations, such as non-profits or political parties, that advocate in support of access to abortion or provide funding to abortion providers; or 4) organizations that publish advocacy or educational materials which discuss abortion without giving the required statement preferring natural childbirth over abortion.

"When a statute's language is ambiguous because it is susceptible to differing but rational meanings, [interpretation may be aided by] extrinsic aids, including legislative history, along with the language of the statute, to ascertain the Legislature's intent."[44] The Legislature has statutorily authorized courts to consider the object sought to be obtained by the Legislature and the circumstances under

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[41] *Little*, 497 N.W.2d at 705 (citing *City of Dickinson v. Thress*, 290 N.W. 653, 657 (1940)).
[42] *Dickinson*, 290 N.W. at 657.
[43] N.D.C.C. § 15-10-48(1)(b)(3); N.D.C.C. § 15-10-49(1)(b)(3).
[44] *State v. Laib*, 644 N.W.2d 878, 882 (N.D. 2002) (citing *State v. Rambousek*, 479 N.W.2d 832, 834 (N.D. 1992)).

which a statute was enacted in interpreting an ambiguous statute.[45] The overarching object of the Legislature in passing the requirement appears to have been to entirely sever the relationship between NDSU and PPMNNDSD, and to bar the establishment of similar relationships with other, similar organizations. However, based on your letter, doing so may require NDUS institutions to police faculty and student scholarship and research, student internships, textbook choice by faculty, and student and faculty advocacy on issues such as access to abortion. Any interpretation requiring these actions by NDUS institutions could be determined to violate the guarantees of the First Amendment to the United States Constitution and Article I, Section 4 of the North Dakota Constitution, including student speech and association[46] and faculty academic freedom.[47]

The North Dakota Supreme Court adheres to the "cardinal principle that if a serious doubt of a statute's constitutionality is raised, the court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided."[48] "If a statute may be construed in two ways, one that renders it of doubtful constitutionality and one that does not, we adopt the construction that avoids constitutional conflict."[49]

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[45] N.D.C.C. § 1-02-39.

[46] *See*, *e.g. McCauley v. Univ. of the V.I.*, 618 F.3d 232, 247, 250 n.12 (3d Cir. 2010) (public universities have only limited leeway to regulate student speech and association); *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 863-864 (8th Cir. 2021) (finding that a school's decision to deregister student organization because of its viewpoint violated the First Amendment); *Business Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 981 (8th Cir. 2021) (noting that the Supreme Court has repeatedly held that singling out student speech or student groups for their speech or viewpoint violated the First Amendment) (citing *Christian Legal Soc. Chapter of the Univ. of Calif. v. Martinez*, 561 U.S. 661, 683-84 (2010); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169, 187-88 (1972)).

[47] *See*, *e.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021) ("professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship"); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001) (rejecting as "totally unpersuasive" "the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction"); *Burnham v. Ianni*, 119 F.3d 668, 679 (8th Cir. 1997) (finding that freedom of expression protected professor's display of photographs in display case); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (invalidating state law prohibiting teachers from being employed if they were members of "seditious" organizations on the grounds of academic freedom); *Asociación de Educación Privada de Puerto Rico, Inc. v. Garcia-Padilla*, 490 F.3d 1, 11 n. 6 (1st Cir. 2007) (applying principles of academic freedom applies to textbook selection).

[48] *State ex rel. Heitkamp v. Fam. Life Servs., Inc.*, 616 N.W.2d 826, 841 (2000).

[49] *Ash v. Traynor*, 579 N.W.2d 180, 182 (1998).

This office follows that rule. If a broad interpretation of a statute would result in "constitutional problems," this office will construe the statute to avoid those constitutional conflicts.[50] As a result, this office will interpret the third eligibility requirement narrowly, so as to accomplish the legislature's intent to prevent money from flowing from state coffers to organizations that promote or provide abortion services and to avoid entanglement with the same organizations, while avoiding the significant constitutional concerns regarding academic freedom and student free speech and association.

As a result, it is my opinion that the requirement should be interpreted as follows: 1) no funds may flow directly from NDUS institutions to persons or organizations which perform or promote the performance of abortion unless the abortion is necessary to prevent the death of the woman, whether by contract, grant, grant subaward, or otherwise, except ordinary and neutral payments to support internships or other educational opportunities; and 2) NDUS institutions may not enter into any contract or other agreement which would explicitly result in participation in or sponsorship of any program which produces, distributes, publishes, disseminates, endorses, or approves materials that, between normal childbirth and abortion, do not give preference, encouragement, and support to normal childbirth. These elements do not, and cannot, include any measures which would violate academic freedom or student free speech or expression, or the first amendment rights of the public.

This interpretation further validates the intent of the legislature, as throughout the process legislators opined that the proposed requirement would not violate the constitutional rights of the institutions, their employees, their students, or their affiliated organizations.[51]

Your letter provided fourteen factual questions, many including sub-parts, regarding how any interpretation of the requirement would apply to specific factual situations on the campuses. However, "this office will not issue an opinion when the issues presented are questions of fact rather than questions of law."[52] The Challenge Grant Review Committee, NDUS and its institutions have been assigned

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[50] N.D.A.G. 2002-F-07 (citing N.D.A.G. 2001-L-25).

[51] *E.g.,* Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 23); Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 24); Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 25); Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Mar. 29); Hearing on S.B. 2030 Before the House Comm. on Approp., Educ. and Env't, 2021 N.D. Leg. (Apr. 1); Hearing on S.B. 2030 Before the House Comm. on Approp., 2021 N.D. Leg. (Apr. 1); Hearing on S.B. 2030 Before the Senate Conf. Comm. on Approp., 2021 N.D. Leg. (Apr. 20).

[52] N.D.A.G. 1999-L-68. *See also,* N.D.C.C. § 54-12-01(6), (8) (opinions issued to state agencies on "legal or constitutional questions").

counsel by my office, and those attorneys can advise their clients on the application of this opinion and the requirement.

4. Standard of Diligence

The final question in your letter regards the proper standard for determining whether a campus is in compliance with the requirement. It is my opinion that the standard set forth in N.D.C.C. § 44-08-05.1(4) applies to determining compliance. That section effectively provides that public officers who approve payments must use "ordinary care and diligence" to avoid personal liability for any false or fraudulent charges.[53] While under N.D.C.C. §§ 15-10-48 and 15-10-49, the Challenge Grant Review Committee is responsible for evaluating the matching fund applications submitted by NDUS institutions, the Committee is entitled to rely on the representations provided by the institutions, including representations regarding compliance with the requirement as of the date the application is submitted.

CONCLUSION

Based on the foregoing, it is my opinion that the requirement added in S.B. 2030 is not preempted by prior legal decisions, and this office will not call the constitutionality of a duly enacted statute into question when a violation is not clearly established. Instead, it is my opinion that the requirement should be read to carry out the purpose of the Legislative Assembly in enacting it, while avoiding constitutional conflicts, and that NDUS officials should exercise "ordinary care and diligence" in ensuring compliance with the requirement.

Sincerely,

Wayne Stenehjem
Attorney General

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 question presented is decided by the courts.[54]

[53] N.D.C.C. § 44-08-05.1(4).
[54] *See State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).