

LETTER OPINION
96-L-164

October 1, 1996

Mr. Larry Isaak
Chancellor
North Dakota University System
600 E Boulevard Ave
Bismarck, ND 58505

Dear Mr. Isaak:

Thank you for your letter requesting clarification of my July 30, 1996, opinion to Sheila Peterson concerning deposit and expenditure of asbestos litigation settlement funds. You ask whether the conclusions stated in the opinion apply to State Board of Higher Education institutions.

The July 30, 1996, opinion concludes:

It is therefore my opinion that money recovered as a result of the lawsuit, whether through settlement or otherwise, should be allocated among the participating agencies and deposited to the credit of that agency in the fund, general or special, from which money for construction and maintenance of the building in question was obtained, that settlement money received by the subject agencies is not comparable to insurance recovery and may not be used accordingly, and that the subject agencies may resort to the Emergency Commission for authorization to receive and spend funds recovered in a lawsuit.

Letter from Attorney General Heidi Heitkamp to Sheila Peterson (July 30, 1996).

N.D.C.C. § 15-10-12 governs deposit of funds received by Board of Higher Education institutions. Section 15-10-12 states:

The state board of higher education may, subject to the limitations of section 15-10-12.1, receive donations,

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gifts, grants, and bequests offered or tendered to or for the benefit of any institution of higher education under its control or subject to its administration, and all moneys coming into the hands of the board as donations, gifts, grants, and bequests must be used for the specific purpose for which they are donated or given. A special revenue fund, for each institution of higher education under the control of the board or subject to its administration, must be maintained within the state treasury and all institutional income from tuition collections must be placed in the special fund for the use of the institution for which the money was raised. All rent, interest, or income from land, money, or property, donated or granted by the United States and allocated to specific institutions of higher learning under the terms of the Enabling Act and the Constitution of North Dakota must be deposited in the special revenue fund of each institution and expended in accordance with Section I of Article IX of the Constitution of North Dakota. Moneys in the special revenue fund are subject to legislative appropriations. All other funds, unless restricted by the terms of a grant, donation, or bequest, received by the institutions from federal, state, and local grants and contracts, indirect cost recoveries, special student fees, room and board fees and other auxiliary enterprise fees, student activity fees, continuing education program fees, internal service fund revenues, and all other revenues must be deposited in the Bank of North Dakota. Biennial estimates of revenue and expenditures of the other funds by source of funds must be presented at the same time biennial budget requests for appropriations from the special revenue fund and state general fund are prepared and submitted to the office of management and budget pursuant to section 15-10-15. Payments from each institution's general fund appropriation must be made in amounts as may be necessary for the operation and maintenance of each institution, except that at the close of the biennium the balance of funds not paid from the general fund appropriation must be deposited in the special revenue funds of the institutions. All such appropriations are subject to proration in the same manner as other appropriations are prorated if insufficient funds are available to meet expenditures from the general fund. Sinking funds for the payment of interest and principal of institutional revenue bonds must be deposited pursuant to section 15-55-06.

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(Emphasis added.) Lawsuit settlement proceeds received by Board institutions fall into the category of "all other revenues." Therefore, pursuant to section 15-10-12, settlement funds must be deposited in the institution accounts at the Bank of North Dakota and not in the special revenue funds in the state treasury.

One of the questions the July 30, 1996, opinion addressed is whether the settlement funds may be spent in a manner similar to an insurance recovery. I referred to N.D.C.C. § 26.1-22-19, which governs expenditures from the State Fire and Tornado Fund, and concluded:

There is no equivalent appropriation, either as a permanent self-executing statutory or constitutional provision, or as a biennial appropriation, permitting the expenditure of any money received via judgment or settlement of the asbestos litigation. In the absence of an appropriation, the proceeds from any judgment or settlement cannot be spent. North Dakota Constitution, Art. X, § 12(1).

Id. In other words, absent an appropriation, there is no statute or constitutional provision of general application permitting state agencies to spend settlement proceeds and state agencies lacking specific appropriation authority must have Emergency Commission approval, granted pursuant to N.D.C.C. § 54-16-04.2, to spend settlement funds. Id.

Unlike other state agencies generally, Board institutions have specific appropriation authority to spend the settlement funds. Section 4 of 1995 N.D. Sess. Laws ch. 3 states:

Any funds received by the board of higher education and the entities of the North Dakota university system pursuant to federal acts, private grants, and other sources not deposited in the operating funds in the state treasury are hereby appropriated for the period beginning July 1, 1995, and ending June 30, 1997.

The settlement funds were received from "other sources" and, consistent with N.D.C.C. § 15-10-12, the funds were deposited in the institution accounts at the Bank of North Dakota and not in the institution operating funds in the state treasury. Therefore, Emergency Commission approval is not required and the funds may be expended by the institutions as directed by the Board of Higher Education.

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Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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