

**OPINION  
73-440**

January 3, 1973           (OPINION)

Mr. Walter R. Fiedler  
Director of Institutions  
State Capitol  
Bismarck, ND 58501

Dear Mr. Fiedler:

This is in response to your letter in which you state the following:

"I do hereby request an opinion by your office in regard to Burial Accounts at the Grafton State School. The Burial Fund is kept in the Walsh County Bank and the Grafton National Bank in the form of Certificates of Deposit entitled Residents' Personal Welfare and Last Rites Account. These accounts, totaled as of December 31, 1971, \$342,174.30, and there is some concern as to the security of such a large amount of money in two private banking institutions.

"The fund is made up almost exclusively of moneys from Social Security with some exceptions, which are funds set aside by parents, other relatives or estates. The Social Security Administration suggests that a Burial Account be set up and no consent form is required to be signed by relatives or the patient as Social Security requires this be done it seemed that the school had no choice.

"The Arthur Anderson and Company of Minneapolis, Minnesota, in an official report on reviewing and evaluating of standard accounting and reporting procedures at state charitable and penal institutions reported to Lieutenant Governor Richard Larson, as the Chairman of the Audit and Fiscal Review Committee, as of July 26, 1972, that, at page 12, 'the Last Rites Account at the Grafton State School has a current balance of approximately \$300,000. This money is invested in Certificates Deposit currently earning 5-3/4 percent per year with monthly expenditures for Last Rites averaging approximately \$2,000 per month, this account at 6 percent interest, would be very close to being on a self-funding basis. With this large balance, we believe the account should be removed from local control and placed under the state's cash management control.'

"An audit report of the Grafton State School by Sidney B. Hall, CPA, Grand Forks, North Dakota, for the year ending June 30, 1971, states he believes under section 186 of the Constitution referring to public moneys and section 21-04-01, North Dakota Century Code, defining public funds, indicates that these funds should be invested in the Bank of North Dakota and that the institution is not now complying with the law by its failure to do so.

"I note in *Menz v. Coyle*, found at 117 N.W.2d. 290, 301, the

Supreme Court has stated that not all public moneys come within the provisions of this section.

"Because a conflict has arisen between the CPA and the school officials handling the funds, I feel it necessary to request an official opinion in regard to where these moneys should be deposited."

The Menz v. Coyle case, 117 N.W.2d. 290, in its holding, recognized that there are two types of public funds, as distinguished from private funds. One type of public fund which is the result of an exaction or a tax, is governed by the general provisions of section 186 of the North Dakota Constitution, whereas another type of public fund (license fees), by the special provisions of section 186 of the North Dakota Constitution, does not come within its general provisions. The public funds governed by the general provisions must be deposited with the State Treasurer and may be expended only pursuant to an appropriation made. However, the provision of section 186 of the North Dakota Constitution are not dispositive of the question under consideration.

Section 69-09-07 of the North Dakota Century Code as amended provides that all state funds, and funds of all state, penal, educational, and industrial institutions, shall be deposited in the Bank of North Dakota by the persons having control of such funds or shall be deposited in accordance with constitutional and statutory provisions. We are not aware of any other constitutional provision than section 186 mentioned earlier. The term "public funds" as used here obviously means public money, as distinguished from private funds.

Section 25-10-10 and 25-01-11 relate to funds derived from the sale of land and would not apply to the burial fund or burial account under consideration. Section 25-01-15 pertains to the disposition of funds in the personal account with the institution and would not have application to the question under consideration.

Section 25-01.1-20 of the North Dakota Century Code pertains to the care and custody of funds belonging to patients and requires the maintenance of separate accounts for that purpose and that the funds be paid out only pursuant to such rules and regulations as may be prescribed by law or by the supervising department. This section is not directly concerned with the question of where these funds shall be deposited.

section 21-04-01(4) defines "public funds" as such term is used and found in chapter 21-04 relating to the depositories of public funds. This term is defined as follows:

4. 'Public' funds' shall include all funds derived from taxation, fees, penalties, sale of bonds, or from any other source, which belong to and are the property of a public corporation or of the state, and all sinking funds of such public corporation or of the state, and all funds from whatever source derived and for whatever purpose to be expended of which a public corporation or the state shall have legal custody. They shall include the funds of which any board, bureau, commission, or individual, created or

authorized by law, is authorized to have control as the legal custodian for any purpose whatsoever whether such funds were derived from general or special taxation or the assessment of persons or corporations for a specific purpose;"

Subsection 5 of the same section defines state to mean and include the State of North Dakota and any institution, industry, enterprise or agency of the state.

The Grafton State School, without question, comes within the terms of this definition. We would also conclude that the burial fund or account in question would come within the terms of public funds as defined.

Section 21-04-02 of the North Dakota Century Code provides as follows:

"STATE FUNDS TO BE DEPOSITED IN BANK OF NORTH DAKOTA. Public funds belonging to or in the custody of the state shall be deposited in the Bank of North Dakota." (emphasis supplied)

By applying the definitions to the language found in the foregoing section, the thought clearly emerges that the funds in question are to be deposited in the Bank of North Dakota.

We have also taken into account the provisions of section 21-04-03 which provides as follows:

"FUNDS OF PUBLIC CORPORATIONS TO BE DEPOSITED IN DESIGNATED DEPOSITORY. Public funds belonging to or in the custody of any public corporation shall be deposited in the Bank of North Dakota or in banks which have been duly designated as depositories in the manner prescribed in this chapter."

This section, however, pertains to public corporations such as counties, school districts, municipalities, etc., and does not apply to the state or its agencies.

The question under consideration does not involve the investment of the funds, but merely where such funds are required to be deposited by law.

Taking into account the aforementioned provisions and specifically sections 21-04-01 and 21-04-02, it is our opinion that the burial funds or burial accounts at the Grafton State School are required to be deposited in the Bank of North Dakota.

In reaching the above conclusion, we are not concluding that the funds in question are funds which are covered by the provisions of section 186 of the North Dakota Constitution. In making this distinction, we are not suggesting they they are not public funds. They are public funds, as distinguished from private funds.

Sincerely yours,

Allen I. Olson

Attorney General