LETTER OPINION
80-1

April 15, 1980 (OPINION)

Mr. T. N. Tangedahl
Executive Director
Social Service Board of North Dakota
State Capitol
Bismarck, ND 58505

Dear Mr. Tangedahl:

This opinion is in response to your request of March 5, 1980, in which you state the following:

> In the 1965 Special Session, the North Dakota Legislature enacted what is now codified as North Dakota Century Code chapter 50-24.1, Medical Assistance for Needy Persons. That chapter was written and designed for the purpose of qualifying the state to receive federal funds under Title XIX of the Social Security Act, otherwise known as the Medicaid program. Since the effective date of the 1965 Act North Dakota has been a participant in the Medicaid program, and has received federal funding by virtue of its having a state plan which conforms to the requirements set forth at 42 U.S.C. Section 1396a. (a).
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> On February 25, 1980, and under date of February 20, 1980, the Social Service Board of North Dakota received a letter from Mr. Francis T. Ishida, Regional Administrator, Department of Health, Education and Welfare, concerning a telephone call of February 19, 1980, and detailing the following information:
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> > On January 15, 1980, the United States District Court for the Eastern District of New York ruled in McRae v. Secretary, HEW, (Civ. No. 76 C 1804) and New York City Health and Hospitals Corporation v. Secretary, HEW, (Civ. No. 76 C 1805) that provisions contained in HEW's appropriations acts since FY 1977 that limit the use of Federal funds for abortions are unconstitutional. Those provisions are commonly referred to as the Hyde Amendment. Specifically, the District Court's order stated that all versions of the Hyde Amendment are "unconstitutional as applied to abortions that are necessary in the professional judgment of the pregnant woman's attending physician exercised in the light of all factors, physical, emotional, psychological, familial, and the woman's age, relevant to the health-related well-being of the pregnant woman." The judgment ordered the Department to: "A. Cease to give effect to (the Hyde Amendments) so far as they forbid the making of Medicaid payments for abortions performed by qualified Medicaid providers in cases in which the abortions are necessary in the professional judgment of the pregnant woman's attending physician; B. Continue to authorize the expenditure of Federal matching funds for medically necessary abortions provided by duly certified providers for Medicaid-eligible women at the proportionate

> level and in accordance with the standard of medical necessity set forth (above); C. Forthwith, communicate the substance of this judgment to the Regional Directors of the Department of Health, Education, and Welfare, with instructions that they promptly disseminate that communication to all State Medicaid authorities within their regions with instructions that they in turn communicate it to all local Medicaid authorities and providers of pregnancy-related care to Medicaid-eligible women."
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> The District Court's judgment becomes effective on February 19, 1980. This means that as of February 19, 1980, the Department will provide FFP in all medically necessary abortions as that term is defined in the District Court's ruling. As documentation for abortions performed after that date, states must have on file at least either (1) a statement signed by the attending physician that in his or her judgment the abortion was medically necessary as defined above, or (2) documentation that is presently required for abortions in regulations at 42 CFR 441.203 and .205.
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> Finally, we should note that states have the statutory authority to exclude medically necessary abortions from coverage only when federal funding of those procedures is not available. Since federal funding is now available, each state is required, under Section 1902(A) (13) of the Social Security Act (42 U.S.C. 1396A(A) (13)) and our regulations are 42 CFR 440.230, to cover all medically necessary abortions falling within the service categories described in 42 CFR 230(C) (required services, including inpatient and outpatient hospital and physician services.)

You were then instructed to amend your state plan accordingly and to notify local Medicaid authorities that the state would be funding medically necessary abortions. You state that a provision of state law, namely North Dakota Century Code section 14-02.3-01, does not allow for funding of medically necessary abortions. That section states:

> 14-02.3-01. STATE POLICY ON ABORTION AND CHILDBIRTH - USE OF PUBLIC FUNDS RESTRICTED. Between normal childbirth and abortion, it shall be the policy of the state of North Dakota that normal childbirth is to be given preference, encouragement, and support by law and by state action, it being in the best interests of the well-being and common good of North Dakota citizens.
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> No funds of this state or any agency, county, municipality, or any other subdivision thereof and no federal funds passing through the state treasury or a state agency shall be used to pay for the performance, or for promoting the performance, of an abortion unless the abortion is necessary to prevent the death of the woman. (Emphasis added).

You then ask whether, in view of McRae and recent decisions of the

Eighth Circuit Court of Appeals, namely Reproductive Health Services v. Freeman, No. 79-1275 (8th Cir., Jan. 9, 1980), and Hodgson v. Board of County Commissioners, No. 79-1665 (8th Cir., Jan. 9, 1980), section 14-02.3-01 is constitutional. In our opinion, it must be presumed that section 14-02.3-01 is constitutional until declared otherwise by an appropriate court of law.

North Dakota Century Code section 1-02-38 provides that, when enacting a statute, it is presumed that the Legislature was intending to comply with the state and federal constitutions. It has been a long-standing policy of this office that statutes of the sovereign State of North Dakota are presumed to be constitutional until declared to be otherwise by the courts of this state. 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. The North Dakota Supreme Court, in numerous cases, has reiterated this presumption of constitutionality. In Menz v. Coyle, 117 N.W.2d. 290 (N.D. 1962), the Court held that an act is presumed constitutional and will be upheld unless "manifestly" contrary to the state or federal constitutions, that every presumption in favor of constitutionality will be adopted, and that only when the statute is unconstitutional "beyond a reasonable doubt" will it be declared void. Id., at p. 295.

The decision that you cite, McRae v. HEW, is a decision of the United States District Court of the Eastern District of New York. That decision dealt with the federal Hyde Amendment to HEW appropriations, which amendment has generally been held to be a substantive amendment to Title XIX of the Social Security Act. That amendment has had various forms since it was first enacted in 1976, but generally, has precluded public funding for abortions except in cases where the life of the woman is endangered, the pregnancy is a result of rape or incest, or would result in severe and long lasting damage to the physical health of the woman. Section 14-02.3-01 is more restrictive in that it limits public funding to lifesaving situations. The United States Supreme Court is scheduled, on April 23, 1980, to hear arguments on McRae and a similar case arising from the Seventh Circuit, Zbaraz v. Quern, 596 F.2d. 196 (7th Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3013 (U.S. July 24, 1979) (No. 79-64).

The McRae decision, being from a district court other than for North Dakota, only has relevance to the North Dakota statute in two respects. One is that it can be cited for its legal precedential value in a lawsuit challenging North Dakota's law. The other, and obviously more important aspect to you, is that it effects HEW, which because of its approval of state plans via Title XIX, can threaten to cut off funds from the state if it does not comply. A threatened cut in funds for noncompliance, while obviously of serious consequence to the State of North Dakota, does not directly alter the constitutionality of section 14-02.3-01.

The jurisdiction of the federal district courts is generally territorial, that is, unless there is express authority by Congress otherwise, its jurisdiction is coextensive with its boundaries. 36 C.J.S. Federal Courts Section 16, p. 94, states:

> Each federal district court is a separate entity and none has jurisdiction crossing a state boundary. Each district court is considered a court of the particular state in which it sits and by which is bounded. While Congress can confer broader powers, on district courts, of an extraterritorial nature, implications which impinge on the general territorial structure of jurisdiction will not readily be given weight.

Id., at pp. 94-5.

Additionally, pursuant to Rule 65 of the Federal Rules of Civil Procedure, an injunction is "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Therefore, the judgment in McRae does not affect the constitutionality of section 14-02.3-01.

As you mentioned in your letter, the Eighth Circuit Court of Appeals has recently decided two cases of relevance. The first, a Minnesota case, Hodgson v. Board of County Commissioners supra, held that the Hyde Amendment substantively amended Title XIX, so that state legislation which was more restrictive than the Hyde Amendment would be in conflict with Title XIX. Minnesota was required then to finance at least those abortions contemplated by the Hyde Amendment. However, in a companion case, Reproductive Health Services v. Freeman supra, a Missouri case, the Hyde Amendment was declared to be unconstitutional as in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court stated at pp. 28-29:

> We therefore rule that Missouri's medicaid exclusion for therapeutic non-Hyde Amendment abortions is invalid under the equal protection clause not only because it invidiously discriminates against the pregnant and medically needy who are not victims of rape or incest, but also it singles out for exclusion one procedure medically necessary to preserve health without furthering a legitimate state interest in doing so. The interest promoted by the exclusion - protecting fetal life - is not a constitutionally permissible objective when the pregnant woman's life or health is at stake.

Neither case, of course, directly involved North Dakota's statute. While the federal district court for the State of North Dakota would generally be bound by the decisions of the Eighth Circuit Court of Appeals, as controlling precedent, there has been no court action specifically dealing with North Dakota's statute. The presumption of constitutionality, particularly in view of the fact that the Supreme Court has not yet ruled on this issue, is then still in full force and effect, with the net result being that this office cannot declare that section 14-02.3-01 is constitutionally infirm.

We hope the foregoing is sufficient for your purposes.

Sincerely,

ALLEN I. OLSON
Attorney General