OPINION NO. 84-080

Syllabus:

The Ohio Department of Human Services may implement a system under which county departments of human services advance to private entities, for the provision of social services described in Title XX of the Social Security Act (42 U.S.C. §§1397-1397f) and R.C. 5101.46 through 5101.464, funds derived from the federal and state governments under those provisions, provided that the Department determines that the implementation of such a system is reasonably necessary to the efficient performance of its duties.

To: Patricia K. Barry, Director, Department of Human Services, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 19, 1984

I have before me a letter from your predecessor requesting an opinion relating to the authority of the Ohio Department of Public Welfare (now the Ohio Department of Human Services (ODHS))[1] to implement a particular system of payment by county welfare departments (now county departments of human services) for social services described in Title XX of the Social Security Act and R.C. 5101.46-.464. The letter of request asks whether "federal and state laws allow county [departments of human services] to advance federal and state funds to private entities for the provision of social services described in Title XX of the Social Security Act and Sections 5101.46 [et] seq. of the Ohio Revised Code." It is my understanding that, under the Title XX block grant program, ODHS advances funds to the counties on a periodic basis. The funds so advanced are derived from the federal and state governments, but are transferred to the county treasuries so that, when expended, they are paid out upon warrants of the county auditor. See

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[1] R.C. 5101.01, as enacted by Am. Sub. H.B. 401, 115th Gen. A. (1984) (eff. July 20, 1984), states:

> As used in the Revised Code, the "department of public welfare" means the department of human services, and the "director of public welfare" means the director of human services. Whenever the department or director of public welfare is referred to or designated in any statute, rule, contract, or other document, the reference or designation shall be deemed to refer to the department or director of human services, as the case may be.

R.C. 329.01, as amended by the same act, contains similar language changing the names of the county department of welfare and the county director of welfare to the county department of human services and the county director of human services, respectively, as used throughout the Revised Code.

note 3, infra. Thus, the question is whether ODHS has the authority to implement a system whereby a county may, once it has received such funds, pay them to providers before the providers render the particular services to which the payments relate. Your predecessor asked only for an informal opinion; however, because of the general applicability of principles involved in this analysis, I have elected to respond by means of this formal opinion. For purposes of this opinion, I use the term "Title XX funds" to refer to federal, state, or local funds expended by a county for Title XX purposes.

Title XX of the Social Security Act, 42 U.S.C. §§1397-1397f, provides for block grants to states for social services, including children's day-care services, homemaker and home health aide services, and services to treat alcoholism and drug addiction. It specifies that the allotment to a state for a fiscal year must be expended in that fiscal year or the succeeding year (42 U.S.C. §1397a(c)); that, prior to expenditure, the state must "report on the intended use of the payments the State is to receive under [Title XX], including information on the types of activities to be supported and the categories or characteristics of individuals to be served" (42 U.S.C. §1397c); and that there are certain purposes for which the funds may not be used (42 U.S.C. §1397d). It also requires a state to file reports describing the activities which have been carried out with Title XX funds and the purposes for which such funds were spent. 42 U.S.C. §1397e. In addition, it sets forth audit requirements and specifies that a state may be required to repay amounts ultimately found not to have been expended in accordance with federal law. 42 U.S.C. §1397e; see 31 U.S.C. §6503; 45 C.F.R. §§96.50-.51. The federal law does not, however, address the question whether funds may be paid to providers in advance of their provision of services.

R.C. 5101.46 through 5101.464 govern the state administration of the program for the provision of social services authorized by Title XX of the Social Security Act. R.C. 5101.46 provides that the Departments of Human Services, Mental Health, and Mental Retardation and Developmental Disabilities shall administer the program, and that ODHS may assign administrative responsibilities to the county departments of human services. It also provides that ODHS, with input from the other departments, is responsible for the preparation of a comprehensive social services program plan that meets all the requirements of applicable state and federal laws and regulations, including those outlined above.

R.C. 5101.462 sets forth the manner in which federal Title XX funds are distributed within the state. It provides in part:

> (A) All federal funds received under Title XX of the Social Security Act shall be appropriated to the departments of [human services], mental health, and mental retardation and developmental disabilities. Seventy-two and one-half per cent of all federal funds received shall be appropriated to the department of [human services], twelve and ninety-three one hundredths per cent to the department of mental health, and fourteen and fifty-seven one hundredths per cent to the department of mental retardation and developmental disabilities. Of the amount appropriated to the department of [human services], the director of [human services] shall make allocations to county departments of [human services] for the following purposes:
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> (1) Children's day-care services, twenty per cent;
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> (2) County administration and direct services provided by county departments of [human services], thirty-six per cent;
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> (3) The purchase of services and direct services provided by county departments of [human services], forty per cent;
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> (4) The training of employees of county departments of [human services], providers of services under contract with such departments or with community mental health boards or county boards of mental retardation and developmental disabilities, and county children services boards who are directly engaged in providing services under the program, two per cent;
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> (5) State administration, two per cent.
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> . . . .
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> (B) Expenditures by any county department of [human

services], community mental heath board, or county board of mental retardation and developmental disabilities for the overall planning and administration of the program shall not exceed ten per cent of the department's or board's total allocation. All expenditures by county departments of [human services] for such purposes shall be made from funds allocated under division (A)(2) of this section. The ten per cent limitation does not apply to administrative costs associated with the delivery of any service. The director of [human services] shall, subject to the approval of the controlling board, adopt rules governing the use of funds for planning and administration.

(C) No county department of [human services], community mental heath board, or county board of mental retardation and developmental disabilities shall require or pay any administrative costs from fees or other charges from a provider of services as a condition or provision of the contract for the purchase of services.

(D) The combined federal and state cost sharing rate for all services and training, except those for which payment is made from funds allocated under divisions (A)(1) and (2) of this section, shall be seventy-five per cent. The combined federal and state cost sharing rate for all services for which payment is made from funds allocated under divisions (A)(1) and (2) of this section shall be one hundred per cent.

(E) The directors of [human services], mental health, and mental retardation and developmental disabilities shall, subject to the approval of the controlling board, develop formulas for the distribution to county departments of [human services], community mental health boards, and county boards of mental retardation and developmental disabilities of funds appropriated to their respective departments under division (A) of this section. The formulas shall take into account the total population and the population with income and resources below the one hundred per cent standard of need of each county and the county's history of and ability to utilize Title XX funds. Such distributions shall not include the amounts of any contracts entered into between one of the state departments and a provider for services on a statewide or regional basis. Such contracts between a state department and a provider shall be subject to the requirements of division (B) of section 5101.463 of the Revised Code.

(F) As used in this section and section 5101.463 of the Revised Code:

(1) "Combined federal and state cost sharing rate" and "combined federal and state funds" refer to the proportion and amount of federal Title XX funds appropriated under division (A) of this section and any state funds appropriated specifically to supplement such federal funds.

(2) "Local share" means any funds used to match the combined federal and state cost sharing rate as required under division (D) of this section. The local share may be provided from any source except those prohibited under federal law and state funds appropriated specifically to supplement federal Title XX funds under division (A) of this section.

Representatives of your office have informed me that state and federal funds earmarked for Title XX purposes are advanced to the counties on a periodic basis, up to the amount allocated to each county department of human services under R.C. 5101.462, based upon the expenditure pattern of the county.[2] Such funds are

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[2] R.C. 5107.25 through 5107.30 govern the provision of child day-care services by county departments of human services, including child day-care services funded under Title XX and R.C. 5101.46 through 5101.464. R.C. 5107.26 states, in part:

> The department of [human services] shall, with respect to sections 5107.25 to 5107.30 of the Revised Code:
>
> (A) Authorize county [departments of human services] to

paid into the county public assistance fund, see generally, R.C. 5101.16, 5101.161; 1984 Op. Att'y Gen. No. 84-033, and periodic adjustments are made to compensate for variations in expenditure.[3]

R.C. 329.04 imposes upon the county departments of human services certain powers and duties with respect to the provision of social services, as follows:

> The county department of [human services] shall have, exercise, and perform, under the control and direction of the board of county commissioners, the following powers and duties:
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> . . .
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> (B) To perform such duties relative to the provision of public social services, including services authorized under. . .Title XX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended, as are assigned by the department of [human services], to

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> purchase child day-care services from funds made available by general assembly appropriation, federal aid, or other means and reimburse counties in full from general assembly appropriations and federal aid for such expenditures, except for any part of the cost which is provided locally;
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> . . . .

This provision is somewhat circular, since it speaks both of authorizing county departments of human services to purchase services from funds made available by the state and federal governments and of reimbursing the counties for such expenditures. It is, however, my understanding that, under the Title XX program, federal and state funds are "made available" to the counties in advance of expenditure by the counties. See note 3, infra. Thus, R.C. 5107.26(A) authorizes the county departments of human services to purchase child day-care services from such funds. Since the funds are made available in advance of expenditure, there is no need for reimbursement, except to the extent that adjustments may be necessary if funds from ODHS have been less than the amount actually spent by the county for such purpose during a given period. See 1984 Op. Att'y Gen. No. 84-033.

[3] By its terms, R.C. 5101.161 pertains to amounts expended for aid, health care, and administration under R.C. Chapters 5107 and 5113. R.C. Chapter 5107 deals primarily with aid to dependent children, although R.C. 5107.25 through 5107.30 relate to the provision of child day-care services under Title XX. R.C. Chapter 5113 deals with poor relief. With the exception of child day-care services governed by R.C. 5107.25-.30, see note 2, supra, R.C. 5101.161 contains no reference to the Title XX services provided under R.C. 5101.46-.464, and no other statute specifies the procedure by which funds for such purposes are to be paid to the counties. It is, however, clear that the types of assistance now provided by Title XX were at one time included within Title IV of the Social Security Act, which governs aid to families with dependent children. By the Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337, Congress repealed the then-existing provisions of the Social Security Act relative to social services and added a new Title XX to cover such social services. Thus, prior to the enactment of Title XX, federal funds for social services were included within the reference of R.C. 5101.161 to aid, health care, and administration under R.C. Chapter 5107. See R.C. 5107.02(G) (authorizing ODHS to administer sums paid to the state by the United States under Title IV of the Social Security Act). It is my understanding that financing of the programs covered by Title XX has continued under the arrangements established by R.C. 5101.161, although the reference is no longer precise. In any event, your question does not focus on the details of procedures used to provide Title XX funds to the counties. Therefore, I am directing this opinion to the question whether, when Title XX funds are received by a county, through any lawful method, the county may pay them to private entities in advance of the provision of services by such entities.

> prevent or reduce economic or personal dependency and to strengthen family life. . . . The county department shall, upon approval of the comprehensive social services program plan by the general assembly under section 5101.461 of the Revised Code and prior to the effective date of the plan, take steps necessary to assure the efficient administration of public social services under the plan, including the negotiation of contracts with providers of services and the performance of other duties assigned to it by the department of [human services].
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> . . .
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> (D) To cooperate with state and federal authorities in any matter relating to public welfare and to act as the agent of such authorities;
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> (E) To submit an annual account of its work and expenses to the board and to the department of [human services] at the close of each fiscal year;
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> . . . .

The question presented to me relates to contracts between county departments of human services and providers of various services. With respect to such contracts, R.C. 5101.463(A) states:

> Except for contracts entered into directly between providers and the departments of [human services], mental health, and mental retardation and developmental disabilities, all purchases of services under the Title XX social services program shall be made under a contract entered into by the provider of the services and the county department of [human services], community mental health board, or county board of mental retardation and developmental disabilities. The directors of [human services], mental health, and mental retardation and developmental disabilities shall each prescribe a standard form for such contracts.

The question does not relate to contracts entered into directly between providers and ODHS. Thus, all the contracts to which this opinion relates will be subject to R.C. 5101.463.

R.C. 5101.463(B) specifies certain matters which the contracts must address, including the following:

> (B) Each contract shall specify:
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> (1) The period covered by the contract, not to exceed one year;
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> (2) The amounts of combined federal and state funds and local funds to be expended;
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> (3) That the provider agrees to submit semiannual reports showing the number of persons served and actual expenditures of Title XX funds in each eligibility category for each service covered in the contract, within thirty days of the end of each six month period;
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> (4) That the provider agrees to determine eligibility for all service recipients, directly or through a subcontract or other agreement with a county department of [human services], or a public or private non-profit agency or organization;
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> (5) The units by which the amounts of services provided are to be measured, and codes to be used to identify the units;
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> (6) Estimated costs by category of expense;
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> (7) That the provider agrees to meet the requirements of federal and state laws and regulations and the state plan;
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> . . . .

R.C. 5101.463(B)(10) states that a provider contract shall specify that the provider agrees, if required "on the basis of evidence of misuse or improper accounting of funds or substantial errors in determinations of eligibility," to have an independent audit conducted. R.C. 5101.463(B)(10) also states: "The amount of any adverse findings against a provider shall not be subject to payment from combined federal

and state funds or local share. . . . The cost of conducting audits required under this division shall be reimbursed under a subsequent or amended provider contract." R.C. 5101.463 does not, however, specifically address the question with which you are concerned—namely, whether Title XX funds may be paid to private entities in advance of their provision of social services.

It is, thus, apparent, that neither the federal law nor state statutory law specifically authorizes or prohibits a county from expending Title XX funds for services which are to be rendered in the future. Whether funds are paid to the county in advance of its expenditure of funds or only by way of reimbursement for funds which it has expended is irrelevant on this point. The question is whether the actual expenditure by a county for services to be rendered by a private entity in the future is permissible under the Title XX program, as implemented by R.C. 5101.46-.464, and whether ODHS may establish a program which provides for such expenditures.

As discussed above, I find nothing in either state statutes or federal law which prohibits expenditures by a county in advance of the receipt of services, or which specifies that a different method of payment must be used. If a county department of human services actually pays money to a provider as the purchase price for services, that money constitutes an expenditure of the department, whether or not the services for which it was the intended compensation have yet been rendered.[4] ODHS is authorized by R.C. 5101.46 to administer the Title XX program, and by R.C. 5101.463 to establish standard forms for contracts between county departments of human services and providers. Thus, it has authority to implement any lawful procedure for payment of providers. See generally 6 Ohio Admin. Code Chapter 5101:2-31, as amended (rules governing the purchase of social services under Title XX by a county department of human services). It is a general rule that, where statutory authority to perform an act is granted, and there is no provision governing the manner in which the act is to be performed, the act may be performed in any reasonable manner. Jewett v. Valley Railway Co., 34 Ohio St. 601 (1878). Since neither federal law nor state statutory law addresses the advancement of state or federal funds to providers, such a manner of payment would seem to be permissible, provided that those who seek to implement it find it reasonably necessary to the proper performance of their statutory duties, and that it is otherwise lawful.[5]

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[4] I note that R.C. 5107.28 states, in part:

> In lieu of payments on the basis of attendance of individual children, the [county] department [of human services] may, with approval of the state department of [human services], contract with public or private agencies, organizations, or corporations for the provision of child day-care services on the basis of the reservation of accommodations for a specific number of children.

A contract for the reservation of accommodations for a specific number of children would seem particularly appropriate for the sort of advance payment about which you have inquired.

[5] It is firmly established in Ohio that a rule validly adopted by an administrative body has the force and effect of law, unless it is unreasonable or in clear conflict with statutory enactments governing the same subject matter. Kroger Grocery & Baking Co. v. Glander, 149 Ohio St. 120, 77 N.E.2d 921 (1948). Existing rules adopted by the Department of Human Services clearly contemplate that a county department of human services [CDHS] will pay providers after services are rendered. See, e.g., [1984-1985 Monthly Record] Ohio Admin. Code 5101:2-31-07(A)(6) at 287 ("[p]rovider shall collect a service fee from eligible individuals. . . . All such fees shall be deducted from total service reimbursement requested from the [CDHS]); [1984-1985 Monthly Record] Ohio Admin. Code 5101:2-31-07(A)(9) at 287 ("[p]ayment for purchased services: Reimbursement will be made pursuant to rule 5101:2-31-20 of the Administrative Code. Provider will within thirty days of the end of

The main concern with the lawfulness of the procedure you have outlined goes to its constitutionality. The letter requesting this opinion states:

> From the inception of this program in 1975, county welfare departments have contracted with such private entities and have reimbursed them for rendered services with federal and state funds allocated to counties by this department. However, in Am. Sub. H.B. 694 the General Assembly attempted to amend R.C. 5101.463 to require that such funds be advanced to service providers on a quarterly basis. This attempt was ultimately vetoed by Governor Rhodes, based on the rationale that Art. VIII Section 4 of the Ohio Constitution prohibits a state agency from advancing public funds to a private entity.
>
> Realizing that the present version of R.C. 5101.463 does not compel the advancing of social services funds, does it (and Title XX of the Social Security Act) nevertheless allow this department the option of implementing an advancement system?

As passed by the General Assembly as part of Am. Sub. H.B. 694, 114th Gen. A. (1981) (eff. Nov. 15, 1981), R.C. 5101.463(B)(4) stated that provider contracts shall specify: "[t]hat the combined federal and state share shall be distributed to the provider in quarterly installments paid at equal intervals during the contract period within thirty days of the beginning of each quarter. For annual contracts, the quarters shall begin on the first day of July, October, January, and April." This provision was vetoed by the Governor. The Governor's "Statement of Reasons for Veto of Items in Amended Substitute House Bill 694" (Nov. 15, 1981) states, in Item 4:

> The provision authorized that the Department of Public Welfare upon entering into a Title XX contract with a private provider shall advance federal and state funds to that provider on a quarterly basis.

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each month submit an invoice to the [CDHS] covering purchased services rendered to eligible individuals. . . . (b) The [CDHS] will review such invoice for completeness and any information necessary before making payment within thirty days after receipt of invoice"); [1984-1985 Monthly Record] Ohio Admin. Code 5101:2-31-07(A)(12) at 287 ("[p]rovider warrants that claims made to [CDHS] for payment for purchased services shall be for actual services rendered to eligible individuals. . ."); [1983-1984 Monthly Record, vol. 2] Ohio Admin. Code 5101:2-31-20(D) at 1223 ("Title XX vendors and providers are reimbursed by [CDHSs] up to the negotiated rate of the contract, not to exceed the limits established by [ODHS]. . ."). It is, however, my understanding that, if the Department chooses to implement an advancement system of the sort discussed in this opinion, the Department will make appropriate amendments to its rules. See generally Am. Sub. H.B. 291, 115th Gen. A. (1983) (eff. July 1, 1983), section 161 (uncodified). Therefore, I am not considering any impact which existing rules might have on the implementation of such a plan by the Department.

I note, further, that the question posed in your request is whether the Department may implement a program by which counties pay providers in advance of the provision of services. Since the scheme established by federal law and state statute would permit such payments, if reasonably necessary to accomplish the purposes of such law, it appears that, absent a rule of the Department to the contrary, a county department of human services may make such payments even if no general program to such effect is established by the Department. See R.C. 329.04(B); R.C. 5101.463. Existing rules of the Department are to the contrary, however. See [1984-1985 Monthly Record] Ohio Admin. Code 5101:2-31-07 at 287 (quoted, in relevant part, above); [1983-1984 Monthly Record, vol. 2] Ohio Admin. Code 5101:2-31-20 at 1223 (providing for reimbursement of providers on monthly basis). Thus, absent rule changes by the Department, a county department of human services may not pay its providers for Title XX services in advance of their provision of services.

> Article 8, Section 4 of the Ohio Constitution has been interpreted by the Attorney General that Ohio agencies cannot advance funds to private entities. Furthermore, the Department of Public Welfare is only able to draw federal funds monthly based on demonstrated need.

While I appreciate the concerns raised in this veto message, I do not find them sufficient to establish the unconstitutionality of the plan which has been presented to me.[6]

Ohio Const. art. VIII, §4 provides:

> The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.

Similar language in Ohio Const. art. VIII, §6 applies an analogous lending-credit prohibition to subdivisions of the states:

> No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association: provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state, or doing any insurance business in this state for profit.

The two provisions have been given the same interpretation. State ex rel. Eichenberger v. Neff, 42 Ohio App. 2d 69, 330 N.E.2d 454 (1974).[7]

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[6] It is generally established that the fact of a veto and the reasons given therefor should not be given great weight in the construction of legislation which was enacted. See generally, e.g., Garden State Farms, Inc. v. Bay, 77 N.J. 439, 390 A.2d 1177 (1978); State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 P.2d 91 (1933).

[7] The Ohio Supreme Court has held that Ohio Const. art. VIII, §§4 and 6 do not forbid the giving or loaning of aid or credit to a public organization created for a public purpose or to a private nonprofit organization for a public purpose. See Bazell v. City of Cincinnati, 13 Ohio St. 2d 63, 233 N.E.2d 864, appeal dismissed, 391 U.S. 601 (1968); State ex rel. Dickman v. Defenbacher, 164 Ohio St. 142, 128 N.E.2d 59 (1955); State ex rel. Speeth v. Carney, 163 Ohio St. 159, 126 N.E.2d 449 (1955); State ex rel. Leaverton v. Kerns, 104 Ohio St. 550, 136 N.E. 217 (1922). See generally 1977 Op. Att'y Gen. No. 77-049. You have, however, indicated that at least some of the providers which will be recipients of funds under the proposed arrangement are for-profit corporations which could not come within this exception.

Further, an exception has been recognized where the funds in question are at all times exclusively federal funds, granted for the express purpose of operating a particular federal program. See Op. No. 77-049. On the facts you have presented, this does not appear to be the case. In addition, 45 C.F.R. §96.30(a) states: "Except where otherwise required by Federal law or regulation, a State shall obligate and expend block grant funds in accordance with the laws and procedures applicable to the obligation and expenditure of its own funds." Thus, I do not find this exception applicable in the instant case.

It is true that certain Attorney General opinions have construed these provisions as prohibiting the payment of public moneys to private entities in certain instances. See, e.g., 1979 Op. Att'y Gen. No. 79-101 (board of trustees of county hospital may not make a contribution to a for-profit insurance company); 1978 Op. Att'y Gen. No. 78-040 (board of education may not enter into a joint venture with a commercial oil company); 1972 Op. Att'y Gen. No. 72-096 (state may not have ownership interest in corporation operating an information center in an interstate highway rest area); 1971 Op. Att'y Gen. No. 71-044 (municipality may not make an outright gift of funds to a nongovernmental organization); 1942 Op. Att'y Gen. No. 5402, p. 593 (municipality may not enter into a contract or lease of municipal property by the terms of which it becomes a partner with a private corporation in the control and disposition of such property or funds arising therefrom).

These opinions were based on a number of Ohio Supreme Court cases construing Ohio Const. art. VIII, §§4 and 6. Chief among those was Walker v. City of Cincinnati, 21 Ohio St. 14, 54 (1871), which stated of Ohio Const. art. VIII, §6: "The mischief which this section interdicts is a business partnership between a municipality or subdivision of the State, and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever." See, e.g., State ex rel. Wilson v. Hance, 169 Ohio St. 457, 159 N.E.2d 741 (1959) (under Ohio Const. art. VIII, §6, a municipality is prohibited from owning part of a property which is owned in part by another, so that the parts, when taken together, constitute a single property). It is, however, my understanding that the evil sought to be avoided by the lending credit provisions of the Ohio Constitution is not the payment of funds to private entities in advance of the provision of services by those entities, but, rather, the payment of funds to private entities where no services are to be rendered in return, or where the governmental body seeks to enter into a joint venture with the private entity. See, e.g., State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 197 N.E.2d 328 (1964) (Ohio Const. art. VIII, §4, prohibits giving or loaning the credit of the state, as borrowing power or a loan of money, to private borrowers who are giving nothing in return except promises to repay the money); State ex rel. Leach v. Price, 168 Ohio St. 499, 156 N.E.2d 316 (1959); Markley v. Village of Mineral City, 58 Ohio St. 430 (1898) (municipal corporation is without capacity to purchase land for the purpose of donating it to a private person as an inducement to build and operate manufacturing plants); 1981 Op. Att'y Gen. No. 81-092 (a board of education does not violate Ohio Const. art. VIII, §4 by trading a commodity it possesses for something it needs).

The Ohio Supreme Court stated in Taylor v. Commissioners of Ross County, 23 Ohio St. 22, 77-78 (1872):

> Every step in the public service requires compensation. . . . Compensation for services is as necessary as compensation for property.
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> The constitution does not forbid the employment of corporations, or individuals, associate or otherwise, as agents to perform public services; nor does it prescribe the mode of their compensation. . . . (Emphasis added.)

Thus, where the money to be paid constitutes compensation for services, the lending credit provisions do not operate to specify how the money is to be paid. See generally Perkins v. Stockert, 45 Ohio App. 2d 211, 218, 343 N.E.2d 340, 345 (Montgomery County 1975) ("[t]he fact that private individuals may, and probably will, derive an income or profit is not significant in the determination of what constitutes a public purpose"); Rogers v. City of Cincinnati, 22 Ohio N.P. (n.s.) 401 (Super. Ct. of Cincinnati 1919) (postponement of payment of obligation of company to a city does not constitute a lending of the credit of the city to the company, where city shall in any event get a specified sum of money).

On two occasions, my immediate predecessor considered the question whether the act of advancing public funds would constitute a violation of lending credit provisions of the Ohio Constitution, and concluded that it would not. In 1973 Op. Att'y Gen. No. 73-018, he concluded that a state university did not violate the Constitution by advancing to an employee funds to cover travel expenses which the employee expected to incur in connection with his employment, provided that the

travel to be undertaken was reasonably incidental to the public purposes of the university. In 1973 Op. Att'y Gen. No. 73-038, he considered whether a state university could make initial payments of compensation to employees who served under annual employment contracts prior to the time that services were rendered under those contracts, and concluded that the university had authority to make such payments if it found the arrangement necessary to the proper operation of the university. I agree with my predecessor that the mere fact that compensation for services is paid in advance of the rendering of such services does not mean that the payment is violative of Ohio Const. art. VIII, §4 and §6. Thus, I find that the arrangement about which I have been asked is not prohibited by the lending credit provisions of the Ohio Constitution.

There may, however, be certain questions concerning the reasonableness and wisdom of the proposed plan.[8] See, e.g., Walker v. City of Cincinnati; Op. No. 73-038. It is true that the Department of Human Services has discretion to carry out its duties within the bounds of its statutory authority. See Jewett v. Valley Railway Co. The Department is, however, limited by the general rule that powers granted by statute encompass only such authority as is expressly or by necessary implication required to carry out the duties imposed by statute. See, e.g., State ex rel. Godfray v. McGinty, 66 Ohio St. 2d 113, 419 N.E.2d 1102 (1981) (per curiam); note 5, supra. Thus, the Department may implement a program providing for the advancement of funds to providers only if it finds that such a program is reasonably necessary to the efficient performance of the duties of the Department.[9] See generally 1981 Op. Att'y Gen. No. 81-033 at 2-128 ("[e]xpenditures which benefit only a [private party] and do not benefit the state would, clearly, be improper public expenditures. Where, however, a determination is made that the expenditure aids a department of the state in the performance of its duties, an expenditure of public funds. . .does serve a public purpose"). While a court will not substitute its judgment for that of an administrative body, determinations made by such a body will be subject to judicial review for abuse of discretion if a controversy should arise. See, e.g., Hocking Valley Railway Co. v. Public Utilities Commission, 92 Ohio St. 362, 110 N.E. 952 (1915).

There is, further, the practical question of what would happen if the services which had been paid for were not rendered at all, or were not rendered as had been agreed upon. See, e.g., R.C. 5101.463(B)(10). It is clear that the county department of human services would be entitled to the provision of services, reimbursement of funds, or damages for breach of contract. As one of my predecessors stated in 1945 Op. Att'y Gen. No. 646, p. 796 at 802: "It appears to be that if X [a contractor] had wholly failed to provide any [services] but had been paid for so doing, that would be an illegal payment which could be recovered [from the contractor]. . . . If, however, X has been negligent or inefficient in [the provision of services], whereby the village has suffered great loss or damage, that is a matter for the

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8 The Governor's "Statement of Reasons for Veto of Items in Amended Substitute House Bill 694" (Nov. 15, 1981) indicated, in Item 4, that the Department of Public Welfare drew federal funds monthly based on demonstrated need. I have no reason to believe that the payment of funds by county departments of human services in advance of provision of services would affect the total number of federal dollars that could be obtained by the state under the Title XX program, assuming that the funds are expended for purposes which are properly within the Title XX program. Cf. R.C. 5101.57 (concerning steps to be taken if the federal share of Title XX funds is reduced from the level indicated by submission of estimated expenditures by the state as a result of adverse quality control findings or final federal disallowance of federal financial participation). Consideration should, however, be given to difficulties which might ensue with respect to auditing or reporting requirements, and to requirements for repaying amounts which are found to have been improperly expended. See 42 U.S.C. §1397e; 45 C.F.R. §§96.50-.51.

9 Similarly, if there were no rules to the contrary promulgated by ODHS, a county department of human welfare could implement such a program if it were to find that the program was reasonably necessary to the efficient performance of its duties. See note 5, supra.

village to pursue if it sees fit, by an action for damages." See generally R.C. 117.10; Koch v. Rhodes, 177 Ohio St. 163, 203 N.E.2d 230 (1964); State ex rel. Smith v. Maharry, 97 Ohio St. 272, 119 N.E. 822 (1918). The county or the state could be required to repay any amounts which were found to have been improperly expended, or to suffer reductions in future allocations to cover such amounts. See 42 U.S.C. §1397e; 45 C.F.R. §§96.50-.51; R.C. 5101.161; R.C. 5101.462-.463; R.C. 5101.57; Op. No. 84-033. Assuming that the public officials involved made payments of funds pursuant to the reasonable and prudent exercise of their statutory duties, such officials would bear no personal liability, even if appropriate recovery could not be obtained from the provider. See, e.g., Thomas v. Wilton, 40 Ohio St. 516 (1884). If, however, the officials exceeded their statutory authority in making particular payments, they might be found to have expended funds illegally and to be subject to personal liability. See generally R.C. 117.10; State v. Herbert, 49 Ohio St. 2d 88, 358 N.E.2d 1090 (1976); Crane Township ex rel. Stalter v. Secoy, 103 Ohio St. 258, 132 N.E. 851 (1921); 1980 Op. Att'y Gen. No. 80-104; 1980 Op. Att'y Gen. No. 80-074; 1976 Op. Att'y Gen. No. 76-017. In light of these possible consequences, any proposal for advancement of public funds to providers should be examined carefully before it is implemented.

Based on the foregoing, it is my opinion, and you are hereby advised, that the Ohio Department of Human Services may implement a system under which county departments of human services advance to private entities, for the provision of social services described in Title XX of the Social Security Act (42 U.S.C. §§1397-1397f) and R.C. 5101.46 through 5101.464, funds derived from the federal and state governments under those provisions, provided that the Department determines that the implementation of such a system is reasonably necessary to the efficient performance of its duties.