



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS
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Jim Ryan
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FILE NO. 00-010

STATE MATTERS:
State Disbursement Unit for Child Support-
Recovery of Emergency Payments

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The Honorable Joseph M. Lyons
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House Child Support Enforcement Committee
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Gentlemen:

I have letters from Mr. Holland and two members of the House Child Support Enforcement Committee regarding certain "emergency payments" made to custodial parents who failed to receive their scheduled child support payments in a timely manner following the creation of the "State Disbursement Unit" pursuant to a contract between the Illinois Department of Public Aid and the office of the clerk of the circuit court of DuPage County. Specifically, the following questions have been raised: (1) did

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the Illinois Department of Public Aid have the authority to transfer funds to the State Disbursement Unit for the purpose of making such payments; and (2) are the funds which were transferred to the State Disbursement Unit subject to repayment? For the reasons hereinafter stated, it is my opinion that: (1) the Department of Public Aid possessed the authority to transfer the funds in question to the State Disbursement Unit; and (2) the Illinois Department of Public Aid is entitled to recover the funds made available to the State Disbursement Unit for emergency payments.

In discussing these questions, it is necessary to review the circumstances concerning the creation and operation of the State Disbursement Unit in some detail. In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. No. 104-193; 110 Stat. 2105), which, inter alia, amended the Social Security Act (42 U.S.C. §§ 601 et seq.) to require that each State establish and operate a single and separate organizational unit, referred to as the "State disbursement unit", for the collection and disbursement of payments under child support orders. (42 U.S.C. §§ 654, 654b.) While this requirement generally became effective on October 1, 1998, those States which, as of the date of the enactment of the

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amendment, were processing the receipt of child support payments through local courts (including Illinois) were permitted, at their option, to continue to process payments through the courts until October 1, 1999. (Pub. L. No. 104-193, Title III, Subtitle B, § 312(d), 110 Stat. 2209; 42 U.S.C. § 654b note.) Illinois elected to do so.

During this period, the Illinois Department of Public Aid began planning for compliance with the provisions of the Federal law. To that end, the Department's personnel engaged in a series of discussions with members of the Illinois Association of Circuit Court Clerks regarding, among other things, the implementation of the State Disbursement Unit. As a result of these discussions, the Illinois Association of Circuit Court Clerks endorsed the concept of having the State Disbursement Unit operated by one of the several circuit court clerks. Following presentations by all interested circuit court clerks, the Illinois Association of Circuit Court Clerks unanimously voted to endorse the selection of the DuPage County Circuit Clerk's office to serve as the State Disbursement Unit. On September 24, 1998, the Illinois Department of Public Aid sent a letter to Joel A. Kagann, DuPage County Circuit Court Clerk, setting forth the intent of the Illinois Department of Public Aid to enter into an

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agreement with Mr. Kagann "* * *" for the implementation of the State Disbursement Unit * * *". Subsequent to the execution of that letter of intent, the Illinois Department of Public Aid and the office of the clerk of the circuit court of DuPage County commenced negotiations concerning a "Development Contract", the agreement under which the DuPage County Circuit Court Clerk would operate the State Disbursement Unit. Under the original terms of the letter of intent, the Department of Public Aid and the DuPage County Circuit Court Clerk anticipated executing the Development Contract by November 1, 1998. The letter of intent agreement was later amended to require execution of the Development Contract by December 1, 1998. Ultimately, on February 26, 1999, the Department of Public Aid and the office of the clerk of the circuit court of DuPage County entered into a contract, officially entitled the "SDU AGREEMENT", pursuant to which the DuPage County Circuit Court Clerk agreed, inter alia, to develop, establish and maintain the State Disbursement Unit Computer System (SDU AGREEMENT §§ 2.1.1 and 2.1.2), that is, the "* * *" management information and data processing systems * * * used to operate the SDU [State Disbursement Unit] * * * for the purpose of receipt collection, processing and disbursement of child support payments in accordance with 42 U.S.C. § 654 * * *", to receive, identify

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and post child support payments from employers, individuals and interstate agencies and to disburse child support payments to identifiable payees within two business days of receipt. (SDU AGREEMENT §§ 1.4 and 6.2.7.1.) In return, the Department of Public Aid agreed, inter alia, to compensate the DuPage County Circuit Court Clerk for the services provided. (SDU AGREEMENT §§ 7.1 et seq.) The initial term of the SDU AGREEMENT extended from October 1, 1998, until June 30, 2000. (SDU AGREEMENT § 12.1.)

To date, the SDU AGREEMENT has been amended on several occasions. (See, e.g., "Amendment[s] to SDU AGREEMENT", dated August 24, 1999, October 26, 1999, and November 5, 1999, and "AMENDMENT #5 TO SDU AGREEMENT", dated February 16, 2000.) The first amendment addressed issues relating to the development of the State Disbursement Unit's computer system and does not have an impact upon the matter at hand. The other amendments to the SDU AGREEMENT were intended to address the initial cash flow problems associated with the operation of the State Disbursement Unit. The second amendment authorized the transfer of an additional \$2 million to the State Disbursement Unit which was, according to representatives of the Department of Public Aid, used to make emergency payments to custodial parents. Similarly, the third amendment to the SDU AGREEMENT provided another \$3

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million to the State Disbursement Unit which was, according to Department of Public Aid representatives, also used for emergency payments. The most recent amendment to the SDU AGREEMENT provided an additional \$3 million to the State Disbursement Unit to address cash flow issues resulting from the State Disbursement Unit making the foregoing emergency payments. These amendments will be addressed at some length below.

While the DuPage County Circuit Court Clerk's office was in the process of setting up the State Disbursement Unit, the Department of Public Aid sought the amendment of various provisions of the Illinois Public Aid Code (305 ILCS 5/1-1 et seq. (West 1998)) and other pertinent statutory provisions to reflect the Federal child support collection requirements. (See Public Act 91-212, effective July 20, 1999.) Of particular note in these circumstances are the provisions of new section 10-26 of the Illinois Public Aid Code (added by Public Act 91-212, effective July 20, 1999, to be codified at 305 ILCS 5/10-26), pursuant to which the Illinois Department of Public Aid is placed under a statutory mandate to establish a State disbursement unit in accordance with the requirements of Title IV-D of the Social Security Act (42 U.S.C. § 651 et seq.). Section 10-26 expressly authorizes the Department of Public Aid to enter into an agree-

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ment with a State or local governmental unit or a private entity to fulfill the federally-mandated functions of a centralized disbursement unit. Section 10-26 of the Public Aid Code, however, did not become effective until July 20, 1999. Thus, questions have arisen regarding whether the Illinois Department of Public Aid possessed the requisite authority to enter into the SDU AGREEMENT with the DuPage County Circuit Court Clerk on February 26, 1999. Because the resolution of these inquiries necessarily involves the provisions of the SDU AGREEMENT and the amendments thereto, it is appropriate, initially, to consider the authority of the Department of Public Aid to enter into the SDU AGREEMENT.

It is well established in Illinois that administrative agencies possess only those powers that are expressly granted to them by statute, together with those powers that may be necessarily implied therefrom to effectuate the powers which have been granted. (Lake County Board of Review v. Property Tax Appeal Board (1988), 119 Ill. 2d 419, 427; Illinois Bell Telephone Co. v. Illinois Commerce Comm'n (1990), 203 Ill. App. 3d 424, 438.) Nothing in the provisions of the Illinois Public Aid Code in effect on February 26, 1999 (see 305 ILCS 5/1-1 et seq. (West 1996)), the day the SDU AGREEMENT was executed, expressly autho-

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rized the creation of a State disbursement unit or expressly authorized the Department of Public Aid to contract with the DuPage County Circuit Court Clerk for the creation of such a unit. Therefore, the authority for the Department of Public Aid to enter into the SDU AGREEMENT must be found, if it existed at that time, under other statutory provisions.

At the time of the execution of the SDU AGREEMENT, section 3 of the Intergovernmental Cooperation Act (5 ILCS 220/3 (West 1997 Supp.)) provided:

"Intergovernmental agreements. Any power or powers, privileges or authority exercised or which may be exercised by a public agency of this State may be exercised and enjoyed jointly with any other public agency of this State and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States do not prohibit joint exercise or enjoyment. This includes, but is not limited to, (i) arrangements between the Illinois Student Assistance Commission and agencies in other states which issue professional licenses and (ii) agreements between the Illinois Department of Public Aid and public agencies for the establishment and enforcement of child support orders and for the exchange of information that may be necessary for the enforcement of those child support orders." (Emphasis added.)

As used in the Intergovernmental Cooperation Act (5 ILCS 220/1 et seq. (West 1996)), the phrase "public agency" refers to "* * *

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any unit of local government as defined in the Illinois Constitution of 1970, any school district, any public community college district, any public building commission, the State of Illinois, any agency of the State government or of the United States, or of any other State, any political subdivision of another State, and any combination of the above pursuant to an intergovernmental agreement which includes provisions for a governing body of the agency created by the agreement. * * *" (5 ILCS 220/2 (West 1996), as amended by Public Act 90-636, effective July 24, 1998.) The underscored language authorizing the Department of Public Aid to enter into agreements with other public agencies for the enforcement of child support orders, which is central to your question, was added by Public Act 89-006, which became effective on March 6, 1995.

Under the language of section 3 of the Intergovernmental Cooperation Act, the Department of Public Aid is expressly authorized to enter into agreements with other public agencies for the enforcement of child support orders. As noted above, the phrase "public agency" includes the State of Illinois and any agency of the State. The clerk of the circuit court is considered to be a non-judicial officer in the judicial branch of State government. (Drury v. County of McLean (1982), 89 Ill. 2d 417,

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422; Ill. Const. 1970, art. VI, sec. 18(b).) As such, the office of the clerk of the circuit court is a "public agency", as that phrase is used in the Intergovernmental Cooperation Act. Consequently, both the Department of Public Aid and the clerk of the circuit court of DuPage County were authorized to enter into agreements concerning child support enforcement pursuant to the provisions of the Intergovernmental Cooperation Act.

With regard to the SDU AGREEMENT, section 3 of the Act specifically contemplates agreements relating to "* * * the establishment and enforcement of child support orders * * *". The creation of a centralized office responsible for the collection and distribution of all child support payments and for maintaining the necessary documentation associated therewith would appear to be one phase of the child support order enforcement process. Consequently, it is my opinion that on February 26, 1999, the Department of Public Aid possessed the statutory authority necessary to enter into the SDU AGREEMENT with the clerk of the circuit court of DuPage County pursuant to the provisions of the Intergovernmental Cooperation Act.

The principal questions raised concern the funding and recovery of the "emergency payments" made by the State Disbursement Unit to custodial parents who failed to receive their

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scheduled child support payments in a timely manner. As noted above, effective October 1, 1999, all States were required by Federal law to begin processing child support payments through a centralized location. In accordance with the Federal requirements, on October 1, 1999, the State Disbursement Unit operated by the clerk of the circuit court of DuPage County assumed the responsibility for processing virtually all support payments in Illinois. Almost immediately, however, a backlog of payments was created because of operational problems at the State Disbursement Unit. As a result, by October 19, 1999, approximately 3,000 checks received from employers, non-custodial parents and other affected parties had been processed by the State Disbursement Unit but had not been delivered to custodial parents because the State Disbursement Unit had not received adequate information from employers and circuit clerks. For many families dependent upon those funds, the delay was critical. To address this problem, Governor Ryan stated that "'we're going to start * * * issuing emergency checks to people in trouble who need money as quickly as possible' * * * '[t]he Department of Public Aid has identified money in its budget that can be used to make these payments.' * * *" (See Press Release of Governor George H. Ryan of October 19, 1999 entitled "Ryan Takes Steps To Correct Child

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Support Payment Problems; State Will Issue Emergency Checks To Parents".) In anticipation of the requests for emergency payments, on October 21, 1999, the Department of Public Aid made the first in a series of transfers of moneys from the Child Support Enforcement Trust Fund to the State Disbursement Unit. To allow the State Disbursement Unit to distribute these additional funds, on October 26, 1999, the second amendment to the SDU AGREEMENT was executed. The second amendment provided, in pertinent part:

" * * *

1. * * * Operational Services Service Fees. The State shall compensate DuPage for its Operational Services beginning on October 1, 1999 for the maintenance and operation of the SDU ('Service Fees') in the amount of \$4,804,947.00, based on an estimated 4.6 million transactions annually under the Initial Term of this Agreement (as defined in Section 12.1 of this Agreement). *DuPage may also draw upon an additional \$2,000,000.00, subject to the prior approval of and repayment to the State (by offset or otherwise), as initial cash flow for the orderly operation of the SDU. The State shall make payments to DuPage pursuant to Sections 7.2.2.3 and 7.2.2.4.*

* * *

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(Italics added.)

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the maintenance and operation of the SDU ('Service Fees') in the amount of \$4,804,947.00, based on an estimated 4.6 million transactions annually under the Initial Term of this Agreement (as defined in Section 12.1 of this Agreement). The State shall make the foregoing payments to DuPage pursuant to Sections 7.2.2.3 and 7.2.2.4. *DuPage may also draw upon an additional \$8,000,000.00, subject to the prior approval of and repayment to the State (by offset or otherwise), as initial cash flow for the orderly operation of the SDU.*

* * *

"

(Italics added.)

As used in the SDU AGREEMENT, the term "DuPage" refers to the office of the clerk of the circuit court of DuPage County.

According to the Department of Public Aid, the additional moneys made available to the State Disbursement Unit to be used for emergency payments to custodial parents were paid out of the Child Support Enforcement Trust Fund, a special fund held outside the treasury which was created by section 12-10.2 of the Illinois Public Aid Code (305 ILCS 5/12-10.2 (West 1998), as amended by Public Act 91-212, effective July 20, 1999 and Public Act 91-400, effective July 30, 1999). It is derived, in part, from support payments assigned to the Department of Public Aid, Federal grant moneys, certain prescribed incentive payments and

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fees charged by the Department for child support enforcement purposes. Disbursements from the Fund are limited to specified purposes, such as making reimbursement of funds received in error, payment of administrative expenses incurred in performing Title IV-D activities and payment of any amounts which are reimbursable to the Federal government.

Although nothing in the language of section 12-10.2 of the Code expressly authorizes the distribution of moneys held in the Child Support Enforcement Trust Fund for the purpose of making emergency payments to custodial parents, it is permissible to expend them for "payment of any administrative expenses * * * including personal and contractual services, incurred in performing Title IV-D activities authorized by Article X of this Code * * *". It is my understanding that the services performed by the State Disbursement Unit are essentially encompassed within that description. Moreover, I note that the General Assembly has appropriated sufficient sums for contractual services payable from the Fund to cover the amounts paid out to the State Disbursement Unit pursuant to the amendments to the SDU AGREEMENT. (See Public Act 91-20, effective July 1, 1999, which appropriated \$75,785,300 from the Child Support Enforcement Trust Fund for contractual services related to child support enforcement.)

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Therefore, it is my opinion that the Department of Public Aid was authorized generally to transfer funds to the State Disbursement Unit for expenses relating to the contractual services performed by the State Distribution Unit.

Under the language of the amendments to the SDU AGREEMENT quoted above, the State of Illinois, acting through the Department of Public Aid, ultimately agreed to make available \$8 million for the orderly operation of the State Disbursement Unit, subject to repayment of those sums. It is well established under Illinois law that the terms of an agreement, if not ambiguous, should be enforced in accordance with their plain meaning, and that those terms will control the rights of the parties. (Dowd & Dowd, Ltd. v. Gleason (1998), 181 Ill. 2d 460.) Therefore, based upon the plain and unambiguous language of the amendments to the SDU AGREEMENT, it is my opinion that the Illinois Department of Public Aid is entitled to be repaid the amounts it made available to the State Disbursement Unit's use for the purpose of making emergency payments. (I note that the Management Audit filed by the Auditor General in March, 2000, indicates that the State Disbursement Unit issued emergency payments totaling \$10,556,243, but that \$881,857 of those emergency checks were not cashed or were returned or the monies repaid. Thus, at the time the

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Management Audit was filed, \$9,674,386 of emergency payments were outstanding. The Department of Public Aid provided \$8 million to the State Disbursement Unit pursuant to the contractual amendments described above. The State Disbursement Unit also borrowed \$500,000 "*" * * from the money that had been paid by employers but not distributed by the SDU [State Disbursement Unit]. * * *"
(See Auditor General Management Audit, Department of Public Aid's Child Support State Disbursement Unit 62 (March 2000).) The remaining payments apparently were made from other funds in the custody of the State Disbursement Unit.)

With respect to the issue of whether the amounts of emergency payments received may be recouped from the recipients thereof, it is helpful to summarize the process that custodial parents followed in obtaining emergency checks. As noted above, on October 19, 1999, Governor Ryan announced through a press release that emergency payments would be made available to custodial parents who had not received their regular child support payments. As the press release indicated, requests for emergency payments were made simply by calling the child support hotline number operated by the Department of Public Aid's Division of Child Support Enforcement. Hotline operators requested certain minimal identifying information from the custodial

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parents and then told the custodial parents that the information would be verified through a search of the State Disbursement Unit's computer system. Thereafter, the State Disbursement Unit would issue and mail a check within 48 hours of the initial telephone call. Custodial parents were instructed to call back if no check was received within five days. On October 23, 1999, the State Disbursement Unit began requiring hotline operators to obtain case docket numbers so that emergency payments could be linked to specific cases for recoupment purposes. Eventually, the information required of custodial parents prior to the issuance of an emergency check was expanded to include other data necessary for the State Disbursement Unit to process child support checks generally. Although beginning October 27, 1999, hotline operators were instructed to inform callers who indicated that they had received both their regular checks and emergency checks and wanted to return the overpayment that they could do so by returning the overpayment to the State Disbursement Unit, it does not appear that custodial parents calling the child support hotline were specifically informed by the hotline's operators of their potential obligation to repay any moneys provided, nor were the custodial parents required to sign any documentation indicating they were entitled to the requested moneys or agreeing to an

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offset of the emergency payments against future child support payments. On November 10, 1999, however, the State Disbursement Unit began enclosing a notice with each emergency check mailed out. Subsequently, a notice was mailed to all persons who had received an emergency check stating:

"* * * Due to the implementation of the new federally MANDATED State Disbursement Unit (SDU) for child support payments, there have been delays in disbursing income withholding payments received from employers due, in large part, to incomplete or incorrect information supplied to the SDU.

In order for Custodial Parents to receive income withholding child support payments on a timely basis, the SDU began issuing emergency advance payments to parents who called the Child Support Hotline. [toll free 1-877-225-7077]

The SDU records indicate that you have received an emergency advance payment(s). That payment(s) was most likely generated after you called the Child Support Hotline. You may have also received a regular child support check(s) in October and/or November. Your account will reflect all checks disbursed to you. Therefore, your account may reflect one or more additional payments and your account may have to be adjusted accordingly.

We will notify you in advance of adjustment and the process for recovery, if this applies to your case. * * *" (Emphasis in original.)

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On January 11, 2000, the Legislative Audit Commission adopted Resolution No. 117, which directed the Auditor General to conduct a management audit of the State Disbursement Unit regarding, among other things, the issuance of emergency payments. During the course of performing this audit, it was determined that from October 19, 1999, through January 5, 2000, the State Disbursement Unit issued 35,559 emergency checks, totaling \$10,556,243. Emergency checks were issued to custodial parents in each of Illinois' 102 counties. As of March, 2000, the audit report indicates that \$9,674,386 of the emergency payments have not been repaid. Given the publicity surrounding the problems experienced by the State Disbursement Unit in distributing payments to custodial parents, there can be little doubt that the recipients recognized that the emergency payments were temporary in nature and would be recovered at some point in the future. Indeed, to permit the recipients to retain the emergency payments, in addition to the child support payments ultimately received, would constitute unjust enrichment. Therefore, it is clear that the emergency payments may be recovered from the recipients thereof.

We have also been requested to comment upon the methods which may be employed to recoup moneys paid out as emergency

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payments from the affected custodial parents. It has long been the practice of this office to consult with State officers or agencies to whom a debt is owed to develop a mutually agreeable approach for collecting any moneys due as may be appropriate to the specific case. Therefore, representatives of this office will meet with the representatives of the Department of Public Aid and the State Disbursement Unit to devise a feasible collection plan.

It has been suggested that the most effective method for recouping the payments would involve offsetting the amount of a particular custodial parent's emergency payments against his or her future child support disbursements. The United States Department of Health and Human Services, however, in action transmittal 97-13, dated September 15, 1997 (see Question and Answer No. 13), has taken the position generally that Federal law does not permit States to offset overpayments from the custodial parent's next monthly support check unless the custodial parent agrees to allow the State to do so. The apparent basis for this interpretation is that a State is required to distribute all moneys it collects in accordance with the requirements of section 457 of the Social Security Act and the rules promulgated thereunder. (42 U.S.C. § 657; 45 C.F.R. §§ 302.32, 302.50-54 (1999).)

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In this regard, section 457 of the Social Security Act provides, in pertinent part:

"(a) In general

Subject to subsections (e) and (f) of this section, an amount collected on behalf of a family as support by a State pursuant to a plan approved under this part shall be distributed as follows:

(1) Families receiving assistance

In the case of a family receiving assistance from the State, the State shall-

(A) pay to the Federal Government the Federal share of the amount so collected; and

(B) retain, or distribute to the family, the State share of the amount so collected.

In no event shall the total of the amounts paid to the Federal Government and retained by the State exceed the total of the amounts that have been paid to the family as assistance by the State.

* * *

(3) Families that never received assistance

In the case of any other family, the State shall distribute the amount so collected to the family.

* * *

(Emphasis added.)

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As used in subsection 457(a) of the Social Security Act, the phrase "assistance from the State" refers to temporary assistance for needy families programs or approved foster care maintenance payments. (42 U.S.C. § 657(c)(1).)

Nothing in the language of section 457 of the Social Security Act or in the rules promulgated thereunder (see 45 C.F.R. §§ 301.0-307.40 (1999)) expressly addresses the issue of whether emergency payments may be offset from future child support distributions. Section 457 of the Act does provide, however, that "an amount collected on behalf of a family as support by a State * * * shall be distributed * * *" in accordance with the provisions of section 457, and with respect to families that have never received assistance from the State, "* * * the State shall distribute the amount so collected to the family". It is well established that the term "shall" generally indicates a mandatory obligation. (See Pierce v. Underwood (1988), 487 U.S. 552, 569-70, 108 S. Ct. 2541, 2552; Alyeska Pipeline Service Co. v. Wilderness Society (1975), 421 U.S. 240, 257, 95 S. Ct. 1612, 1621.) As noted above, the Department of Health and Human Services has interpreted subsection 457(a)(3) as requiring the distribution to a family of "the amount so collected", not the amount so collected less any offset of

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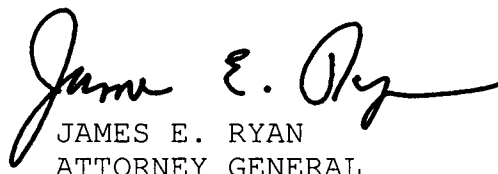
overpayments. It is well recognized that the construction of a statute by the agency charged with its administration is entitled to deference. (People v. Interstate Commerce Comm'n (7th Cir. 1982), 687 F.2d 1047, 1056.) Moreover, absent a showing that an agency's interpretation of a statute is unreasonable, the agency's interpretation should be followed. (National Credit Union Administration v. First National Bank & Trust (1998), 522 U.S. 479, 499, 118 S. Ct. 927, 938; Sharondale Corp. v. Milford Ross (6th Cir. 1994), 42 F.3d 993, 998.) The Department of Health and Human Services' construction of the provisions of section 457 of the Act to prohibit offsets against child support moneys without the consent of the custodial parent does not appear to be patently unreasonable, although its application in these circumstances may well be inequitable.

If the Department of Health and Human Services' interpretation of the provisions of section 457 of the Social Security Act is applicable in these circumstances, then neither the Department of Public Aid nor the State Disbursement Unit will be allowed to recoup the amount of an emergency payment by offsetting the amount against future child support collections unless the custodial parent consents to the offset or unless the Federal agency's interpretation of section 457 is challenged. Action

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transmittal 97-13, however, only addresses the issue of whether States may offset overpayments from a custodial parent's next monthly support check generally. Action transmittal 97-13 does not contemplate the particular circumstances which have been presented in Illinois. Thus, as of this date, I am requesting from the Department of Health and Human Services a policy interpretation addressing these circumstances, to determine whether, given the extenuating circumstances present in Illinois, the State Disbursement Unit may be permitted to offset the amount of the emergency payments received by a particular custodial parent against his or her future child support disbursements absent the custodial parent's consent thereto. I will provide a copy of the Department's response to my request to each of you when issued.

Sincerely,


JAMES E. RYAN
ATTORNEY GENERAL