United States Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
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27 FEB 1981

cc: Simms
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MEMORANDUM FOR
MICHAEL HOROWITZ
CONSULTANT, OMB

Re: Use of funds under Home Energy Assistance Act of 1980 for payments to public housing authorities.

This responds to your request for our advice, on an urgent basis, concerning the Home Energy Assistance Act of 1980, 94 Stat. 288, to be codified at 42 U.S.C. § 8601 et seq. You wish to know whether States can be required by the Department of Health and Human Services to dispense funds received from the federal government under that Act to public housing projects to reduce fuel costs. This has become an issue because no more funds are available from the Department of Housing and Urban Development for this purpose. In this connection, we have been furnished with an opinion of May 22, 1980 from Joan Z. Bernstein, then General Counsel of the Department of Health and Human Services, to the Secretary of that Department.

The Act provides that each State desiring to receive a home energy grant shall submit a state plan to the Secretary. § 308, 42 U.S.C. 8607. Among other things, the state plan shall provide for a State program for furnishing home energy assistance to eligible households, home energy suppliers, and "(B) building operators, in housing projects" established under specified legislation. Read literally, the language of the Act appears to impose a requirement that public housing projects be funded in state plans. The General Counsel's May 22 opinion reached the same conclusion. This construction was also reflected in the published analysis of the Department's regulations which, under the heading "Payments to Building Operators," states: "The Act specifies that building operators of public and subsidized housing must receive energy assistance payments on behalf of eligible tenants in the building . . . ." 45 Fed. Reg. 36818 (May 30, 1980).

The analysis of the regulations explains that States are "not required to make payments to all housing projects and building operators." However, distinctions must be based upon objective

criteria, including the extent to which the operator's costs are uncompensated by subsidy programs and the benefits such payments will have for the tenants." Ibid. This interpretation was based on the May 22 memorandum by the General Counsel that this position had "sufficient legal support," even though the Act was silent on the subject. According to the General Counsel, it was consistent with the purpose of the Act to prevent windfalls to operators already compensated for fuel costs. That memorandum also concludes that there was authority to impose a "maintenance-of-effort requirement." Thus, under the regulations, States could not use this program as a means of reducing their support for other programs unless the programs were "solely to pay for home energy." Analysis at 45 Fed. Reg. 36812; 45 C.F.R § 260.56, Maintenance of regular benefit levels, at 45 Fed. Reg. 36826.

We believe that the various exceptions that were imposed as a matter of administrative discretion by the Secretary should not be permitted to defeat one of the clear purposes of the Act--to aid public housing projects. To the extent that the exceptions in the regulations have defeated the purpose of the Act, the Secretary may issue new regulations to prevent this from occurring. Section 313(a)(2), 42 U.S.C.§8612. The Act does not impose any special requirements for the issuance of regulations. */

The general requirements of the Administrative Procedure Act permit notice of proposed rulemaking to be dispensed with "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b). We believe that under the present circumstances the Secretary may make such a finding. You are, of course, familiar with the requirements of the President's Memorandum of January 29, 1981 on Postponement of Pending Regulations and Executive Order No. 12291 of Feb. 17, 1981, entitled Federal Regulation.

Larry L. Simms
Acting Assistant Attorney General
Office of Legal Counsel

*/ The Secretary may delegate functions under the Act. We do not know if any such delegation exists. The original regulations were signed by the Social Security Commissioner and the Secretary.