

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

For the Years
1967 through 1972

Commissioner to grant permits to dredge in "great ponds." Paragraph C of the same section broadens the definition of the term "great pond" beyond the Colonial Ordinance definition to include a body of water "artificially formed or increased from natural size which has a surface area in excess of 30 acres at all times, the shore of which is owned by 2 or more persons, firms or corporations."

It is undisputed that Pond P is a "great pond" as defined by paragraph C. The question presented is whether the bog is part of the pond for purposes of the Forest Commissioner's jurisdiction. The State's title to the bed of a natural great pond begins at the natural low-water mark. *Fernald v. Knox Woolen Co.*, 82 Me. 48 (1889). We consider it reasonable to assume that the Legislature, in enacting section 514, intended the regulatory authority of the Forest Commissioner to commence at the artificial mean low-water mark of artificially increased great ponds.

Accordingly, we are of the opinion that on the facts presented the Forest Commissioner may grant a permit to dredge in such portion of the bog as lies below artificial mean low-water mark of Pond P. The portion of the bog above artificial mean low-water mark is not within the sphere of the Commissioner's jurisdiction.

ROBERT G. FULLER, JR.
Assistant Attorney General

June 1, 1971
Education

Carroll R. McGary, Commissioner

Providing Educational Opportunities for Physically Handicapped or Exceptional Children "within practical limits".

We acknowledge receipt of your inter-departmental memorandum dated April 29, 1971.

SYLLABUS:

The phrase, "within practical limits", as used in the statutes respecting educational opportunities for physically handicapped or exceptional children, means the providing of reasonable or feasible special education by administrative units, as determined by the State Board of Education.

FACTS:

Legislation was presented at the present session of the Legislature intending to require public school education for physically handicapped or exceptional children. (L.D. No. 896: AN ACT to Require Public School Education of Handicapped Children). The reference legislation has been withdrawn.

You request legal advice defining the extent of your authority under present statutes respecting educational opportunities for physically handicapped or exceptional children. Your memo quotes statutory language appearing in 20 M.R.S.A. §3111 and §3116 specifically involving such special education as well as language in 20 M.R.S.A. §101, 1 and 7 reciting certain of the general duties of the Commissioner of Education.

QUESTIONS:

1. What is the meaning of “within practical limits”, recited in 20 M.R.S.A. § 3111?
2. Does the Commissioner of Education determine what are “practical limits”?
3. Can the Commissioner of Education absolutely require programs for special education for physically handicapped or exceptional children?

ANSWERS:

1. See REASON below.
2. No, the State Board of Education.
3. No.

REASON:

1. Research discloses no decisional law specifically defining the phrase “within practical limits”. However, the heart of the clause is in the word “practical”, and that term has been judicially defined as meaning that which is possible of reasonable performance. *Woody v. South Carolina Power Co.*, 202 S.C. 73, 24 S.E.2d 121. In *Joynes v. Pennsylvania R.R. Co.*, 234 Pa. 321, 83 Atl. 318, the word “practical” was defined as meaning feasible. The sentence containing the clause “within practical limits” reads as follows:

“It is declared to be the policy of the State to provide, within practical limits, equal educational opportunities for all children in Maine able to benefit from an instructional program approved by the state board. * * *” 20 M.R.S.A. § 3111.

The quoted sentence, as a statement of policy, should be interpreted to mean that the State of Maine intends to provide equal educational opportunities for all children in the State who are able to profit from instruction approved by the State Board of Education, provided the instructional program is feasible or reasonable as to its existence. Actually, definition of the phrase, “within practical limits”, may be aided by reading the language of § 3117. The last noted section recites, inter alia, that: “In administrative units where there are *too few* handicapped or exceptional children to make the organization of a special class feasible, such children may be entered in a special class in another administrative unit”. (Emphasis supplied.) Note the presence of the word “feasible”. The words, “within practical limits”, should be defined according to each individual set of circumstances. Whereas in one case, the facts may require an administrative unit to provide educational facilities and instructional program for physically handicapped or exceptional children, because the same is reasonable or feasible (“within practical limits”), an opposite result may well exist on a different set of facts. In 1964, this office was asked to express its opinion on the question whether an administrative unit was liable for payment to a receiving private school, located outside the administrative unit, for the local per capita cost of educating a number of physically handicapped and exceptional children residing in the administrative unit. We answered the question in the affirmative. (1963-64 Report of the Attorney General, p. 129, February 5, 1964.) That opinion states that administrative units are responsible for appropriating sufficient funds for the education of physically handicapped or exceptional children to the extent that instructional programs exist either in the administrative unit or in a public or private school of an adjacent administrative unit. Liability for tuition payments attached to the situation described in the opinion because the given facts fit the legislative declaration of “feasibility”: and was, “within practical limits,” capable of realization.

2. After reading applicable provisions of the Maine statutes relating to specialized public education, we conclude that the State Board of Education is the body authorized to administratively determine whether a particular set of facts are, "within practical limits", such that an administrative unit is obligated to provide educational programs of the nature involved here. The second paragraph of §3111 authorizes each administrative unit to operate a program for trainable children as approved by the State Board of Education, under rules and regulations which the Board may prescribe. Section 3115 specifies that appropriated funds are to be paid administrative units or institutions according to regulations formulated by the State Board of Education "to permit adequate instruction and to prevent unnecessary use of state funds." The balance of the language of §3115 confines the use of appropriated funds to specified purposes as well as "for any other purposes approved by the state board as being necessary to carry out the purpose of this chapter". True, §3113 gives general supervision of the education of all children of school age in the State, including physically handicapped or exceptional children, to the Commissioner of Education; but we distinguish here between the exercise of general administrative supervision exercised by the Commission of Education, and the separate, independent authority of the State Board of Education when requiring an administrative unit to appropriate sufficient funds to provide for particular special instructional programs for physically handicapped or exceptional children. The decision that a given set of facts does or does not, "within practical limits", give rise to an obligation is of primary concern to the State Board of Education, whereas supervision of existing or ordered instructional programs is the function of the Commissioner.

3. Since the Commissioner of Education lacks authority to order performance by an administrative unit until the Board finds the facts are capable of performance "within practical limits", the Commissioner cannot absolutely require programs of special education for physically handicapped or exceptional children by administrative units absent such finding by the Board.

JOHN W. BENOIT, JR.
Deputy Attorney General

June 4, 1971
Maine State Police

Captain Emery H. McIntyre

Interpretation of Title 17 M.R.S.A. § 303

SYLLABUS:

Fair Associations must be in existence for two years before they can hold a license issued under 17 M.R.S.A. §303.

FACTS:

A fair association which has been in existence for less than one year has applied for a Beano license under the provisions of 17 M.R.S.A. § 301, et. seq.

QUESTION:

May the Chief of the State Police issue a license to the fair association under the terms