

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

For the Years
1967 through 1972

be different.

We further wish to make it absolutely clear that we do not, by this opinion, intend to sanction any activities on the part of the Deputy State Treasurer which directly or indirectly detract from the full and proper performance of his present duties. If, for example, the additional burdens of the new position, in terms of time or energy, directly or indirectly were to result in decreased efficiency below acceptable standards, or otherwise materially affect the proper performance of his present duties, we would conclude that the second position interfered with the first, and should not be undertaken or should immediately be discontinued.

MARTIN L. WILK
Assistant Attorney General

September 15, 1972

Dean Fisher, M.D. Commissioner,

Educational Responsibility of the State for Financing Maintenance and Tutoring of
Blind Children

SYLLABUS:

a) Neither the State nor local government is required to pay maintenance of blind children attending private boarding schools.

b) Whether the administrative unit is required to pay for tutorial services at public schools and/or resource setting depends upon the purpose for which the services are offered.

FACTS:

For the past ten years the Division of Eye Care, which obtains federal funds for its vocational rehabilitation program under the authority of the Federal Vocational Rehabilitation Act, has been paying maintenance charges on those children enrolled in grades seven through twelve at Perkins School for the Blind with Federal Vocational Rehabilitation funds (80% federal, 20% state). The tuition charges were paid with 100% state funds. The Division of Eye Care has also been paying private tutoring charges for children in this same age group with vocational rehabilitation funds in a public school and/or resource setting. The rationale behind this practice was that tuition charges were the responsibility of the state and maintenance and tutoring charges were not clearly defined as such under 22 M.R.S.A. 3502 (supp.). The Federal Regional Office has recently questioned this practice.

QUESTION:

a. Is the Maine State and/or local government required to pay for maintenance of blind students at private schools?

b. Is the Maine State and/or local government required to pay for tutorial services for its blind students at public schools?

ANSWER:

a. No.

b. Whether the Maine State and/or local government is required to pay for tutorial services at public schools or resource settings depends upon the purpose for which the tutoring is offered.

REASONS:

(a) It is generally recognized that the State educational system is responsible for providing education through the high school level. This responsibility embraces general education, 20 M.R.S.A. 851-856 and 20 M.R.S.A. 1281-2195; vocational education, 20 M.R.S.A. 2351; and special education, 20 M.R.S.A. 3111-3116. Legislation has also been enacted specifically referring to education of blind children, 22 M.R.S.A. 3502 (Supp.). In order to determine whether the State and local governments are financially responsible for supporting blind children at private schools and for tutoring of blind children at public schools it is necessary to review these provisions.

The purpose of the legislation specifically governing the education of blind children 22 M.R.S.A. 3502 (Supp.) is limited. It authorized the Department of Health and Welfare to send a blind child to any school qualified to provide suitable education for the blind child. All of the powers conferred by this enabling legislation are discretionary.

The statutory provisions of 22 M.R.S.A. 3502 (Supp.) are as follows:

Upon request, and with the approval of the parents or guardians, the Department may send such blind children as it may deem fit subjects for any length of time in the discretion of the Department but not beyond the time when said child has reached its 21st birthday, to any school considered by the Department to be qualified to provide suitable education for the blind child. In the exercise of the discretionary power conferred by this section, no distinction shall be made on account of the wealth or poverty of the parents or guardians of such children. The sums necessary for the support and instruction of such pupils in such school, including all traveling expenses of such pupils may be paid by the State. Nothing herein contained shall be held to prevent the Department of Health and Welfare from securing whole or partial payment of such sums from the parents or guardians of such pupils or from local school systems. Nothing herein contained shall be held to prevent the voluntary payment of the whole or any part of such sums by the parents or guardians of such pupils," 22 M.R.S.A. 3502 (Supp.).

To interpret this statute as conferring a discretionary power upon the Department is consistent with the general rule that the word "may" in a statute is permissive and not mandatory. In *Collins v. State, Me.*, 263 A.2d 835 (1965) the rule is stated as follows:

In general, the word "may", used in statutes, will be given ordinary meaning, unless it would manifestly defeat the object of the Statute, and when used in a statute is permissive, discretionary, and not mandatory. *Roy v. Bladen School District No. R-31 of Webster County*, 165 Neb. 170, 84 N.W. 2d 119, 124 (1957).

See also *Dumont v. Speers, Mr.*, 245 A.2d 151 (1968).

The legislature made manifest its intent that the State's financial responsibility for support, instruction, and travel is to be discretionary by amending 22 M.R.S.A. 3502 (Supp.) as part of "An Act to Appropriate Money for the Expenditures of State Government" 1971, c 91 (P. & S.L.), Section E, effective July 1, 1971. This amendment consisted of substituting the word "may" for "shall" in the third sentence of 22 M.R.S.A. 3502 (Supp.). The fact that the legislature deliberately changed the word

“shall” to “may” is very significant, and clearly negates the existence of a legislative intent that the State is compelled by this statute to pay for support. See *State v. Yelle*, 52 Wash. 158, 324 P.2d 247, 249 (1958).

Another amendment to 22 M.R.S.A. 3502 (Supp.) added the fourth sentence. This sentence authorizes the Department of Health and Welfare to secure payment for support from the parents or the local school systems. In interpreting this provision it seems clear that the language “Nothing . . . shall be held to prevent . . .” is intended as a rule of construction. It requires that the chapter be construed to authorize the Department to secure payment from the parents or administrative units at its discretion. The sentence does not require that the Department secure such payment nor does it require that the parents or the administrative unit pay for such services. If the legislature had intended to impose the obligation for payment of board and maintenance of handicapped children upon either the administrative unit or the parents, the statute would expressly state that such an obligation exists. In the absence of an express provision in 22 M.R.S.A. 3502, any financial responsibility placed upon the State or administrative unit must be found under the general education and special education provisions of the statutes. The applicable sections are discussed below.

In reviewing the provisions relating to board there is a general section which authorizes the administrative unit to raise sums for board at secondary schools.

Any administrative unit may in addition to the sums raised for the support of high and public schools, raise and appropriate a sum for the payment of conveyance or board of pupils attending secondary schools, said sum to be expended under the direction of the superintending school committee . . . 20 M.R.S.A. 1285 (Supp.)

The powers conferred by this section are permissive and not obligatory. The legislature has indicated by utilizing the word “may” that the determination of whether to raise and appropriate funds is discretionary. See *Collins v. State (Supra)*. Also, any determination of how to spend the amount raised and appropriated is left to the discretion of the superintending school committee. The committee is not obligated to pay board of pupils attending secondary schools. If the Legislature had intended to impose the obligation for payment of board and maintenance of handicapped children upon either the State or administrative unit, a specific provision would have been enacted. Legislation has been enacted requiring the administrative unit to pay board for pupils in specific situations and authorizing the State to reimburse the unit. See sections 20 M.R.S.A. 1291 (Supp.), 20 M.R.S.A. 1292 (Supp.), 20 M.R.S.A. 862, 20 M.R.S.A. 1453, 20 M.R.S.A. 1454 and 20 M.R.S.A. 3731-3732 (Supp.). However, none of these sections require the administrative unit or the State to pay for board or maintenance of handicapped children. Because the obligation to pay board has been imposed in specific instances, the absence of a provision specifically requiring the unit to pay board for handicapped children implies that the legislature did not intend that the unit be required to pay.

(b) The second issue involves determining whether tutorial services provided in a public school or resource setting are the State’s and/or the administrative units’ educational responsibility.

For the reasons previously discussed with reference to maintenance, 22 M.R.S.A. 3502 (Supp.) does not require that the State or the administrative unit pay for tutoring. The sections devoted to the general powers and duties of the administrative unit, 20 M.R.S.A. 851-862 and 20 M.R.S.A. 1281-1295, do not specifically refer to tutorial services. However, the provisions in 20 M.R.S.A. 3111-3118 make the administrative unit financially responsible for tutoring of handicapped children. The primary purpose for which the tutoring is offered determines whether or not the State or local

government is financially responsible.

“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. The purpose of this chapter is to provide educational facilities, services and equipment for all handicapped or exceptional children below 20 years of age who cannot be adequately *taught with safety and benefit in the regular public school classes of normal children or who can attend regular classes beneficially if special services are provided*” . . . (emphasis added) 20 M.R.S.A. 3111 (Supp.).

“Special services” shall be transportation; *tutoring*; corrective teaching . . . ; and provision of special seats, books and teaching supplies and equipment required for the instruction of handicapped or exceptional children. 20 M.R.S.A. 3112 (2). (emphasis added)

Every administrative unit is responsible for appropriating sufficient funds to provide for the education of handicapped or exceptional children. This appropriation is to be expended for programs of special education at either the elementary or secondary level under the supervision of the superintending school committee or school directors or for programs approved by the commissioner . . . 20 M.R.S.A. 3116 (Supp.) (emphasis added)

The state is authorized to reimburse the administrative unit 20 M.R.S.A. 3731 and 3732.

It is clear that these sections make the administrative unit responsible for appropriating and expending funds for the education of handicapped children who cannot be taught with safety and benefit in the regular public school classes of normal children or who can attend regular classes beneficially if tutoring and other special services are provided. These sections do not authorize the administrative unit to appropriate and expend funds for tutorial services in public schools or resource settings if the purpose of the tutoring is for the vocational rehabilitation of handicapped children. As a corollary the State vocational rehabilitation agency is not precluded from financing services such as educational or training resources with vocational rehabilitation funds if their primary purpose is to assist in the rehabilitation of the disabled and is not that of some other function of State or local government. (See letter dated October 1, 1963 from Joseph Hunt, Assistant Commissioner, Department of Health, Education and Welfare, Boston Regional Office, to Mr. H. Kennebt McCollam, Director, Board of Education and Services for the Blind, Hartford, Connecticut).

Determining whether the purpose is part of the education program or part of the vocational rehabilitation program is frequently difficult. However, this determination is necessary in order to decide whether the administrative unit is financially responsible for tutoring. The following example was provided in the letter from Joseph Hunt, *supra*.

For instance, adjustment centers for the blind may include in their programs of services some which partake of the nature of special education such as instruction in braille. In such an instance, braille instruction at an adjustment center is part of the cluster of rehabilitation services which together with the others is specifically designed to be part of the totality of services needed in the rehabilitation of the blind. On the other hand, braille instruction which is part of the high school curriculum would be considered part educational system and not subject to Federal financial participation from vocational rehabilitation funds, except in unusual circumstances such as that of an adult newly blinded individual who is not already enrolled in high school and would not receive instruction under educational auspices except as a rehabilitation client.