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STATE OF MAINE

Inter-Departmental Memorandum Date September 28, 1976

To John Wakefield, Acting Commissioner

Dept. Mental Health and Corrections

From Joseph E. Brennan, Attorney General

Dept. Attorney General

Subject _____

FACTS:

This office has received a request from the Commissioner of Mental Health and Corrections for advice in addition to that issued on September 10, 1976, relative to issues arising from the proposed closing of the Bangor Mental Health Institute. The additional questions deal entirely with permitted use of, and vehicle for effecting the use of, funds appropriated to the Bangor Mental Health Institute and not required for the purposes of the appropriation. The questions relate to funding the following purposes as stated in the opinion request; "efforts to more appropriately serve our mentally ill patients, ... developing and increasing community mental health programs as well as better utilizing our institutional resources to serve those patients and decrease program at Bangor Mental Health Institute."

QUESTIONS:

[The form of the questions posed in the opinion request is altered to permit ease of disposition: the substance of each question is the same as posed in the opinion request.]

May the Department transfer funds appropriated to the Bangor Mental Health Institute so as to cause such funds to be used:

1. By community mental health centers and private hospitals for the purpose of capital construction; i.e., renovations of existing facilities, or for the leasing of facilities?
2. To fund contracts between the Department of Mental Health and Corrections and nonstock corporate providers of mental health services?
3. For inpatient care provided by nonstock corporate providers of mental health services?
4. By nonstock corporate providers of mental health services for the improvement of care to discharged patients and patients on convalescent status?
5. For continuation of joint venture with The Counseling Center of Bangor for acute inpatient treatment at Bangor Mental Health Institute or for contracting those services elsewhere?
6. For a "project director" for phasing down Bangor Mental Health Institute and, alternatively, whether funds from the contingency account can be used for the same purpose?

ANSWERS:

[N.B. Funds appropriated to the Bangor Mental Health Institute required to maintain the capacity of the Bangor Mental Health Institute to receive and treat persons admitted under the emergency provisions of 34 M.R.S.A. § 2333 may not be transferred for other uses without legislative action; see Opinion of Joseph E. Brennan, Attorney General, to Commissioner John Rosser re: Bangor Mental Health Institute, dated September 10, 1976.]

1. Funds of the Bangor Mental Health Institute may not be used for capital construction, including renovations, by nonstock corporate mental health services providers. However, funds appropriated to the Bangor Mental Health Institute (not subject to the bracketed proviso above) may be transferred to the Bureau of Mental Health by the Governor and Council, when such funds are not required for the purposes of the appropriation and when recommended by the Department head and State Budget Officer, under 5 M.R.S.A. § 1585 and then may be granted by the Bureau to such nonstock mental health services providers and used to defray rental costs under leases.

2 and 3. Funds appropriated to the Bangor Mental Health Institute may be used by the Department of Mental Health and Corrections to underwrite contractual arrangements for the provision of inpatient care pursuant to 34 M.R.S.A. § 2.

4. Funds appropriated to the Bangor Mental Health Institute (not subject to the bracketed proviso above) may be transferred to the Bureau of Mental Health by the Governor and Council, when such funds are not required for the purposes of the appropriation and when recommended by the Department head and State Budget Officer, under 5 M.R.S.A. § 1585 and then may be granted by the Bureau to community mental health services under 34 M.R.S.A. § 2052 for the improvement of programs for discharges from the Bangor Mental Health Institute and persons on convalescent status therefrom.

5. Under 34 M.R.S.A. § 2518 the joint venture between Bangor Counseling Center and the Bangor Mental Health Institute for the provision of treatment to acutely ill patients of the Bangor Mental Health Institute may continue or similar services may be procured under contract from other providers, or such acutely ill patients of the Bangor Mental Health Institute may be transferred under 34 M.R.S.A. § 2373 and hospitalization services to such persons may be paid for with Bangor Mental Health Institute funds under contracts entered into pursuant to 34 M.R.S.A. § 2.

6. A project director for any activities of the Bangor Mental Health Institute program may be paid from funds appropriated to the Bangor Mental Health Institute. The nature of the functions of such person will determine whether such funds would be paid to the project director as salary to a state employee hired under the Personnel system or as a fee for services under a contract for special services as an independent contractor.

[N.B. We take the phrase, "phasing down," to mean--insofar as it connotes present action--the reduction of operations at the Bangor Mental Health Institute as is permitted under present law prior to legislative action. (See Opinion of Attorney General Joseph Brennan to Commissioner Rosser dated September 10, 1976; Opinion of Attorney General Joseph Brennan to House Speaker John Martin dated September 20, 1976 and the instant opinion)]

REASONS:

We reiterate the caveat of the September 10, 1976, opinion on the same subject that funds appropriated to the Bangor Mental Health Institute and necessary to permit admission and care of persons admitted thereto under the emergency provisions of 34 M.R.S.A. § 2333 may not be transferred to other divisions of the Department of Mental Health and Corrections. Funds otherwise appropriated to the Bangor Mental Health Institute and not required for the purpose of such appropriation may be transferred within the Department of Mental Health and Corrections in accordance with 5 M.R.S.A. § 1585, which we quote again:

"Any balance of any appropriation or subdivision of an appropriation made by the Legislature for any state department or agency, which at any time may not be required for the purposes named in such appropriation or subdivision, may, upon the recommendation of the department or agency head concerned and the State Budget Officer, be transferred by the Governor and Council at any time prior to the closing of the books, to any other appropriation or subdivision of an appropriation made by the Legislature for the use of the same department or agency for the same fiscal year."

1. It is our opinion that funds appropriated to the Bangor Mental Health Institute may be transferred in accordance with 5 M.R.S.A. § 1585 to the Bureau of Mental Health and that such bureau may, through the grant program authorized by 34 M.R.S.A. § 2052 (P.L. 1973, c. 457, § 2), grant funds thus transferred to providers of mental health services such as mental health centers and private hospitals for the mentally ill. The Legislature has set forth the permitted use of such grant funds by a grantee as follows: "to be used in the conduct of its mental health services." (T. 34, § 2052). We have previously addressed the scope of mental health services referred to in Title 34, § 2052, taking guidance from the language of Title 34, § 2052-A, and have indicated that such services are "out-patient counseling and other psychological and psychiatric, diagnostic or therapeutic services and other allied services." (Opinion of Attorney General Joseph E. Brennan to John Rosser, Commissioner, dated September 18, 1975). We view the quoted language to be broad enough to include in-patient mental health services.

We are constrained to advise that the phrase, "to be used in the conduct of its mental health services," in our opinion, does not include the use of granted funds for capital construction by a mental health services provider/grantee and thus does not include the use of such funds for building renovations. We reach this conclusion through reference to two legislative enactments in the regular session of the 106th Legislature--P.L. 1973, Chapter 457, and P.L. 1973, Chapter 629. The former repealed and replaced the provisions of law relative to community mental health services and

the grant authority of the Department of Mental Health and Corrections with respect thereto and specifically included the phrase last quoted. The second enactment was new and established the authority of the Department of Mental Health and Corrections to make grants for community based services for the mentally retarded, which enactment now appears as 34 M.R.S.A. §§ 2095-2100. In neither enactment did the Legislature state as a permitted use of grant funds expenditure for capital construction. The 106th Legislature in Special Session, however, by P.L. 1973, Chapter 788, "An ACT to Correct Errors and Inconsistencies in the Public Laws," in § 174-A, amended 34 M.R.S.A. § 2095 by adding the following language, "capital construction, purchase of buildings." With this legislative history we are irresistibly drawn to the conclusion that the Legislature intended the availability of grant funds for capital construction vis-a-vis community based services for the mentally retarded and did not intend the expenditure of grant funds for capital construction with respect to community mental health services. (See Opinion of Jon A. Lund, Attorney General, to Senator Walter Hichens dated March 22, 1974. This opinion was issued prior to the enactment of P.L. 1973, c. 788, § 174-A).

We are of the opinion that funds granted under 34 M.R.S.A. § 2052 may be used by a grantee to defray its costs of its overhead naturally occurring in the conduct of its mental health services, which may include rental payments under a lease.

2. and 3. It is our opinion that funds appropriated to the Bangor Mental Health Institute may be used to underwrite contracts between the Department of Mental Health and Corrections and a nonstock corporate provider of mental health services in accordance with 34 M.R.S.A. § 2 as amended by P.L. 1975, Chapter 643, which reads:

"The department shall have authority to perform such acts, relating to the care, custody, treatment, relief and improvement of the inmates of the institutions under its control, as are not contrary to law, or to purchase residential services when the department does not provide the appropriate institutional services for the inmate or client." (Emphasis ours)

For this purpose Bangor Mental Health Institute funds need not be transferred but may be expended by Bangor Mental Health Institute if the authority for the purchase of residential services is delegated to the Bangor Mental Health Institute by the Department under the authority of 34 M.R.S.A. § 1; however, funds appropriated to the Bangor Mental Health Institute may be transferred under 5 M.R.S.A. § 1585 to other appropriations within the Department to permit direct contracting by the Department for the purchase of such services.

4. It is our opinion that Bangor Mental Health Institute funds transferred to the Bureau of Mental Health may be granted to nonstock corporate providers of mental health services under 34 M.R.S.A. § 2052 for use in improving mental health services to discharges from the Bangor Mental Health Institute and persons on convalescent status therefrom. Such purpose appears clearly to fall within the legislatively stated purpose, "to be used in the conduct of its mental health services." (Title 34, § 2052).

5. We understand the "joint venture," so-called, between the Counseling Center of Bangor and the Bangor Mental Health Institute to be an arrangement established pursuant to 34 M.R.S.A. § 2, previously quoted, and 34 M.R.S.A. § 2518, which reads:

"Notwithstanding any other provision in the law, in the event that part of the care and treatment of a patient as referred to in this chapter is provided by a party other than the State, that portion of the care and treatment costs borne by the provider, if other than the State, shall be paid by the department to such provider from the fee collected by the department for the care and treatment of the patient in the same ratio as the fee collected to the total charge made. However, this section shall not be construed as a limitation on compensation for providers of patient care and treatment or as a limitation on contractual arrangements between such providers and the State."

Under the "joint venture," the Counseling Center participates with the Bangor Mental Health Institute in the provision of treatment to acutely mentally ill patients of the Bangor Mental Health Institute. It is our opinion that such arrangement may continue. Indeed, such arrangement reflects the compliance of the Department of Mental Health and Corrections with 34 M.R.S.A. § 2252 which requires the provision of quality care and treatment. It is unclear what is meant by the second part of your question 5 in which you inquire as to whether services to acutely ill patients can be contracted elsewhere. If you mean by "elsewhere,"--the provision of the same services by another provider, we answer in the affirmative. If you mean by "elsewhere,"--sending such acutely ill patients to another hospital to receive services to be paid for from funds appropriated to the Bangor Mental Health Institute, we are of the opinion that this can also be done; however, such patients would no longer be patients of the Bangor Mental Health Institute but would be patients of the other hospital, having been transferred thereto in accordance with 34 M.R.S.A. § 2373 and payment therefor may be in accordance with our responses to your questions 2 and 3 above. (See also, with respect to the transfer authority, Opinion of Attorney General Joseph E. Brennan to House Speaker John Martin dated September 20, 1976).

6. It is our opinion that funds appropriated to the Bangor Mental Health Institute may be used by the Department to pay a project director, whose function is to administer operations directed by the Department at the Bangor Mental Health Institute; however, the position to be thus funded will have to be in accordance with requirements of the State personnel system if the elements of an employer/employee relationship exist with respect to such project director; i.e., the Department engages and selects the director, pays wages to him, may dismiss such person, and controls such person's conduct in carrying out the functions of the project director. (See Opinion of Attorney General Joseph E. Brennan to Commissioner John Rosser regarding Hiring, Grant and Contract Practices dated September 18, 1975). If the elements exist, such person would have to be hired as required by 34 M.R.S.A. § 1 in accordance with the personnel system as an employee of the State. If, however, the project director is not subject to the above elements and is thus an independent contractor, the Department may enter into a contract for special services in accordance with the rules of the Department of Finance and Administration for such contracts, using funds of the Bangor Mental Health Institute. It can only be determined into which category--employee or independent contractor--the project director would appropriately fit,

through an examination of a complete description of the functions of such project director.

In view of the above answer to your question 6, it is unnecessary to consider the propriety of using funds from the contingency account.

Our discussion of question 6 is undertaken with the understanding that the actions to be taken with reference to the Bangor Mental Health Institute means the reduction of operations at the Bangor Mental Health Institute within the contemplation of the present law and the limits thereof addressed in this opinion and in the opinions of this office on the same subject dated September 10, 1976 and September 20, 1976, previously referred to.

Joseph E. Brennan
Attorney General

JEB/a