

# MAINE STATE LEGISLATURE

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Education Sex Discrimination - Federal Requirements  
Sex Discrimination Federal Programs  
20 APR 83 3671 + 3672

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STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333

March 25, 1977

H. Sawin Millett, Commissioner  
Department of Educational and Cultural Services  
State House  
Augusta, Maine

Dear Commissioner Millett:

The newspaper reports give the impression that you are awaiting advice from this office as to how to proceed on behalf of the Department of Educational and Cultural Services (the Department) in relation to certain assurances which are to be made to the Department of Health, Education and Welfare (HEW) regarding federal funds used for education in the State of Maine. It is my understanding that this is not the case; rather, the advice you are awaiting is related to a request from Terry Ann Lunt-Aucoin of the Maine Human Rights Commission concerning the interpretation of the State Code of Fair Practices and Affirmative Action, Title 5 M.R.S.A. §§ 781-790.<sup>1/</sup> That request is limited to certain questions as to your responsibilities to insure non-discriminatory conduct under State law; those responsibilities are distinct from and in addition to your obligations under federal law.

While you have not specifically inquired of this office as to your obligations under federal law, we have reviewed the relevant statutory and regulatory provisions and wish to inform you of our views in this matter.

The State Board of Education, which is part of the Department of Educational and Cultural Services, is

"designated as the sole agency for administering the funds allotted under any federal Act providing for financial assistance in the operation and construction of school facilities, including higher educational facilities and it is authorized to make such

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<sup>1/</sup> This opinion is now being prepared and a copy will be forwarded to you upon completion.

certifications to the United States Commissioner of Education as are necessary to entitle the State to receive the benefits of such Act, . . . " 20 M.R.S.A. § 3672.

In addition, State law specifically provides that if financial assistance for the construction of school facilities or other purposes is accepted pursuant to a federal act, the State

"will comply with all provisions of the said Act of Congress, including any regulations published by the United States Department of Health, Education and Welfare under such Act which have the force of law when published in the federal register," 20 M.R.S.A. § 3671.

The federal laws which authorize financial assistance in general and for education in particular mandate that these funds be used in a non-discriminatory manner. Pursuant to Title VI of the Civil Rights Act of 1964 (hereinafter "Title VI"), no person

"shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance," 42 U.S.C. § 2000d.<sup>2/</sup>

Similarly, Title IX of the Education Amendments of 1972 (hereinafter "Title IX") provides that no person shall, on the basis of sex, be

"excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681.<sup>2/</sup>

Each federal agency extending such financial assistance by way of grant, loan, or contract is authorized to issue regulations to effectuate these provisions; see 42 U.S.C. § 2000d-1 concerning Title VI and 20 U.S.C. § 1682 concerning Title IX.

Acting pursuant to the above-cited authority, the Department of Health, Education and Welfare (HEW) has promulgated regulations to prohibit certain actions defined as discriminatory; these restrictions as to discrimination on the basis of race, color or national origin appear at 45 C.F.R. § 80.3, and, as to discrimination on the basis of sex, at 45 C.F.R. § 86.21 through § 86.61.

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<sup>2/</sup> Please note that the exceptions and exemptions to these provisions are not explicitly discussed herein; should you require information as to these provisions, we will endeavor to provide it.

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In each case, certain assurances that funds will not be used for discriminatory purposes are required to be provided. While this office is not aware of the specific programs conducted by the State with federal funds, we would refer you to those programs listed in Appendix A of 45 C.F.R. Part 80 as to Title VI.<sup>3/</sup>

3/ As to compliance with Title VI the following regulation applies to assurances concerning continuing State programs:

"Every application by a State or a State agency. . . shall. . . (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation," 45 C.F.R. § 80.4(b), see also § 80.4(a) re: non-continuing programs.

In addition, please refer to applicability provision, 45 C.F.R. § 80.2, which states:

"This regulation applies to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal assisted programs and activities listed in Appendix A of this regulation. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This regulation does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this regulation, (c) the use of any assistance by any individual who is the ultimate beneficiary under any such program, or (d) any employment practice, under any such program, or any employer, employment agency, or labor organization, except to the extent described in § 80.3. The fact that a type of Federal assistance is not listed in Appendix A shall not mean, if Title VI of the Act is otherwise applicable, that a program is not covered. Federal financial assistance under statutes now in force or hereinafter enacted may be added to this list by notice published in the FEDERAL REGISTER."

Similar assurances are required regarding discrimination on the basis of sex pursuant to Title IX. That is, recipients must indicate that,

". . . each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. . . ."  
45 C.F.R. § 86.4.(a)

Again, I have not been specifically informed as to the exact nature of all of the federal programs in which the Department now participates. However, it is my view, pursuant to the definitions of 45 C.F.R. § 80.13 (f), (i) and (j) as to Title VI and § 86.2(g) and (h) as to Title IX 4/

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4/ "45 C.F.R. 86.2(g): 'Federal financial assistance' means any of the following, when authorized or extended under a law administered by the Department:

"(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

"45 C.F.R. 86.2 (h). 'Recipient' means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof."

Also refer to the definitions of "Federal financial assistance," "recipient" and "primary recipient," 45 C.F.R. §§ 80.13(f), (i) and (j) respectively.

that for those programs where money is received by the State directly (as opposed to programs where the funds may go directly to a local educational agency), the State, through your Department, is a recipient subject to the assurance obligations indicated above.

I would point out that the obligations of the State include, in addition to the making of specified assurances, the keeping of certain records as to compliance. These procedures are specified as to Title VI and are incorporated by reference into the regulations of Title IX, see 45 C.F.R. § 86.71. That is, the State, as a recipient as defined by 45 C.F.R. § 86.2(h) or by § 80.13 (i) or (j), is required to keep and make available data described in 45 C.F.R. § 80.6.<sup>5/</sup>

While this office is not currently aware of the basis upon which such compliance reports and/or assurances may be made by you, we are aware of the several lawsuits filed by the Maine Human Rights Commission alleging discrimination on the part of various school systems as to pregnancy disability payments and as to disparity in coaching salaries. These allegations would appear to indicate violations of the provisions of 45 C.F.R. § 86.57 and § 86.54 respectively. To the extent that monies received originally by the State are involved, we would advise you to investigate these situations prior to making any assurance of compliance. Where these allegations seem to be supported by the facts, it would appear that no such assurances can properly be made.

Finally, I am aware that the Legislature has allocated its federal revenue sharing funds to the Department of Educational and Cultural Services for "General Purpose Aid for Local Schools," P. & S.L. 1975, c. 40, § 1. In so doing the Legislature explicitly stated that certain provisions of federal law and regulation "shall be complied with," P. & S.L. 1975, c. 40, § 5; see also P. & S.L. 1973, c. 98.

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5/ "45 C.F.R. 80.6 (b). Compliance reports. Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part."

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Specifically, the Legislature has referred to the State and Local Assistance Act and regulations adopted pursuant thereto, see generally P.L. 92-512, Title I, 31 U.S.C. § 1221, et seq. The State and Local Assistance Act, like the federal statutes discussed earlier, provides:

"No person in the United States shall on the grounds of race, color, national origin or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under Subchapter I of this chapter," 31 U.S.C. § 1232.

Regulations adopted pursuant to this Act (which regulations are specifically referred to in Private and Special Laws of 1975, Chapter 40) prohibit discrimination in programs funded with entitlement funds as defined, see generally 31 C.F.R. § 51.50, § 51.51. A recipient government is prohibited from participating in discriminatory actions "directly or through contractual or other arrangements," 31 C.F.R. § 51.52; the recipient is also required to make assurances of compliance through its Governor and to keep compliance records, see 31 C.F.R. § 51.55 and § 51.56 respectively. It is my opinion that section 5 of Chapter 40 of the Private and Special Laws of 1975 as quoted above requires the Department to comply and to assure compliance with the revenue sharing regulations as to those monies allocated by section 1 of that chapter.

In addition to the obligation imposed by State law as to these revenue sharing funds, I am concerned as to whether or not revenue sharing funds would be encompassed within the HEW regulations (and required assurances) as federal funds used for education, see Title IX, 20 U.S.C. §§ 1681, 1682, 45 C.F.R. § 86.2(g) quoted herein. I would suggest that you formally seek an opinion from HEW regarding the applicability of the Title IX regulations to these funds, as well as regarding any other matter which you believe needs further clarification. In particular, you may wish to inquire as to the extent to which assurances made for one program must take cognizance of patterns of discrimination in the school system as a whole; for example, if HEW funds are used for library resources by a school which discriminates in its athletic programs, can an assurance be properly made?

Also, inasmuch as I am not fully aware of the extent to which educational funds come through your Department and the extent to which they go directly to local educational agencies, I suggest that you may wish to inform the various school administrative units of the advice provided in this letter as well as any information you may have concerning HEW assurance deadlines which may be applicable to them.

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If I can be of further assistance in this matter, please do not hesitate to call me.

Sincerely,

JOSEPH E. BRENNAN  
Attorney General

JEB/ec