STATE OF MAINE

Inter-Departmental Memorandum Date April 12, 1977

To Terry Ann Lunt-Aucoin, Director Dept. Maine Human Rights Commission

From Joseph E. Brennan, Attorney General Dept. Attorney General

Subject The Code of Fair Practices and Affirmative Action

This is in response to your request for an opinion concerning various provisions of the Code of Fair Practices and Affirmative Action, Title 5 M.R.S.A. §§ 781-790 (hereinafter sometimes referred to as "the Code"). This opinion confirms that of June 27, 1975 from John W. Benoit to Commissioner H. Sawin Millett, Jr. and addresses the questions raised by the opinion of October 7, 1975 from John W. Benoit to Commissioner H. Sawin Millett, Jr. As discussed herein, your questions are answered as follows: School administrative units are state-related agencies. They are also recipients of funds from the State; these funds are clearly state financial assistance and are also to be considered as "grants" of that assistance. The effective date of the Code implies that affirmative plans are to be in existence by July 1, 1976. Federal money received by the State and redistributed is a grant of state financial assistance for purposes of the Code.

Question No. 1:

"Would a local educational agency, as a state related agency, be considered a recipient for the purposes of the Code of Fair Practices and Affirmative Action Law?"

ANSWER NO. 1:

Yes.

For purposes of this opinion the term "local education agency" is presumed to mean the various "school administrative units" cognizable pursuant to Title 20 of the Maine Revised Statutes, see 20 M.R.S.A. §§ 851, 3452.1 (defining school administrative unit); see also, e.g., §§ 215, et seq., 310, et seq., 351, et seq., 411, 521, et seq. (defining various units).1/

Your question raises two interrelated concerns as to these school administrative units: first, as to whether they are "state related agencies" and, second, as to whether they are "recipients" of a grant of state financial assistance as these terms are used in the Code.

1/ This definition is consistent with the use of the term "local education agency" under federal law, see 45 C.F.R. § 86.2(j), 20 U.S.C. § 881(f). This opinion does not specifically address educational institutions such as vocational schools, industrial schools, schools for exceptional children or the University of Maine, see 20 M.R.S.A. c. 307, c. 309, c. 404, c. 303, respectively.

All school administrative units are state related agencies for purposes of the Code. The Code itself provides, in a section entitled "Affected state agencies and state related agencies" that "school districts" are required to implement the terms of the Code, 5 M.R.S.A. § 790. As used in this section the term "school district" must be read to include all the varieties of school administrative units authorized and organized pursuant to Title 20, and not simply the so-called single unit "school district." There would be no logical reason for the Legislature to have limited the application of the Code to only one type of school administrative unit. In any case, all school administrative units would be encompassed within the term "state financed agencies," 5 M.R.S.A. § 790, 20 M.R.S.A. § 3741, et seq. This inclusion of all school administrative units in the term "state related agency" for purposes of the Code is also consistent with the general scope of the State's involvement with educational funding and supervision, as well as with relevant court opinions, see generally 20 M.R.S.A. §§ 1-A and 3741, et seq., Orono v. Sigma Alpha Epsilon Society, 105 Me. 214 (1909).2/

School administrative units, as state related agencies, are explicitly subject to the affirmative obligations enumerated in the Code as follows:

a). Not to discriminate in providing services to the public or in enforcing regulations, § 784.1;

b). Not to discriminate in any education, counselling, vocational guidance, apprenticeship or on the job training program, § 784.1;

c. Not to discriminate unless based on a bona fide occupational qualification, § 784.1;

2/ In Orono v. Sigma Alpha Epsilon Society, the Court, in finding the University of Maine not to be a State agency, indicates that:

> ". . . The defendant seeks to class it as a State institution in the same sense as are the public schools or the normal schools, but such is not its legal status." 105 Me. 214, 218 (1909) (Dicta, Emphasis supplied). Compare 20 M.R.S.A. § 2252 as to the current status of the University of Maine as a State agency.

d). Not to accept job orders which carry specifications or limitations as to race, color, religion, sex, national origin, ancestry, age, or physical handicap unless based on a bona fide occupational qualification, § 784.1;

e). To incorporate nondiscriminatory provisions in contracts, § 784.2;

f). To render employment services on a nondiscriminatory basis, § 785;

g). To provide educational and vocational guidance counselling programs on a nondiscriminatory basis, § 786; and

h). To withhold state financial assistance from recipients who discriminate, § 787.

In addition, school administrative units are properly encompassed within the generic term "agency" as it is used in Sections 781 and 783 of the Code.3/ Thus, they are further required to act as follows:

a). Pursue in good faith affirmative action programs, § 781;

b). To treat personnel on a nondiscriminatory basis, § 783;

c). To appoint an equal opportunity officer, § 783, and

d). To prepare an affirmative action program, § 783.

3/ Their inclusion is supported by the bill's Statement of Fact which provided that the purpose of the legislation was to "make the Code of Fair Practices and Affirmative Action which currently applies to only Executive Department agencies, apply to all state financed agencies and state related agencies," L.D. 516, 1975.

The second aspect of your question raises the issue not of affirmative obligations of school administrative units pursuant to the Code, but of their status as "recipients" of state financial assistance. The fact that school administrative units are state related agencies does not preclude them from being "recipients" of state funding. There is no question that school administrative units receive funding from the State, see, e.g., The Maine School Building Authority Act, 20 M. R. S. A. § 3501, et seq. The Maine School Finance Act of 1976, 20 M.R.S.A. § 3741, et seq. Accordingly, school administrative units are clearly "recipients"[4/] as that term is used in Section 787 of the Code. They therefore are subject to the obligations and limitations placed on recipients by the Code including the obligation to submit data as required by the Maine Human Rights Commission, 5 M.R.S.A. § 787.

QUESTION NO. 2:

"Would the State subsidy under the School Finance Act of 1976 be considered as grants or state financial assistance under the code?"

ANSWER NO. 2:

The funds distributed pursuant to the School Finance Act of 1976 are a grant of state financial assistance.

As discussed in the context of the first question herein, school administrative units are "recipients" of state financial assistance. Your second question raises the further matter of interpretation as to whether monies distributed pursuant to the School Finance Act of 1976 are "a grant of state financial assistance" which cannot be approved pursuant to Section 787 of the Code if the school administrative unit is engaged in discriminatory actions.

4/ In interpreting a statute "words are to be interpreted in the sense in which they are commonly understood, according to the common meaning of the language. . . . taking into consideration the context and the subject matter relative to which they are employed." Merchants Case, 106 A. 117, 118 Me. 96, 97 (1919).

"Recipient" is commonly defined as "one who or that which receives," and "receive" as "to take, as something that is offered, given, committed, sent, paid or the like," Webster's New International Dictionary, (2nd ed., 1955).

Title 5 M.R.S.A. § 787 provides in part that:

> "No state agency or state related agency shall approve a grant of state financial assistance to any recipient who is engaged in discriminatory practices."

Title 5 M.R.S.A. § 784 provides in part that:

> "1. State action. No agency or individual employee of the State or state related agencies will discriminate because of race, color, religious creed, sex, national origin, ancestry, age or physical handicap while providing any function or service to the public, in enforcing any regulation, or in any education, counseling, vocational guidance, apprenticeship and on-the-job training programs. Similarly, no state or state related agency contractor, sub-contractor, or labor union or representative of the workers with which the contractor has an agreement, will discriminate unless based on a bona fide occupational qualification. State agencies or related agencies may withhold financial assistance to any recipient found to be in violation of the Maine Human Rights Act or the Federal Civil Rights Act. Any state agency or related agency shall decline any job order carrying a specification or limitation as to race, color, religious creed, sex, national origin, ancestry, age or physical handicap, unless it is related to a bona fide job requirement." (Emphasis supplied.)

Generally, there appears to be some ambiguity in the Legislature's use of the word "may" in Section 784 and "shall" in Section 787 of the Code. In such cases, statutory interpretation must attempt to reconcile the ambiguities on the presumption that the Legislature intended to accomplish something by the enactment, see generally Opinion of the Justices, 311 A.2d 103 (1973).

There are two different types of statutory analysis which resolve this ambiguity. In both instances the obligation of a state agency to deny the use of state funds to a recipient engaged in discriminatory practices is evident. The legislative intent in enacting the Code as part of its program to protect human rights is obvious. The Legislature had already enacted the

Maine Human Rights Act prohibiting discrimination by all persons, including state agencies and state related agencies, see 5 M.R.S.A. § 4553.7 enacted by P.L. 1971, c. 501. In addition, the enactment of the Code by Chapter 153 of the Public Laws of 1975 specifically prohibited discrimination by state agencies and state related agencies, see, e.g., 5 M.R.S.A. § 784, which explicitly provides that no state agency will discriminate.

In view of these clear prohibitions against discrimination, it seems that by adding the provisions of § 787 to the then-existing executive order which was the basis of the Code, the Legislature sought to go an additional step in order to assure that no state agency sanction the use of state funds for discriminatory purposes, see Executive Order #1 FY 74-75 issued February 4, 1975, by Governor Longley; see also Executive Orders #24 FY 73-74 issued March 20, 1974 by Governor Curtis; cf. Executive Order #11 issued July 1, 1972 by Governor Curtis. In so doing, the Legislature followed the precedent already set by various enactments of the federal government prohibiting the use of federal funds in a discriminatory way, see, e.g., Presidential Executive Order # 11246, as amended, State and Local Assistance Act, 31 U.S.C. § 1221, et seq.; 31 C.F.R., Part 51; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Indeed, the Legislature had in fact required some state agencies to comply with the federal anti-discrimination provisions, see, e.g., Private and Special Laws of 1975, c. 40 concerning revenue sharing funds.

Legislation such as the Code is remedial civil rights legislation. The Code, like other civil rights legislation is designed to assure that certain personal liberties be protected; in this case it is designed to assure that state action and funding not be used to further any invasion of such liberties. Accordingly, it should be broadly and liberally construed as to its coverage in order to best achieve the beneficent purposes of the legislation, see generally 3 Sutherland Statutes and Statutory Construction, Chapter 72 (4th ed.) and cases cited therein. Where such a public interest is concerned, the word "may" may be construed as "must" or "shall," see Collins v. State of Maine and cases cited therein, 161 Me. 445 at 449-450 (dicta) (1965). In any case, in this context, the word "grant" as it is used in § 787 should not be narrowly construed. In common usage the term is defined as

> "b. a bestowing or conferring, concession or allowance especially of something asked for or in dispute"

or as

> "(c) a gift or bestowal by one having control or authority over it, as of land, money, a franchise, etc." Webster's, supra.

To limit this term to something "asked for" would not be consistent with the various expressions of legislative intent and principles of statutory construction already discussed.

The second analysis of the use of the word "may" in § 784 and "shall" in § 787 produces a like interpretation; that is, that the Code requires that state funds not be distributed directly or indirectly to public or private entitites which are engaged in discriminatory practices.

Section 784 (which speaks to various "state actions") may be viewed as providing the necessary discretion for state agencies to withhold funding where the agencies might otherwise encounter mandatory obligations pursuant to the statutory provisions authorizing their own functions. That is, section 784 provides the authority to consider the Code's mandates in all contexts; at the same time section 787 makes mandatory the agency's responsibility not to approve the distribution of funds in certain instances.

As specifically applied to the Commissioner of the Department of Educational and Cultural Services, Section 787 of the Code, which prohibits a state agency from approving a "grant of state financial assistance," would preclude his authorization of the distribution of funds pursuant to the School Finance Act of 1976 to school administrative units engaged in discriminatory practices, see 20 M.R.S.A. § 3748.2. The Commissioner would be so precluded regardless of the nature of his obligations in the area of school funding, see, e.g., 20 M.R.S.A. § 3741, et seq.

This responsibility is evidenced by various provisions of law. First, section 3748.2 uses the language ". . . shall authorize payments of aid. . . . ". This clearly indicates that the Commissioner of the Department of Educational and Cultural Services has some direct involvement in the distribution of funds. His authority not to approve such distribution of funds may be found in § 784 of the Code itself as discussed above. That school funding is not an absolute obligation of the Commissioner is confirmed by various other sections giving him the power to withhold monies in certain specified instances, see, e.g., 20 M.R.S.A. §§ 3127, 3454, 3461. In addition, the Governor is obligated to withhold school funds in the following instances:

> " When the Governor has reason to believe that a town or district has neglected to raise and expend the school money required by law, or to employ teachers certified as required by law, or to have instruction given in the subjects prescribed by law, or to provide suitable textbooks in the subjects prescribed by law, or faithfully to expend the school money received from the State or in any way to comply with the law prescribing the duties of administrative units in relation to public schools, he shall direct the Treasurer of State to withhold from the apportionment of state school funds made to that administrative unit such amount as he may deem expedient. The amount so withheld shall not be paid until such administrative unit shall satisfy said Governor that it has expended the full amount of school money as required by law and that it has complied in all ways with the law prescribing the duties of administrative units in relation to public schools. Whenever such administrative unit shall fail, within the year for which the apportionment is made, so to satisfy the Governor, the said amount withheld shall be forfeited and shall be added to the General Fund of the State." 20 M.R.S.A. § 854.(Emphasis supplied

School administrative units are, as discussed in Question 1 herein, clearly obligated by law to comply with the Code and other statutes prohibiting discrimination.

The Commissioner's responsibility to assure that state monies not be distributed to those who are engaged in discrimination is also ascertained by a conjunctive reading of the legislative mandates in civil rights and in education.

It is clear that the Legislature is required by the Constitution to be involved in school funding matters, see M.R.S.A. Const., Art. VIII, § 1. It is equally clear that the Legislature and the Commissioner of the Department of Educational and Cultural Services are deeply involved in the funding and operation of the schools of the State, and that state revenues are intended to be extensively used in this regard, see 20 M.R.S.A. § 3741 and generally M.R.S.A., Title 20.

At the same time, the Legislature is committed to the human rights and dignity of the people of the State. The civil rights of the people are protected by the Constitution, M.R.S.A., Const. Art, I, § 6A. The right to obtain employment, housing, public accommodation, and the extension of credit free from

discrimination have been declared by the Legislature to be civil rights, see 5 M.R.S.A. §§ 4571, 4581, 4591, 4595, respectively. In addition, the Legislature has by statute explicitly prohibited discrimination in these areas and has created a Commission to investigate these and other forms of discrimination to insure the human dignity of its people, see 5 M.R.S.A. § 4552 as to the purpose of the Maine Human Rights Commission and §§ 4553.10, 4572, 4582, 4592, and 4596, as to prohibited discrimination. Furthermore, the Legislature has placed additional enumerated obligations not to discriminate and to act affirmatively to assure non-discrimination on the state government and its agents, 5 M.R.S.A. §§ 781 - 790.

Where the Legislature has expressed its intent in two such areas, it is necessary to seek to read the applicable legislative enactment in harmony to effectuate the purposes intended. In the present instance this would indicate the Legislature's intention that: the Commissioner of the Department of Educational and Cultural Services recommend school funding levels to the Legislature (20 M.R.S.A. § 3745); and, when such funds are appropriated for allocation by the Commissioner (20 M.R.S.A. §§ 3747 and 3748), he may authorize their payment (20 M.R.S.A. § 3748.2) only to those school administrative units not engaged in discriminatory practices (5 M.R.S.A. § 787). The Governor also has certain responsibilities regarding funding pursuant to 20 M.R.S.A. § 854.

Such a conjunctive reading of the constitutional provisions and the obligations imposed by Title 20 and Title 5 is consistent with and reiterates the obligations which the Legislature has otherwise imposed on the Commissioner in regard to the distribution of federal monies, see particularly P. & S.L. of 1975, c. 40. It is appropriate that the state civil rights legislation be so read in a manner consistent with federal legislation on the same subject, see generally Sutherland, supra, § 51.01. Pursuant to these provisions the Commissioner may not properly distribute either federal or state funds to school administrative units which are engaging in discriminatory practices. Prior to his decision not to distribute funds, however, the Commissioner (or other state agency or state related agency) should assure that the recipient has been provided with a reasonable opportunity for compliance and with the requisite due process, including notice and opportunity for hearing.

While you have not specifically inquired as to the definition of "discriminatory practices" as that term is used in the Code, it appears that the meaning of this term is central to the operation

of the Code. The Maine Human Rights Commission is the state agency designated to protect human or civil rights, 5 M.R.S.A. § 4552. To do so, it is authorized to investigate, and to determine if discrimination exists, 5 M.R.S.A. §§ 4566, 4612. It is also authorized to adopt regulations to effectuate the purpose of the Maine Human Rights Act, 5 M.R.S.A. § 4566.7. In addition, the Maine Human Rights Commission is designated by the Code as the agency to which recipients of state financial assistance must submit reports and which shall review all state-related affirmative action programs, 5 M.R.S.A. §§ 784 and 789, respectively. Furthermore, the Code explicitly provides in Section 789 that "all powers and duties granted to the Maine Human Rights Commission under section 4551, et seq. as amended shall apply to this section." In addition, the Code specifically refers to findings of discrimination by the Maine Human Rights Commission in section 784.

In this context, it appears that where a school administrative unit is acting in a manner clearly in violation of the statute or properly promulgated rules and regulations of the Maine Human Rights Commission, a state agency would be abusing its discretion by failing to find that such a recipient was engaged in discriminatory practices. In other instances, such as those where the facts were not so precise or where the Maine Human Rights Commission had promulgated no applicable regulations, the distributing agency could properly make its own determination with reference to applicable findings of the Maine Human Rights Commission and federal civil rights agencies, see § 784 of the Code.5/

Of course, where federal funds are involved, the relevant provisions of federal law and regulation would apply to the determination of discrimination.

QUESTION NO. 3:

"Does the effective date July 1, 1976, mean that state related agencies (etc.) must have in place, completed, an affirmative action plan and code of fair practice?"

5/ The state agency approving the distribution of funds must make the final decision in relation to section 787; however, it is possible that it may wish to have the Maine Human Rights Commission hold the requisite hearing and make recommendations to the funding agency.

ANSWER NO. 3:

Yes.

Legislative Document 516 as originally submitted contained no special provision as to its effective date. Had it remained in its original form, the provisions of the Code would have been effective on October 1, 1975, ninety days after adjournment of the Legislature. However, the bill was specifically amended to change that date to July 1, 1976, see Committee Amendment H-120, 1975.

The purpose of a future effective date is generally assumed to be to inform persons of the statutory provisions before they become applicable in order that those required to do so will have the opportunity to discharge their obligations, see 2 Sutherland, supra, § 33.07 and cases cited therein. Presumably in amending L.D. 516 to extend the effective date by approximately 9 months, the Legislature intended to allow a reasonable period during which effected agencies could produce the requisite affirmative action plan and otherwise bring themselves into compliance with the Code. This should have been accomplished by July 1, 1976.

QUESTION NO. 4:

"Is federal money (grant) which is received by a state agency and then is distributed on a competitive grant basis to state-related or other agencies (HEW Title 20 monies or Title 3 of the Education Act monies), state financial assistance of the purposes of this law?"

ANSWER NO. 4:

Yes.

Based on the factors presented in your question, i.e., that funds are received by a state agency which then distributes the monies, it would seem that the state agency is in fact approving a grant of state financial aid. However, in most instances the question would appear to be irrelevant inasmuch as federal law itself generally prohibits the use of federal funds in a discriminatory manner.

In particular, funds received by the Commissioner of Educational and Cultural Services from the federal Department of Health, Education and Welfare or pursuant to the State and Local Assistance Act are subject to regulations prohibiting the use of such funds in a discriminatory manner and requiring assurances that the monies are not so used, see, e.g., 42 U.S.C. § 2000d, 20 U.S.C. § 1681, 45 C.F.R. Parts 80 and 86, 31 U.S.C. §§ 1221, et seq., 31 C.F.R., Part 51.

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