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

May 19, 1977

The Honorable Richard H. Pierce
Senator, District Eighteen
Senate Chamber
State House
Augusta, Maine 04333

Re: L.D. 1183, An Act to Clarify the Definition of Professional
Nursing and Practical Nursing

Dear Senator Pierce:

Your questions concerning L.D. 1183 while serially numbered can appropriately be placed in four general categories. These categories are: 1. delegation of legislative authority; 2. specificity of a criminal statute; 3. interpretation of "new" language; and 4. interrelationship of the proposed law and prior law for purposes of statutory construction.

1. Delegation of Legislative Authority

The legislation proposes to permit the "nursing profession" to define the practice of "professional" and "practical" nursing by specifying, apparently on a case by case basis the "acts which are recognized by the nursing profession as proper to be performed by a . . . nurse. . . ." Thus the initial question is what is meant by the term "nursing profession"? It is an elementary rule of statutory construction that words must be given their common meaning unless the act discloses a different legislative intent. Union Mutual Life Insurance Company v. Emerson, 345 A.2d. 504, 507 (Me. 1975). The word "profession" is defined in Webster's Seventh New Collegiate Dictionary as "the whole body of persons engaged in a calling". It appears, therefore, that this legislation would require all nurses to somehow meet and decide what constitutes the practice of nursing. Even if we assume that such an activity

could practically be carried out, we must ask whether the Legislature is constitutionally permitted to delegate its legislative authority in the manner proposed by L.D. 1183. We must answer in the negative.

In Small v. Maine Board of Registration and Examination in Optometry, 293 A.2d. 786 (Me. 1972), the Supreme Judicial Court of Maine considered questions concerning the delegation of legislative authority in a case dealing with a professional licensure board. Citing 1 AM. Jur. 903, 913, Secs. 105 and 113, the Court recognized the governing principles to be as follows:

From the constitutional prohibition of the delegation of legislative powers, two fundamental concepts emerge: "(1) the legislature may not confer a discretion as to what the law shall be but it may confer discretion in the execution or administration of the law; and (2) the legislature must declare a policy and fix a standard in enacting a statute conferring discretionary power upon an administrative agency, but the agency may be authorized to 'fill up the details' in promoting the purposes of the legislation and carrying it into effect.

In order to avoid an unlawful delegation of power, the legislative authority must declare the policy or purpose of the law and, as a general rule must also fix the legal principles which are to control in given cases by setting up standards or guides to indicate the extent and prescribe the limits of the discretion which may be exercised under the statute or ordinance by the administrative agency. Otherwise, the law may be construed as vesting an uncontrolled discretion and held to violate the inhibition against delegation of legislative powers.

293 A.2d 786 at 7-8

See also City of Biddeford v. Biddeford Teacher's Association, 304 A.2d 387, 398 (Me., 1973). More recently the Supreme Judicial Court reaffirmed these principles in State v. Boyajian, 344 A.2d 410, 412 (Me., 1975), stating, "When a statute is challenged for the limited

reason that it lacks adequate standards . . . we have found constitutional infirmity where the act gives the agency unlimited power, is without prescribed restraints, and is devoid of criteria as a guide to such agency."

Therefore, it is clear that, in order for grants of legislative authority to withstand constitutional scrutiny, the power delegated must be clearly delineated. While the legislature may, constitutionally, grant legislative power to some other entity, such a grant of power must be accompanied by "sufficient standards to guide the agents in the exercise of the legislative authority." City of Biddeford v. Biddeford Teacher's Association, 304 A.2d 387, 398 (Me., 1973). In our opinion, it would be an unconstitutional delegation of legislative authority for the legislature to grant to the "nursing profession" or the Maine State Board of Nursing the power to define what acts constitute the practice of nursing. In order to eliminate this constitutional infirmity the legislation must specifically delineate what constitutes the practice of nursing. The regulator, such as the Maine State Board of Nursing, may then determine whether a specific act falls within the purview of that definition.

2. Specificity of a Criminal Statute

32 M.R.S.A. § 2106 provides that, "it shall be a misdemeanor for any person, including any corporation, association or individual to: . . . practice professional nursing or practical nursing as defined by this chapter unless duly licensed to do so under this chapter". Since criminal penalties are involved, a citizen should be able to know, by reading the statutory definition of the practice of professional or practical nursing, what acts are prohibited. The due process clause of the Constitution of the United States "does not permit legislation which purports to regulate human conduct with sanctions imposed for violation to stand as valid if men of common intelligence must necessarily guess at its meaning." S*** v. State, 299 A.2d 560, 568 (Me., 1973). Citing Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed. 2d 214 (1971), the Court stated, "If no standard of conduct is specified at all, legislation is unconstitutionally vague. It is valid legislation, however, if it requires a person to conform his conduct to an imprecise but comprehensible normative standard." 299 A.2d et 568. If L.D. 1183 limited the definition of the practice of nursing to the elements listed in paragraphs A through F of section 1 and paragraphs A through D of section 2 it would not be unconstitutional

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on the basis that it provided no standard of conduct. However, it might still be subject to attack on the basis that it does not set forth at least an "imprecise but comprehensible normative standard." The major constitutional infirmity of L.D. 1183 is that it leaves the definition of the standard of prohibited conduct wide-open by delegating, without prescribing any restraints, the authority to define that standard to the "nursing profession." Therefore, it is our opinion that L.D. 1183 is unconstitutionally vague.

3. Interpretation of "New" language

In addition to the elementary rule of statutory construction that words will be given their common meaning, unless the act discloses a different legislative intent the language in a statute must be given a meaning consistent with the overall statutory context and construed in light of the subject matter; purposes of the statute; the occasion and necessity for the law; and, the consequences of a particular interpretation. Finks v. State Highway Commission, 328 A. 2d 791 (Me., 1974). While it is difficult for us to ascertain the specific meaning which the sponsors wish to ascribe to certain new terms used in L.D. 1183, such as "assessment" and "counsel," by applying the rules of statutory construction, set forth above, it appears that they establish a "comprehensible normative standard" of conduct thereby withstanding attack as being unconstitutionally vague. See S***S*** v. State, 299 A.2d 560 (Me., 1973). Of course, if the legislature desires to insure that there is no ambiguity concerning the meaning of a specific term, it may statutorily codify the definition of each term.

Your question number 8 must be answered in the negative unless the person providing such services were to derive legal authority to conduct such activities from some other provision of Maine law. Therefore, if a person applies specialized knowledge, judgment and skill derived from the study of the biological, physical and behavioral sciences which are those required for licensure as a registered nurse, he or she may not, under L.D. 1183, engage in health teaching of persons who are experiencing normal developmental changes, for compensation, unless licensed as a registered professional nurse.

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4. Interrelationship of Proposed Law and Prior Law
for purposes of Statutory Construction

With respect to your question number 9, we are of the opinion that, unless there were legislative debate or statements clearly delineating the intent of the legislature, a court might conclude that the legislature, by removing the second sentence of 32 M.R.S.A. § 2102 (2)(D), intended to permit a construction of the first sentence whereby diagnosis of illness and prescription of therapeutic or corrective measures could be deemed to be an act within the scope of the practice of nursing. We would respectfully suggest that you may wish to specifically state, in the legislation, whether such acts fall within the scope of the practice of professional nursing.

Your last question requires that the Medical Practice Act and the Nurse Practice Act be read in pari materia inasmuch as physicians are the only persons authorized to practice medicine, as that term is defined in 32 M.R.S.A. § 3270, there must be some other specific statutory authority to allow any other person to perform acts falling within this definition. The Legislature recognized this to be the case when it authorized physicians to delegate certain medical services to physician's assistants (32 M.R.S.A. § 3270-A) and registered nurses (32 M.R.S.A. § 2102 (2)(E)).

32 M.R.S.A. § 3270-A does not grant authority to a physician to delegate the performance of medical services to a registered nurse because it states that "[n]othing contained in this section shall be construed to apply to registered nurses acting pursuant to chapter 31 of this Title." (The Nurse Practice Act). Our review of the law indicates that the only authority under which physicians may delegate the performance of medical services to registered nurses and under which registered nurses may perform those services is 32 M.R.S.A. § 2102 (2)(E) which includes within the definition of the practice of professional nursing the:

"Diagnosis of illness or prescription of therapeutic or corrective measures when such services are delegated by a physician to a registered nurse who has completed the necessary educational programs required. . ."

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Since L.D. 1183 proposes to repeal this provision, it could be effectively argued that the legislature has removed the legal authority of a registered nurse to perform such activities and therefore the authority of a physician to delegate such activities to a registered nurse. We would again respectfully suggest that such a question can best be answered within the legislation rather than require judicial resolution of such an interpretive question.

In conclusion, to answer your questions in the serial manner presented by your letter we would respond as follows:

1. No.
2. No.
3. Not applicable.
4. No.
5. Not applicable.
6. No.
7. Yes.
8. No.
9. Yes.
10. Yes.

If we can be of any further assistance, please do not hesitate to contact us.

Very truly yours,


JOSEPH E. BRENNAN
Attorney General

JEB:we
Enclosure



State of Maine
Senate Chamber
Augusta, Maine 04330

May 12, 1977

The Honorable Joseph Brennan
Attorney General of Maine
Office of the Attorney General
State House
Augusta, Maine 04333

Re: L.D. 1183, An Act to Clarify the Definition of
Professional Nursing and Practical Nursing

Dear Attorney General Brennan:

I am the co-sponsor of the above referenced bill. As a result of my review of L.D. 1183 and conversations with representatives of various health care providers, several questions of a legal nature have arisen with respect to this bill in its present form. In order that the sponsors might have an opportunity to attempt to make any necessary revisions to the legislation prior to the public hearing, I would appreciate your opinion on several questions.

Initially, the legislation proposes to permit the "nursing profession" to determine the scope of acts which constitute the practice of nursing. The legislation lists certain acts which are included within the purview of the practice of nursing but indicates that the practice of nursing means:

"/T/he application of specialized knowledge, judgement and skill ... of acts which are recognized by the nursing profession as proper to be performed by a registered professional nurse including but not limited to:

1. Inasmuch as the unlawful practice of nursing is subject to criminal penalties, is the definition of "professional nursing" sufficiently clear so as to put the public on notice as to the delineated scope of the practice of nursing?

2. In view of the decision of the Supreme Judicial Court of Maine in the case of Small v. Maine Board of Reg. & Exam. in Optometry, 293 A.2d 786 (1972) and the constitutional prohibition of the delegation of legislative powers, is it permissible for the Legislature to delegate to the "nursing profession" the ability to determine what acts constitute the practice of nursing?

3. If your answer to question #2 is in the affirmative, is the term "nursing profession" sufficiently clear so as to indicate the legal entity to which the Legislature has delegated this power?

4. If your answer to question #2 is in the negative, would your opinion be altered if the Legislature were to delegate to the Maine State Board of Nursing, a state agency, the ability to decide what acts constitute the practice of nursing and, if so, under what circumstances would such delegation be permissible?

5. If your answers to questions #2 and #3 are in the affirmative, is the "nursing profession" referred to in section 1 of the bill concerning "professional nursing" the same "nursing profession" referred to in section 2 of the bill which deals with "practical nursing".

6. Would the answers to questions #1-#5 be different if the relevant parts of the bill were rewritten as follows:

Professional nursing. The practice of "professional nursing" means the application of specialized knowledge, judgment and skill, as derived from the study of biological, physical and behavioral sciences required for licensure under subchapter III in the performance, for compensation, of acts . . . (A-F)

G. Such other acts as are recognized as proper to be performed by a registered professional nurse.

Secondly, the legislation proposes to incorporate in the definition of "professional nursing" certain terms which have not heretofore been utilized in the Nurse Practice Act, codified at chapter 31 of Title 32. These new terms include "assessment"; "counsel"; "health teaching of persons who are experiencing normal developmental changes"; and "collaboration".

7. Are these terms sufficiently clear so that no definitions are required in order to pass the constitutional scrutiny required of a criminal law?

8. Assuming that this bill were to become law and assuming that an individual had developed specialized knowledge, judgment and skill as the result of the successful completion of courses identical to the biological, physical and behavioral science courses required as a condition precedent to licensure as a professional nurse, could such a person engage in the "health teaching of persons who are experiencing normal developmental changes" without becoming a registered nurse and, if so, under what circumstances?

Subparagraph F of section 1 of the bill states that the practice of nursing includes "Administration of Medication and treatment as prescribed by a legally authorized person". The current provision of law which deals with this specific area of practice states as follows:

Administration of medication and treatment as prescribed by a licensed physician or dentist. The foregoing shall not be deemed to include diagnosis of illness or the prescription of therapeutic or corrective measures.
(32 MRSA § 2102 (2) (D) (emphasis added)).

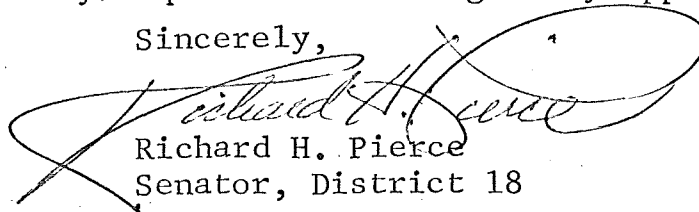
9. Does the deletion of this second sentence from the proposed law create an implication that the foregoing sentence would include the diagnosis of illness or the prescription of therapeutic or corrective measures?

Lastly, the legislation deletes entirely the provision of current law (32 MRSA 2102(2)(E)) which authorizes nurses to engage in the "diagnosis of illness or prescription of therapeutic or corrective measures when such services are delegated by a physician to a registered nurse who has completed the necessary additional educational program required for the proper performance of such duties".

10. If this provision is deleted, does an implication arise that physicians may not delegate such activities to a registered nurse?

Your immediate response to my inquiries will be greatly appreciated.

Sincerely,



Richard H. Pierce
Senator, District 18