

MAINE STATE LEGISLATURE

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Human Rights Section
STATE OF MAINE
Education Department

Inter-Departmental Memorandum Date September 12, 1977

To Terry Ann Lunt-Aucoin, Director

Dept. Maine Human Rights Commission

From Sarah Redfield, Assistant

Dept. Attorney General

Subject _____

This is in response to your request of August 9, 1977, for review and clarification of the obligations of the State Department of Educational and Cultural Services and of the various school units pursuant to Title IX of the Education Amendments of 1972; the statutory and regulatory provisions applicable to revenue sharing funds; and the Vocational Education Amendments of 1976.

Title IX regulations require assurance of compliance as follows:

"Sec. 86.4 Assurance required

"(a) General. Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, 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. An assurance of compliance with this part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance." 45 C.F.R. § 86.4.

Federal financial assistance is defined as

"(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(g).

Recipient is defined as

"(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."
45 C.F.R. § 86.2(h). (Emphasis supplied)

Applicant is defined as

"(i) 'Applicant' means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient."
45 C.F.R. § 86.2(i).

These definitions would indicate that where money is applied for and/or received by the State Department of Educational and Cultural Services and passed on to local educational units, both are applicants and/or recipients. In this regard, I would refer you further to the letter from Albert Hamlin, Acting Director of the Office for Civil Rights to Senator Hathaway concerning recipients who are not primary recipients (a copy is attached).

Generally the mandatory and prohibitory regulations read, for the most part, in terms of obligations of a "recipient", though it would be best to check each section which concerns you, see generally 45 C.F.R. Part 86. In this regard, it may also be useful for you to note the definition of "educational institution" as follows:

"(j) 'Educational institution' means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a pre-school, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section."
45 C.F.R. § 86.2(u)

The Elementary and Secondary Education Act defines local educational agency as

"(f) The term 'local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school."
20 U.S.C. § 881(f).

Paragraphs (k), (l), (m), and (n) as referred to in Sec. 86.2(j) refer to institutions of graduate higher education, institution of undergraduate higher education, and institution of vocational education respectively.

REVENUE SHARING

As you are aware, revenue sharing funds are allocated to the State of Maine and then from the State to the Department of Education, see P. & S.L. 1977, c. 44.*

* There are also revenue sharing funds which flow directly to units of local government, but these funds are not discussed herein. If you wish specific information in this regard, let me know.

Pursuant to the regulations of the Office of Revenue Sharing, recipient governments receiving entitlement funds are prohibited from discrimination in their programs, see generally 31 C.F.R. Part 51, Sec. E. Assurances of compliance are required as follows:

§ 51.58. Assurances required.

(a) General. In order to qualify for any payment of entitlement funds for any entitlement period, each Governor of a State or each chief executive officer of a unit of local government shall, prior to the beginning of each entitlement period, executive to the satisfaction of the Director an assurance that all programs and activities of a recipient government will be conducted in compliance with the requirements of this subpart. . . . "
31 C.F.R. § 51.58.

Recipient government is defined as:

"(m) 'Recipient government' means a State government or unit of local government as defined in this section, or the office of the separate law enforcement officer for any parish in the State of Louisiana other than the Parish of Orleans."
31 C.F.R. § 51.2(m).

Program or activity is defined as:

"(i) 'Program or activity' means any function conducted by an agency or department of the recipient government which government has received or is receiving entitlement funds, or by any other unit of government or private contractor which has received or is receiving entitlement funds from the recipient government." 31 C.F.R. § 51.51(i).

In addition, § 51.4 specifically provides that:

"Those prohibitions and restrictions set forth in Subparts D, E, and F of this part which are applicable to a recipient government's entitlement funds continue to be applicable to such funds if they are transferred to another governmental unit or private organization. A violation of Subparts D, E, and F of this part by a secondary recipient shall constitute a violation by the recipient government and the applicable penalty shall be imposed on the recipient government."

As indicated above, Subpart E contains the regulations concerning discrimination.

As is the case with HEW regulations, most of the ORS provisions address the "recipient government" though each section with which you are concerned should be separately reviewed. The applicability to local educational institutions is made clear by § 51.4 quoted above. In this regard, I have attached for your information correspondence between me and Mr. William Sager, Chief Counsel for ORS, concerning the ORS view of liabilities and responsibilities pursuant to the allocation of revenue sharing monies by P. & S.L. 1977, c. 44.

In each case you should consider separately the responsibility of the State government to make assurances of compliance either through its Governor or through the relevant State agency and the responsibility of all recipients to comply with the statutory and regulatory provisions.

VOCATIONAL EDUCATION

To the extent that HEW or ORS monies flow to vocational technical institutes their responsibilities are indicated by their inclusion or not in the above-quoted provisions. In regarding to the responsibility arising from the Vocational Education Amendments of 1976, it appears that these remain primarily at the State level inasmuch as it is the state education board that prepares the 5-year vocational education plan and annual program plans, see generally P.L. 94-482, § 202, Title I.

If you need information in greater detail than provided herein, please let me know.



SARAH REDFIELD
Assistant Attorney General

SR/ec
Enc.



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20201

FEB 7 1977

file
[Signature]
MHR/KL - HEW

The Honorable William D. Hathaway
United States Senate
Washington, D.C. 20510

Dear Senator Hathaway:

Thank you for your letter of January 5 on behalf of Ms. Susan E. Hirsch, Affirmative Action Officer, Department of Educational and Cultural Services, Augusta, Maine, which was forwarded to the Office for Civil Rights by Ethel Bent Walsh, Vice Chairman, Equal Employment Opportunity Commission. I regret that Ms. Hirsch has not received a more prompt reply to her request for information about the Department's Title IX regulation.

As you know, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex, with certain exceptions, in education programs and activities receiving Federal financial assistance. In implementing Title IX, the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 have been adopted by the Department. Section 80.6(b) of the Title VI regulation (copy enclosed) states that when a primary recipient extends Federal assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient to carry out its obligation under this part. Therefore, State Education Agencies do have a responsibility to monitor Federal funds that are passed through to local education agencies to assure compliance with Title IX. A State Education Agency (SEA) may be called upon from time to time to submit reports necessary to determine Title IX compliance by local education agencies within its jurisdiction. The form and content of such reports will be specified by the Director of the Department's Office for Civil Rights at the time the request is made. Both State and local education agencies should submit Assurance of Compliance forms to this Office.

✓ The language of the Assurance Form (copy enclosed) does mean that local education officials have an obligation to assure themselves that any entity, such as a private school with which they contract to provide services, complies with Federal discrimination prohibitions. Local education agencies have a continuing responsibility in this area.

Page - 2 - The Honorable William D. Hathaway

The recent regulation issued by the Justice Department and appearing in the Federal Register, Vol. 41, No. 32, December 1, 1976, covers only Title VI and clarifies obligations of government agencies to enforce compliance with Title VI of the Civil Rights Act of 1964. This regulation does not cover Title IX.

In answer to Ms. Hirsch's question about Title VII of the Civil Rights Act of 1964 and the role of the Equal Employment Opportunity Commission, I should note that Title VII also created the Commission which has the responsibility to enforce the Title VII, section 703 prohibition against employment discrimination on the basis of race, color, religion, sex, or national origin. Ms. Hirsch may wish to write directly to the Equal Employment Opportunity Commission for more specific information as to that agency's possible plans to change or extend its guidelines.

I hope this is helpful. If I can be of further assistance, please let me know.

Sincerely,
Albert T. Hamlin

Albert T. Hamlin
Acting Director
Office for Civil Rights

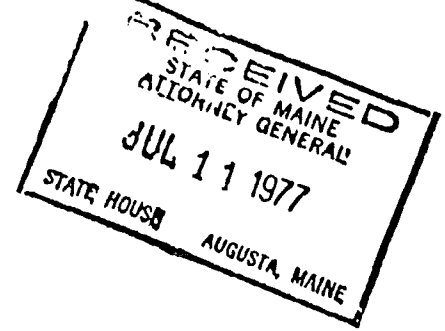
Enclosures



Kw. Shaug

OFFICE OF REVENUE SHARING
2401 E STREET, NW
COLUMBIA PLAZA HIGHRISE
WASHINGTON, D.C. 20226

July 7, 1977



Dear Ms. Redfield:

This is in response to your letter of June 23, 1977, in which you seek confirmation of an oral opinion I gave to you during our telephone discussion concerning compliance with revenue sharing regulations regarding treatment of temporary disabilities caused by pregnancy (§ 51.54 of the revenue sharing regulations). Your inquiry arises from the use of the State of Maine's revenue sharing funds by the State Department of Education and Cultural Services.

You mention in your letter that the State of Maine has recently altered its allocation of revenue sharing funds to the Department from general purpose aid for local schools to the funding of the employer's share of "teacher retirement" costs. You inquire whether this change removes the State of Maine's obligation to comply with other aspects of the revenue sharing regulations (i.e. § 51.54).

As you know, § 122 of the amended Revenue Sharing Act provides, in part, that no person on the basis of sex should be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a recipient government, which government receives revenue sharing funds. Section 51.54(d)(2) of the revenue sharing regulations issued pursuant to § 122 of the amended Revenue Sharing Act states:

A recipient government shall not have a written or un-written policy which results in different treatment of temporary disabilities caused by pregnancy with respect to the commencement or duration of employment or leave.

If a recipient government violates this prohibition, it is subject to the statutory process spelled out under § 122 of the amended Revenue Sharing Act and also risks the suspension or termination of its revenue sharing funds until the violation is remedied.

The only exceptions to § 122 of the amended Revenue Sharing Act (provided in § 122(a)(2)) relate to construction projects (not applicable here) and funding. The funding exception under § 122(a)(2)(A) of the amended Act provides that § 122 would not apply to a recipient government if that government demonstrates, by clear and convincing evidence, that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with revenue sharing funds.

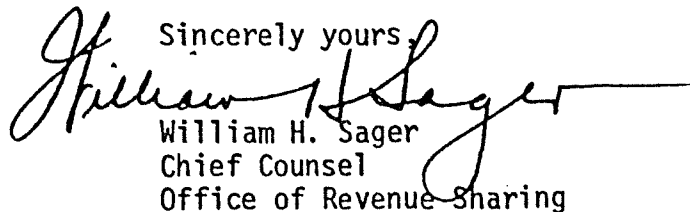
As I noted earlier, the State of Maine funds the Department with revenue sharing funds. The Department concerns itself with educational matters. Evidently, matters dealing with teachers would arise out of the programs or activities of the Department. Even though the concerned revenue sharing funds are designated for "teacher retirement" they benefit the other programs or activities of the Department.

The Office of Revenue Sharing and various courts have interpreted such benefits as constituting funding of those other programs or activities. The revenue sharing funding of "teacher retirement" benefits the other Department programs and activities by, among other things, attracting qualified teachers, and offsetting the expenses of programs that the Department would otherwise either have to curtail or fund with its own source funds. In other words, the State of Maine revenue sharing funding of one Department program affects the funding of all of the Department's programs or activities; therefore, the revenue sharing funds benefit or fund all of these programs. While not here citing the legal cases on this point, it is our judgment that the State would not be able to carry its burden of proof by "clear and convincing evidence" that only the Department's "retirement cost" program was funded with revenue sharing funds. It is our judgment that the § 122(a)(2)(A) exception of the amended Revenue Sharing Act would not apply to your situation.

Accordingly, the State's funding of the Department for "retirement cost" does not remove its obligation to comply with § 122 of the amended Revenue Sharing Act and § 51.54 of the revenue sharing regulations. If a program or activity of the Department violates § 51.54 of the revenue sharing regulations then the State of Maine (as a primary recipient of revenue sharing funds) would be in violation of § 122 of the Revenue Sharing Act, and as mentioned above, would risk suspension or termination of its revenue sharing funds.

I hope that the above information is helpful. If we can be of any further assistance, please let us know. I am enclosing a copy of the amended Revenue Sharing Act and a copy of the interim revenue sharing regulations for your reference.

Sincerely yours,


William H. Sager
Chief Counsel
Office of Revenue Sharing

Ms. Sarah Redfield
Asst. Attorney General
Department of the Attorney General
Augusta, Maine 04333

Enclosures

JOSEPH E. BRENNAN
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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

June 23, 1977

Mr. William H. Sager
Chief Counsel
Office of Revenue Sharing
Office of the Secretary of the Treasury
2401 E. Street, N.W.
Columbia Plaza Highrise
Washington, D.C. 20226

Dear Mr. Sager:

I am writing to ask for written confirmation of the opinion which you gave me over the telephone concerning the use of revenue sharing funds by the Department of Educational and Cultural Services of the State of Maine. First, however, I want to thank you for your prompt and understanding assistance when I called.

As I told you, the State of Maine has allocated its \$14 million in revenue sharing funds to the Department of Educational and Cultural Services for "Teacher Retirement." (Private and Special Laws of 1977, c. 44) In previous years the allocation to the Department has been for General Purpose Aid for Local Schools (Private and Special Laws of 1975, c. 40, Private and Special Laws of 1973, c. 98). The question raised by the change of purpose and use of the allocation is as follows:

Does the use of federal revenue sharing funds for payment of the employers' share of teachers' retirement costs remove the State's obligation to comply with other aspects of the revenue sharing regulations (such as section 51.54 concerning the treatment of pregnant teachers) so long as the retirement system itself is non-discriminatory and consistent with regulations applicable thereto?

Again, I'd like to thank you for your assistance thus far and will look forward to your written confirmation of our discussion. If you should need any further information from me, please feel free to call me.

Sincerely,

Sarah Redfield

SARAH REDFIELD
Assistant Attorney General

SR/ec