JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE

DEPARTMENT OF THE ATTORNEY GENERAL

AUGUSTA, MAINE 04333

April 21, 1978

To: David E. Smith, Commissioner of the Department of Human Services

From: Joseph E. Brennan, Attorney General

Re: Implementation of L.D. 1976 - An Act to Allow Intermediate Care Facilities to be Reimbursed under the Medically Needy Program

This responds to your memorandum of April 7, 1978, by which you asked whether the State is legally obligated to implement the program authorized by L.D. 1976 (P.L. 1977, c. 719) at the present time or whether the State may wait until appropriations are available on July 1, 1978. The bill in question enacts 22 M.R.S.A. § 3173-A authorizing the Department of Human Services to include under the types of care eligible for reimbursement in the medically needy program medically necessary care provided at an intermediate care facility. That amendment, adopted over the Governor's veto, became effective April 6, 1978, as L.D. 1976 was enacted as an emergency measure. Thus, the expansion of eligibility for reimbursement under the medically needy program is presently effective.

As you point out, L.D. 1976 also provided an appropriation to implement the amendments, but that appropriation is not effective until July 1, 1978 - the beginning of fiscal year 1979. The question you pose in light of the lack of appropriation for the remainder of fiscal year 1978, whether the State is legally obligated to implement the program immediately, cannot be entirely answered on the basis of information available to us.

If funds have been appropriated in fiscal year 1978 for the medically needy program as it existed prior to amendment, then the medically needy program would continue but with the expanded eligibility criteria established by L.D. 1976. If the expanded

eligibility criteria should result in a shortfall of funds, the Department may have to examine what other arrangements are available in the same manner as it would with other programs with shortfalls of funds. For example, pursuant to 5 M.R.S.A. § 1585, the Department might transfer surplus funds from another account to the medically needy account.

If, indeed, there are no presently appropriated funds available for the medically needy program, and thus there is no medically needy account to transfer funds to, or if the funds in the medically needy account are depleted and other funds cannot be transferred to that account, then it would not be possible to continue the program since the State cannot enter into commitments for which there are not appropriated funds, 5 M.R.S.A. § 1583.

These determinations will involve an examination of the Human Services appropriations bills and the Human Services budget document which further refines the general accounts established in the Human Services appropriations bills.

Enclosed for your interest are opinions of May 18, 1977, and July 15, 1977, which address the issue of possible action where funds may not be appropriated to support a particular program.

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

JEB/ec
Enclosures

Bangor Mental Health Institute Funding
34 MRSA 2101, 2102

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May 18, 1977

Honorable Louis Jalbert
House of Representatives
State House
Augusta, Maine

Re: Bangor Mental Health Institute.

Dear Representative Jalbert:

This responds to your request for an opinion relative to provision of funds for the Bangor Mental Health Institute.

The facts as background for your opinion request are as follows:

The Governor has recommended the phasing out of the Bangor Mental Health Institute. If the Bangor Mental Health Institute is phased out, no further funds will be required. The legislation relating to phasing out of the Bangor Mental Health Institute has not yet been enacted. Currently the Committee on Appropriations has under consideration the Part I budget relating to funding of current State services.

Based on these facts, you ask whether funds must be provided by the Department of Mental Health and Corrections to continue operation of the Bangor Mental Health Institute in fiscal year 1978.

We would advise that under current statutes, the Department of Mental Health and Corrections is obligated to provide funding to support continued operation of the Bangor Mental Health Institute. Specifically, the Department of Mental Health and Corrections must maintain the Bangor Mental Health Institute for emergency care and treatment of the menally ill. As currently provided by 34 M.R.S.A. §§ 2101, 2102, and 2333 the Bangor Mental Health

Institute must admit and provide care for all persons in need of emergency care and treatment, subject only to the availability of accommodations.

The responsibility of the Department of Mental Health and Corrections regarding funding of the Bangor Mental Health Institute was addressed by our office in three opinions dated September 10, 1976; September 20, 1976; and September 28, 1976. Copies of these opinions are attached. These opinions specify in greater detail the funding obligations of the Department of Mental Health and Corrections relating to the Bangor Mental Health Institute.

In this connection, we would note that it would not be possible to identify any specific level of funding as that absolutely necessary to meet the statutory requirements, the level of funding being a decision left to the absolute discretion of the Legislature.

I hope this informationis helpful. If you need any further information, we will try to provide it.

Sincerely,

DONALD G. ALEXANDER
Deputy Attorney General

DGA/ec
Enclosures

Re: Tort Claims Act' Insurance Purchase Requirements; Appropriations & Proposals where Funds not provided
5 MRSA § 1533
14 MRSA § 8116

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July 15, 1977

John P. O'Sullivan, Commissioner
Department of Finance and Administration

H. W. MacKowen, Executive Secretary
Maine Insurance Advisory Board
State House
Augusta, Maine

Re: Maine Tort Claims Act, Insurance Provision.

This responds to your request for an opinion as to whether, if the provisions of L.D. 1874 are enacted into law, the State will be absolutely required to purchase insurance regardless of cost or quality of coverage.

L.D. 1874 amends the Maine Tort Claims Act, P.L. 1977, c. 2, to provide that State employees are personally liable for negligent acts or omissions within the scope of their employment in areas where the State is immune, but only to a limit of $10,000, 14 M.R.S.A. § 8103-3 (as proposed to be amended). Further, Section 5-A of L.D. 1874 requires the State to purchase insurance for this risk:

> The State shall purchase insurance on behalf of its employees to insure them against their personal liability to the limit of their liability under section 8103, subsection 3 and, to the extent that such insurance coverage is not available, shall assume the defense of and indemnify such employees to the limit of their liability under section 8103, subsection 3."

Your question basically is to what extent does this provision impose an absolute and unavoidable obligation on the State to purchase insurance.

Based on our reading of the law, we believe that the law, if finally approved, would impose an obligation on the State to purchase insurance subject to the following conditions:

1. The State would only be obliged to purchase insurance if adequate coverage is available to insure the risk established by § 8103, sub-§ 3. Accordingly, if the quality of coverage was not such as to adequately cover this risk, the insurance called for by the statute would be unavailable, and the State would only be obligated to assume the defense and indemnity of employees.

2. Further, even if such insurance were available, the State could only purchase such insurance if there is an appropriation to support the State entering into contracts for such insurance.

As a general doctrine of law, the State may not commit funds to projects for which there is no appropriation. In Maine this doctrine is confirmed by the explicit provisions of Title 5 M.R.S.A. § 1583 which prohibit contracting of obligations in excess of appropriations. Accordingly, if the costs of insurance exceeded the available appropriations for such insurance, the State would likewise be under no obligation to purchase the insurance and again would simply assume the responsibility of defense and indemnity. Our review of the appropriations legislation in the Part I and Part II budgets discloses no specific appropriation for this purpose. However, we recognize that appropriations for purchase of insurance may be provided for within other more general budgetary figures.

Accordingly, the Commissioner of Finance and Administration should determine what funds are available for purchase of insurance and then seek to determine if insurance coverage can be provided with the funds made available by legislative appropriation. However, if either the insurance is not available, or the funds appropriated to purchase such insurance are inadequate, the State is under no obligation to purchase insurance and may exercise the option to defend and indemnify. It should be emphasized, however, that the defense and indemnity option is not without its costs as it could involve commitment of considerable attorn time and expenditure of funds for defense costs and for indemnity in cases of unsuccessful defense.

This opinion is issued with the caveat that because of delays in printing the Legisaltive Record, we have not been able to review the legislative history of the debates regarding the mandatory insurance provision. Our opinion has been developed based on the wording of the statute and our general understanding of the laws of the State relating to availability of funding as a necessary pre-condition for implementing a statutory mandate.

Sincerely,

DONALD G. ALEXANDER
Deputy Attorney General

DGA/ec