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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

September 4, 1979

Honorable Swift Tarbell, III
Assistant Minority Leader
House of Representatives
15 State Street
Bangor, Maine 04401

Re: Licensing of Public School Driver Education Programs
by the Secretary of State

Dear Representative Tarbell:

This is in response to your request for an opinion as to whether the Secretary of State has a statutory obligation to regulate and license public school driver education courses or instructors when these courses are offered for a fee after regular school hours. With regard to driver education courses, we answer in the negative; with regard to instructors, we answer in the affirmative, if the instructor is engaging in professional or commercial instruction.

The statutory background against which these determinations must be made is somewhat conflicting. There are two separate statutes which must be construed together to ascertain the overall legislative scheme for regulation of driver education. First, 29 M.R.S.A. c. 7, sub-c. IV, § 721, et seq., establishes a system for regulating commercial driver education schools and commercial instructors. Section 722 expressly mandates that anyone who operates a commercial school or who offers commercial instruction obtain a license therefor. Section 721, sub-§ 2, of this subchapter excepts public or private schools approved by the State Board of Education from the definition of a commercial driver education school. Further, 29 M.R.S.A. § 582, 1st paragraph, penultimate sentence, provides that no license shall be required of certified teachers conducting driver education courses in public secondary schools or academies.

The second statutory scheme, embodied in 20 M.R.S.A. c. 311, § 2451, et seq., establishes guidelines for the purpose of encouraging school committees or directors to develop driver education programs in secondary schools and academies. This statute provides for the appointment of a State Director of Driver Education and the creation of rules and regulations to carry out the chapter. In 1977, new section 2454 was added to this law by P.L. 1977, c. 289 authorizing school administrative units to "charge a fee based on the per pupil cost, for a driver education course conducted after regular school hours during the school year." Your question becomes, therefore, whether such courses or their instructors must be regulated by the Secretary of State consistent with his obligations under Title 29.

As previously mentioned, 29 M.R.S.A. § 721, sub-§ 2 expressly excepts public or private schools approved by the State Board of Education from the definition of commercial driver education schools. It appears clear, therefore, that courses offered after regular school hours during the school year by such schools for remuneration, that is, for a fee based on the per pupil cost, are not subject to regulation by the Secretary of State. This interpretation harmonizes both statutes. See Small v. Gartley, 363 A.2d 724 (Me. 1976). (Legislation on the same subject matter must be viewed in its overall entirety so that an harmonious result presumably intended by the Legislature may be reached.)

The issue of whether driver education instructors who are teaching courses after school hours during the school year for remuneration are subject to licensing and regulation by the Secretary of State requires an analysis of more detailed statutory provisions which at first reading appear somewhat inconsistent. 29 M.R.S.A. § 583 exempts "certified teachers conducting a driver education course in public secondary schools or academies" from the licensing requirement imposed upon commercial instructors. 29 M.R.S.A. § 722-A provides that

[t]he Secretary of State may appoint a driver education teacher, licensed by the Commissioner of Educational and Cultural Services, to give professional driving instruction meeting the need of a licensee or new applicant when a duly licensed commercial instructor is not available within a reasonable distance from his domicile.
(emphasis added)

The statute gives no definition of professional driving instruction, and thus it is necessary to look to the plain and ordinary meaning of the words used to ascertain the intent of the Legislature. State v. Flemming, 377 A.2d 448 (Me. 1977); Appeal of Davis, 369 A.2d 628 (Me. 1977). The word "professional" is defined by Webster's New International Dictionary, 2nd Ed., unabridged, as "engaging for livelihood or gain in an activity pursued, usually or often, for noncommercial satisfaction. . . Syn. - paid, hired." In the overall context of 29 M.R.S.A. § 721, et seq., it appears that the term "professional" as used in § 722-A has a meaning similar to the term "commercial."

The ultimate question, then, is whether a certified teacher licensed by the Commissioner of Education is giving professional or commercial driving instruction when he conducts a driver education course after school hours during the school year for which a pupil must pay a fee. We are of the opinion that this may be the case, if the instructor's compensation results from professional or commercial activity beyond the schools' regularly conducted programs. Although schools are exempted from commercial driver education school licensing, no such blanket exemption exists in the statute for instructors. On the contrary, 29 M.R.S.A. § 722-A provides that in order to teach professionally, a certified driver education teacher must be appointed to do so by the Secretary of State. Further evidence that the Legislature did not intend a blanket exemption for instructors is found in the recently enacted 20 M.R.S.A. § 2455, which allows the Commissioner of Education to temporarily certify a commercial instructor licensed by the Secretary of State so that pursuant to a contractual agreement such person may teach driver education courses in the public or private school systems. Such persons, of course, continue to be regulated by the Secretary of State when teaching outside the school program. To force commercial teachers to be certified by the Commissioner of Education to teach in the public schools or academies, but to allow certified public or private school teachers to teach outside the school program for remuneration appears to offer the latter a benefit not contemplated by the Legislature. 29 M.R.S.A. § 583 exempts "certified teachers conducting driver education courses in public secondary schools or academies" from licensing by the Secretary of State. This exemption cannot be stretched so far as to allow such teachers to offer instruction professionally or commercially after school hours without the requisite license.

There is some difficulty, however, in setting precise guidelines for determining when a school sponsored driver education program becomes commercial or professional so that the instructor must be appointed by the Secretary of State pursuant

to 29 M.R.S.A. § 722-A. The exemption offered certified teachers by 29 M.R.S.A. § 583, as previously indicated, extends only to instruction offered in public secondary schools or academies. A reasonable harmonization of § 583 with § 722-A is that as long as a certified instructor offers course instruction within the school's curriculum, pursuant to a bona fide educational program, then § 722-A is not applicable to the instructor. However, if the driver education course offered through the school is not under the auspices of the school's educational function, that is, if it is conducted in a manner beyond or different from the normal educational programs offered by the school, then § 722-A may well mandate that the instructor be appointed by the Secretary of State.

Factors to be considered in determining whether a particular course is within the regular school curriculum would include:

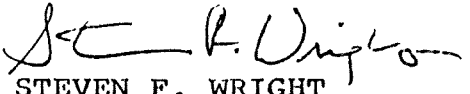
- Where the course is being conducted; the time of day the course is being offered;
- Whether the student receives credit for the course;
- Whether the course is open to other than full-time students;
- Whether the fee is paid to the school or directly to the instructor;
- Whether the instructor has a direct pecuniary interest in the number of students participating;
- Whether the vehicle is owned by the instructor or the school; and
- Whether the liability insurance is paid for by the school, the instructor or the student.

While none of these factors alone may be dispositive of the issue, and while other factors may well be relevant in any given case, the above list at least indicates the types of factors which the Secretary of State must consider in determining whether the program is one for which an instructor should be exempted from the licensing authority of the Secretary of State pursuant to § 583 or appointed to teach professionally or commercially pursuant to § 722-A. In light of the imprecise demarcation between the authority of the Secretary of State and that of the Department of Educational and Cultural Services to license instructors, the Legislature may wish to establish clearer standards in this area.

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If you have any further questions on this matter, please contact me.

Sincerely,


STEVEN F. WRIGHT
Assistant Attorney General

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