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Honorable Richard H. Pierce
Maine Senate
State House
Augusta, Maine 04333

Dear Senator Pierce:

You have asked for an opinion concerning the obligations of the State of Maine under an interstate agreement on higher education. Although the bill which initially prompted your question has apparently been defeated,1/ you remain concerned about the State's financial and legal obligations under the terms of the New England Higher Education Compact.

The Factual Background

The relevant facts are as follows. The New England Higher Education Compact is an agreement among the New England states to cooperate to provide increased educational opportunities for students in New England. Art. 1, 20 M.R.S.A. § 2751. A major focus of the compact is to broaden the opportunity for graduate and undergraduate studies in academic fields which were not offered at home colleges or universities. See, 1981-1982 Undergraduate Catalog of the New England Regional Student Program and 1981-1982 Graduate Catalog of the New England Regional Student Program; Barton, Interstate Compacts in the Political Process, 1965, Chap. V.

1/ L.D. 708, "AN ACT Making Appropriations from the General Fund for Teachers' Retirement and Eliminating Certain Programs Funded from the General Fund" has received Ought Not to Pass votes in both houses. This bill would have deleted $1,700,000 from each year of the budget for fiscal years 1981 and 1982 under a category designated "Education-Grant, Loan/Scholarship Fund." The bill specifically provided that it "[e]liminates the program as well as costs related to activities of the New England Board of Higher Education."

The compact was ratified by the State Legislature (P.L. 1955, c. 441), executed by the Governor pursuant to legislative authority, and approved by the Congress (68 Stat. 982 (1954)). The language of the compact is codified as 20 M.R.S.A. §§ 2751-2760 Pursuant to this compact, the various member states provide financial support for a joint administrative agency, the New England Board of Higher Education (NEBHE), situated at Wenham, Massachusetts.

With eight delegates from each of the member states, NEBHE meets at least once yearly. Art. IV, 20 M.R.S.A. § 2754. It adopts a budget for each two-year period and is required to make annual reports to the Governor and Legislature of each member state concerning the finances and programs of NEBHE. Art. IV, 20 M.R.S.A. §§ 2754; 2804. The Board is authorized to elect officers, to employ an administrative staff, and to adopt rules. Art. IV 20 M.R.S.A. § 2754. It collects data and publishes reports. Art. V, 20 M.R.S.A. § 2755(1).

NEBHE is authorized to "enter into contractual agreements or arrangements with any of the compacting states or agencies thereof and with educational institutions and agencies as may be required in the judgment of the board to provide adequate services and facilities. . . . " Art. V, 20 M.R.S.A. § 2755(2) is intended to maximize educational opportunities for students of member states. Under the program, graduate and undergraduate resident students of the State of Maine may attend public colleges and universities in other member states at a reduced cost to obtain education in curriculum areas not available in Maine. This cost is either the in-state tuition or the in-state tuition augmented by 25%, whichever has been adopted by the institution. Students from other states may, in turn, attend the University of Maine or the vocational-technical institutes with similar privileges. Coordination is the responsibility of NEBHE.2/

Since ratification of the compact, Maine has paid an annual assessment to NEBHE, appropriated as part of the DECS budget. The appropriation item has typically included monies for three purposes: (1) the state's share of the costs for the subsidized out-of-state graduate health professional programs,3/ (2) the NEBHE

2/ Some factual information was obtained from NEBHE publications and a conversation with NEBHE's business manager.

3/ These include medical, dental, veterinary, and dentistry programs. Although originally administered by NEBHE through contracts with universities for such reserved, subsidized placements, the program is now administered by DECS pursuant to independent statutory authority. See, 20 M.R.S.A. §§ 2271-2314.

assessment,[4] and (3) expenses of the state's NEBHE delegation.[5] "Part I" of the proposed budget (L.D. 1583) includes appropriations for 1981-82 and 1982-83 for an "Education-Grant, Loan/Scholarship Fund."[6]

4/ This assessment was $59,948 for FY 1980.

5/ Expenses of the Maine delegation for FY 1980 amounted to approximately $3,000. Members of the delegation "shall receive their actual expenses incurred in the performance of their official duties." 20 M.R.S.A. § 2803.

6/ This appropriation item, it might be noted, is a total figure to be appropriated, as in years past, as a lump sum to DECS for a purpose designated as "Education-Grant, Loan/Scholarship Fund" and without any breakdown of appropriations for the three components to which it is typically devoted. There is no language either in the appropriations section or any other section of L.D. 1583 which explicitly proposes to eliminate the NEBHE assessment or NEBHE delegation expenses from this lump sum. This is in contrast to the previous bill, L.D. 708, which proposed to terminate medical school contracts and the NEBHE program. See footnote 1. As it stands, L.D. 1583 appears merely to appropriate a smaller total sum for the three components listed in the Program Narrative and Expenditure Detail of the Part 1 (Current Services) budget. (See, p. 118, Program 0279, as described by the Department of Educational and Cultural Services.) Without explicit language in the appropriations bill eliminating NEBHE expenses, and no repeal of existing statutory language committing the state to the NEBHE assessment and delegation expenses, the appropriations bill might well be construed to authorize NEBHE expenses. This, of course, would leave a smaller total sum to be used for the purchase of health professions contract places. (Part M of L.D. 1583 authorizes the purchase of "up to" maximum numbers of places in the various health field graduate schools, but does not mandate a minimum number.)

The State's Obligation to Finance NEBHE Operations

Although L.D. 1583 does not explicitly eliminate the State's appropriation to NEBHE and NEBHE delegation expenses, some Legislators apparently support an effort to eliminate such funding. The question you have posed has relevance to this proposal and may be phrased as a two-part inquiry:

1) Is the State obligated by the terms of the New England Higher Education Compact to appropriate funds for the fiscal years 1981 and 1982 for expenses relating to membership in the New England Board of Higher Education?

2) Assuming the compact obligates the State to make such an appropriation, is the compact a valid and binding agreement?

1) The intent of the New England Higher Education Compact -

The extent of the State's obligations under the New England Compact must be determined from the language of the compact itself. The meaning of the compact must be drawn from the document as a whole. The powers of the joint board are outlined above. NEBHE acts by vote of the delegates from each state, if a quorum is present. Art. IV, 20 M.R.S.A. § 2754. However, "no action of the board imposing any obligation on any compacting state shall be binding unless a majority of the members from such compacting state shall have voted in favor therefor." Art. IV, 20 M.R.S.A. § 2754.

The main thrust of the compact is the creation of NEBHE itself, a "body corporate and politic" which serves as "an agency of each party to the compact." Art. II, 20 M.R.S.A. § 2752. To assure some stability in the operation of the joint board, the compact provides that each state "will . . . make available to the board [NEBHE] such funds as may be required for the expenses of the board. . . as authorized by... " the terms of the compact.

Art. VI, 20 M.R.S.A. § 2754.[7] The contributions are calculated according to the proportional populations of each member state by the most recent census. The only prerequisite to this commitment for operational expenses is that a majority of the state's delegation must have approved[8] the expenditure. The continuation of NEBHE operations is further protected by the promise of each compacting state that it will give two years' notice before withdrawing from the compact. Art. IX, 20 M.R.S.A. § 2759. The language here is quite explicit:

7/ The relevant text of this provision is as follows:

> Each state agrees that, when authorized by the legislature pursuant to constitutional process, it will from time to time make available to the board such funds as may be required for the expenses of the board as authorized under the terms of this compact. The contribution of each state for this purpose shall be in the proportion that its population bears to the total combined population of the states who are parties hereto. . . .

While the phrase "when authorized by the legislature pursuant to constitutional processes" may appear to make an appropriation by the legislature a permissive act, we would not interpret the language in that manner. To do so would render the compact essentially meaningless, for any state at any time could functionally withdraw and impede NEBHE operations merely by refusing to appropriate its share of the operational funds approved by a majority of the board and a majority of the state delegation. This would be an irrational interpretation of the compact and would effectively nullify the two-year notice of withdrawal provision. See text accompanying note 9, infra.

8/ This approval would presumably come as approval of the NEBHE budget, according to applicable procedures in the adopted by-laws.

> The compact shall continue in force and remain binding upon a compacting state until the legislature or the governor of such state, as the laws of such state shall provide, takes action to withdraw therefrom. Such action shall not be effective until 2 years after notice thereof has been sent by the governor of the state desiring to withdraw to the governors of all other states then parties to the compact. Such withdrawal shall not relieve the withdrawing state from its obligations accruing prior to the effective date of withdrawal[9/]. . . . (Emphasis added)

In summary, we interpret the compact to mean that the legislature of each state will, upon approval of a majority of the state's NEBHE delegation, appropriate sufficient funds to meet the state's assessment for NEBHE's operational expenses and

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9/ The compact states that NEBHE has no authority to incur any obligations "for salaries, office, administrative, traveling or other expenses prior to the allotment of funds by the compacting states adequate to meet the same." Art. IV, § 2754. This, however, would limit only the timing of NEBHE operations and expenditures, not the state's commitment to make an appropriation.

that the state will continue to meet this obligation for two years after it has given its notice of withdrawal.10/

10/ Beyond the annual assessment for NEBHE's operational expenditures, a compacting state may be liable for contributions to implement various contracts negotiated by NEBHE with educational institutions. Art. V, 20 M.R.S.A. § 2755(2). Since no such contracts appear to have been negotiated, it would appear this is not an issue of concern.

NEBHE's original purpose was to arrange for medical school placements and contracts between states without such facilities and institutions willing to accept New England students. The contracts negotiated under this program were three-way contracts among NEBHE, the member state with potential students and the educational institution with places for those students. Maine now negotiates these contracts bi-laterally with the institutions, without NEBHE involvement. 20 M.R.S.A. §§ 2271-2278. (And, see L.D. 1583, Part M).

It appears that the Regional Student Program is implemented by reciprocal policies of the respective state educational institutions, rather than by contract. No funds are involved beyond the operational overhead incurred by NEBHE in its coordination efforts.

2) The legality of the state's financial commitment under the Compact -

As construed, the New England Higher Education Compact imposes a duty on the state to fund its share of NEBHE operational expenses until the effective date of a withdrawal. This compact represents a promise of future funding. As such, it raises the question whether such a promise is contrary to Maine law, i.e., whether the contract is valid and enforceable. A general principle of Maine law is that one legislature, by its actions, cannot bind future legislatures. Edgerly v. Honeywell Information Systems, Inc., Me., 377 A.2d 101 (1977); Maine State Housing Authority v. Depositors Trust Co., Me., 278 A.2d 699 (1971); Opinion of the Justices, 146 Me. 183 (1951). The Maine Supreme Judicial Court has determined that, where financial obligations undertaken by the state are not fully met by an immediate appropriation of the Legislature, the state must issue bonds, approved by the electorate, to be repaid by appropriations over a period of years. Thus, the State could not finance a construction of an office building by a lease or contract requiring annual appropriations over several years. Opinion of the Justices, Id. Such an arrangement would violate Art. IX, § 14 of the Maine Constitution forbidding the creation of debts or liabilities in excess of $2 million[11/] without a bond issue.

Assuming the annual assessment pledge to NEBHE would exceed the debt limitation of art. IX, § 14, it would, under state law, create an unconstitutional liability of the state and would appear to be an invalid statute and an unenforceable agreement. Thus, the question arises as to whether art. IX, § 14 controls interstate compacts.

11/ The Maine Court explained this principle as follows:

> One Legislature cannot obligate succeeding Legislatures to make appropriations. One Legislature may, within constitutional limitations, impose a contractual obligation upon the State which it is the duty of the State to discharge, but one Legislature cannot impose a legal obligation to appropriate money upon succeeding Legislatures. 146 Me. at 189-190.

As will become apparent, the issue raised in this opinion is ultimately a question of federal law on which there is limited precedent. Thus, we are unable to give a definitive answer. However, we can say, for the reasons outlined below, that there is at least a reasonable possibility that the compact would be held to be binding on the State.

The law of interstate compacts has a long history dating from colonial times.[12/] Barton, Interstate Compacts in the Political Process, 1967; Zimmerman and Wendell, The Law and Use of Interstate Compacts, 1976; Frankfurter and Landis, "The Compact Clause of the Constitution," Yale Law J. 34:691 (1925). Although many such compacts have resulted from efforts to resolve disputes between states (e.g., over water allocations, tax revenues, boundary disputes), a small group of compacts concerns the pooling or coordination of state facilities or services. The New England compact was modelled after a similar compact among Southern states. (See, The Southern Regional Education Compact of 1942, W. Vir. Stat., Chap. 18, Art. 10-C).The Eduation Commission of the States is a nation-wide compact to which Maine is a party. 20 M.R.S.A. §§ 2901-2909.

A compact between states is both a statutory enactment and a contract. State ex rel. Dyer v. Sims, 341 U.S. 22 (1951). A

12/ Compacts between states are prohibited by the United States Constitution unless approved by Congress. Art 1, § 10, Cl. 3, U.S. Const. However, the Supreme Court has held that Congressional approval is necessary only for those compacts which tend to increase the political power of the states in a manner which may encroach on federal government powers. U. S. Steel Corp. v. Multistate Tax Comm., 98 S. Ct. 799 (1978); New Hampshire v. Maine, 96 U.S. 2113 (1976). It is questionable, therefore, whether state service contracts, especially those dealing with matters such as education (generally regarded as a power reserved to the states), need be approved by Congress. Once approved, however, all the protections of federal law would appear to apply.

valid interstate compact creates an enforceable obligation on each state which is a party, in the manner of a contract. Where one party fails to meet its obligations, another party may bring an enforcement action. The United States Supreme Court is the final arbiter of a dispute over a compact and may hear the dispute from its inception as it does other disputes between states. Dyer v. Sims, Id.; Petty v. Tennessee-Missouri Bridge Comm., 359 U.S. 275 (1959); Virginia v. West Virginia, 246 U.S. 565 (1918). The interpretation of an interstate compact is a matter of substantive federal law, not a question of state law. State ex rel. Dyer v. Sims, 341 U.S. 22 (1951).

The Supreme Court has addressed the issue of a conflict between a state's financial obligations under a compact and a state constitutional provision prohibiting the creation of a debt or liability of the state. In Dyer v. Sims, supra, eight states had agreed to make annual appropriations under an interstate compact to fund a joint water pollution control commission. After honoring this commitment for several years, the auditor of West Virginia declined to make further payments to support the commission (after legislative appropriation was made for this purpose) claiming that the compact was unconstitutional. The state supreme court held the compact illegal under the state constitution, specifically stating that the promise of annual payments improperly was deemed to bind future legislatures to make appropriations, in violation of the state constitution.13/ The United States Supreme Court reversed.

The Court declared that the compact "is after all a legal document." 341 U.S. at 28. Final decisions as to its meaning are

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13/ The West Virginia Constitution, Art. X, § 4, read:

> No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the state, to suppress insurrection, repel invasion, or defend the state in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

The provision is similar to that of Art. IX, § 14 of the Maine Constitution, except that Maine expresses an authority to create "debt" or "liability" up to $2 million.

solely the power of the Supreme Court. The issue in the case was determined to be "whether the West Virginia Legislature had authority, under her Constitution, to enter into a compact which involves an agreement to appropriate funds for the administrative expenses of the agency." 341 U.S. at 30. The Court concluded that the promise of annual appropriations did not contravene the state constitution. The opinion recognized the validity of the state's promise to make appropriations and appeared to uphold its validity because the procedures for approval of the appropriations were consistent with the state constitution. Because the governor had approved the commission budget and the state legislature had already appropriated the funds, the Court did not have to consider a legislative refusal to make the promised appropriation. However, its opinion did not question the propriety of the substantive promise to make annual appropriations.

In concurring opinions, two justices firmly concluded that the compacting state must meet its financial obligation. Justice Reed stated unequivocally that interstate compacts could be upheld despite state law to the contrary:

> Since the Constitution provided the compact for adjusting state relations, compacts may be enforced despite otherwise valid state restrictions on state action.

341 U.S. at 34. A second opinion similarly dismissed the state's attempt to avoid its obligations under the compact:

> West Virginia officials induced sister states to contract with her and Congress to consent to the Compact. She now attempts to read herself out of this interstate compact by reading into her Constitution a limitation upon the powers of her Governor and Legislature to contract.
>
> West Virginia, for internal affairs, is free to interpret her own Constitution as she will. But if the compact system is to have vitality and integrity, she may not raise an issue of ultra vires, decide it, and release herself from an interstate obligation. The legal consequences which flow from the formal participation in a compact consented to by Congress is a federal question for this Court. . . . Whatever she now says her Constitution means, she may not apply retroactively that interpretation to place an unforeseeable construction upon what the other states to this Compact were entitled to believe was a fully authorized act.

341 U.S. at 35, Concurring Opinion of Jackson, J.

Justice Jackson specifically concluded that the state would be estopped from claiming a compact to be invalid after entering into it and enjoying its benefits for some time.

The Supreme Court's decision in Dyer v. Sims suggests that the state's failure to meet its NEBHE assessment before a proper withdrawal under the compact would be found improper. The decision is consistent with other decisions enforcing provisions of interstate compacts renounced by a party to the compact. Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

In addition, the Court has subjected interstate compacts to analysis similar to that used in "impairment of contract" cases. Dyer v. Sims, supra at 29; Larson v. South Dakota, 278 U.S. 429, 433. Here again, a question of federal law is posed, specifically the prohibition against state action impairing existing contract rights. U. S. Const. Art. I, § 10, Cl. 1. It is questionable whether the State could justify a failure to fund NEBHE during the term of its membership since State action impairing contract rights is proper and valid only if it is "both reasonable and necessary to serve the admittedly important purposes claimed by the State." United States Trust Co. v. New Jersey, 431 U.S. 1, 29 (1977). A policy decision to spend state funds elsewhere, as in funding medical school placements, might well be deemed not to meet this test.

CONCLUSION:

We believe that the language of the New England Higher Education Compact imposes an obligation upon the State to fund, until two years after notice of withdrawal has been given, the State's assessment of operational expenses for the New England Board of Higher Education, as approved by the Maine delegation to NEBHE. We also believe that even if the State's obligation is inconsistent with the Maine Constitution, there is a reasonable possibility that federal law would make the obligation enforceable against the State.[14/]

Sincerely,

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SLD/ec

14/ We should note another possible consequence from the State's failure to pay its annual assessment. According to the terms of the compact, a state which is in default is not entitled to any of the "rights and privileges and benefits" of the compact or any agreement made under the compact. It is possible, therefore, that the benefits afforded Maine students (instate or reduced tuition elsewhere) could be denied, while Maine institutions may be obligated to continue offering such benefits to outside students.