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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION #23
AUGUSTA, MAINE 04333

July 21, 1988

TO: Richard Crabtree, Chairman
SEED Board

FROM: Jeffrey Frankel
Assistant Attorney General

RE: Miscellaneous SEED Act issues

This will respond to your February 26 request for additional research relating to the personal liability of officers and directors of the SEED Plan. This will also address several other issues you, David Brown and I discussed at our May 4 meeting.

Personal liability of officers and directors. In my January 13 memo to Fred Douglas (copy attached) I stated that the protections of the Maine Tort Claims Act, 14 MRSA section 8101 et seq. "most likely" applied to the members of the SEED Plan. I based this conclusion on the definition of "State" contained in 14 MRSA section 8102(4) (Supp. 1987-88), which reads as follows:

> "State" means the State of Maine or any office, department, agency, authority, commission, board, institution, hospital or other instrumentality thereof, including the Maine Turnpike Authority, the Maine Port Authority, the Maine Vocational-Technical Institute System, the Maine Veterans' Homes and all such other state entities.

Title 20-A MRSA section 12603(1) (Supp. 1987-88) created the SEED Plan as "a public body corporate and politic" exercising independent discretionary authority within the administrative purview of the State Treasury. The Plan's express powers, plus its mission statement set forth in the legislative materials preceding passage of the SEED Act, demonstrate that the Plan was

created as one means of furthering the public purpose of enhancing higher education opportunities for Maine residents. The SEED Plan thus appears to be an "agency, authority, commission, board . . . or other instrumentality . . ." of the State for purposes of section 8102(4).

Young v. Greater Portland Transit District, 535 A.2d 417 (Me. 1987) supports this interpretation of section 8102(4). There, enabling legislation authorized the formation of a transit district as "a body politic and corporate." This designation was one factor in the Court's decision that the transit district was a "governmental entity" as defined in 14 MRSA section 8102(3) for purposes of the Maine Tort Claims Act.

In Taylor v. Herst, 537 A.2d 1163 (Me. 1988) the Law Court held that a physician employed by a municipal hospital should be deemed a state employee for purposes of the Maine Tort Claims Act when participating in the state-mandated involuntary commitment procedure. The decision turned on the Court's perception that the physician was carrying out the State's responsibilities of protecting the public and treating the mentally ill when the events which resulted in suit occurred.

In both Young and Herst the Court took a broad rather than narrow reading of the definitions establishing the classes of entities and individuals which are included within the scope of the Maine Tort Claims Act. If faced with the issue, I believe that the Court would rule that both the SEED Plan, its directors and officers are also protected by that Act.

The Tort Claims Act confers immunity upon the SEED Plan's directors and officers from personal civil liability arising from:

> A. Undertaking or failing to undertake any legislative or quasi-legislative act, including, but not limited to, the adoption or failure to adopt any statute, charter, ordinance, order, rule, policy, resolution or resolve;
>
> B. Undertaking or failing to undertake any judicial or quasi-judicial act, including, but not limited to, the granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial;
>
> C. Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid;
>
> D. Performing or failing to perform any prosecutorial function involving civil, criminal or administrative enforcement; or

E. Any intentional act or omission within the course and scope of employment; provided that such immunity shall not exist in any case in which an employee's actions are found to have been in bad faith.

The absolute immunity provided by this subsection shall be applicable whenever a discretionary act is reasonably encompassed by the duties of the governmental employee in question, regardless of whether the exercise of discretion is specifically authorized by statute, charter, ordinance, order, resolution, rule or resolve and shall be available to all governmental employees, including police officers and governmental employees involved in child welfare cases, who are required to exercise judgment or discretion in performing their official duties.

14 MRSA section 8111(1)

When we meet on July 21 I will discuss with you further the kinds of activity encompassed by these provisions, particularly in light of Darling v. Mental Health Institute, 535 A.2d 421 (Me. 1987).

The protection afforded by section 8111 does not apply to suits based on contract. However, I see little prospect of a litigant credibly arguing that SEED Board members are personally liable for the obligations of the SEED Plan. Title 20-A MRSA section 12604 clearly states that the contracts are made on behalf of the Plan and the State -- not the directors. As in my January 13 memo, I analogize this situation to that of a non-profit corporation. Title 13-B MRSA section 402(2) provides that the directors, officers, employees and members of the corporation shall not, as such, be liable on its obligations.

Some types of legal action against directors and officers are not barred by Maine law. Chief among these are any suits grounded in federal law alleging the deprivation of civil rights. Furthermore, the Maine Tort Claims Act does not bar suits based on any federal law. Thus if a person alleged the directors' personal liability for violations of any federal banking or securities statute in connection with the SEED Plan, such a suit might proceed on the merits.

In the absence of wrongdoing or bad faith, I cannot imagine the State refusing to defend and indemnify a member of a State Board who has been sued for damages arising out of his State service. Nonetheless, 20-A MRSA section 12611(12) explicitly permits the Board to:

Indemnify or procure insurance indemnifying any member of the board from personal loss or accountability from liability resulting from a member's action or inaction as a member of the board, including, but not limited to, liability asserted by a person on any bonds or notes of the board.

See also 20-A MRSA section 12611(8), which authorizes the Board to "procure insurance against any loss in connection with the plan's property, assets or activities." You will probably want to contact Tim Smith, Director of the Division of Risk Management, if the Board is interested in purchasing insurance.

Another approach might be to seek an amendment of the statute along the lines of 10 MRSA section 967-A (Supp. 1988). Section 967-A provides FAME members and employees with absolute immunity from all suits based on state law which arise out of their official duties. Indemnification is made mandatory, not optional.

IRS and SEC ruling requests. Title 20-A MRSA section 12613(2) requires the SEED Board, before entering into any advance tuition payment contracts, to solicit answers from the U.S. Internal Revenue Service to appropriate ruling requests, and bars the Board from entering into any contracts without making known the status of the requests. Title 20-A MRSA section 12613(3) similarly requires the Board, before entering into any contracts, to solicit answers from the U.S. Securities and Exchange Commission to appropriate ruling requests, and bars the Plan from entering into any contracts without making known the status of the requests.

As you know, on or about February 19, 1987 the State of Michigan submitted an IRS ruling request pursuant to the Michigan Education Trust Act, 390, 1421 et seq. (1988), the model for the SEED Act. It received a reply dated March 29, 1988.

You have asked whether the SEED Board may rely on the Michigan ruling as fulfillment of its obligations under section 12613(3), or whether it must (or should) submit its own request. You also asked if the Department of the Attorney General will prepare any necessary ruling requests.

IRS Revenue rulings are issued only to the taxpayer who requested them, are not of general applicability, and may not be relied upon by other taxpayers. See IRS Rev. Proc. 88-1. However, my office has compared the Maine and Michigan laws and reviewed the Michigan request (a full-blown legal brief) and the resulting ruling. We find no substantial difference between the two laws that lead us to believe that the IRS would rule any differently on a separate request from Maine. Nor are we aware of any argument to be made in addition to those already advanced by Michigan.

For purposes of section 12613(2), our advice is that the Board include in the contract documents a disclosure statement summarizing the Michigan ruling; stating counsel's belief that Maine advance tuition payment contracts would be similarly treated; stating that in light of this belief no independent IRS ruling on the Maine contracts has been requested; and advising prospective purchasers to consult with their own counsel for further information.

With respect to the SEC ruling request required by section 12613(3), I must reluctantly tell you that my office does not currently have on staff anyone with the very specialized expertise necessary to perform this task. This service will have to be contracted out pursuant to 20-A MRSA section 12621(5). If more formal approval from my office for the use of private counsel is necessary (see 5 MRSA section 191), I will see that it is provided.

Officers; by-laws. Title 20-A MRSA section 12610(4) provides that the Governor shall designate one of the SEED Board members as chairman. Section 12610(5) also refers to the president and vice-president of the Board. Section 12611(9) authorizes the Board to make and amend by-laws. You have asked what corporate formalities or other procedure must be followed to elect officers and adopt by-laws.

As I noted in my January 13 memo, the SEED Plan is not governed by the organizational framework set out in Titles 13-A and 13-B for business and nonprofit corporations respectively.

My recommendation is that the Board provide in its by-laws for the election of a president, vice-president and any other officers it feels are appropriate. Consistent with the rulemaking authorization contained in section 12611(16), I also recommend that the by-laws be adopted as state agency rules. See also 10 MRSA section 969-A(14) (Supp. 1987-88) (FAME by-laws to be adopted as state agency rules).

JF:lm

Attachment

ORL 4 F-120

STATE OF MAINE

Inter-Departmental Memorandum Date January 13, 1988

To Fred Douglas, Director
Higher Education Services

Dept. Educational & Cultural Services

From Jeffrey Frankel, Assistant

Dept. Attorney General

Subject Student Educational Enhancement Deposit Act, P.L. 1987, c.527.

By memo dated December 4, 1987 you sought advice as to what further acts, if any, were necessary to provide corporate protection to the Board of Directors of the Student Educational Enhancement Deposit Plan authorized by new 20-A MRSA section 12601, et seq. By memo dated October 26, 1987 you asked whether the SEED Board needed to "go through the State Contract Review Board and follow its procedures in letting contracts for goods and services."

<u>Corporate Status</u>

Title 20-A MRSA section 12603 reads as follows:

"1. Student Educational Enhancement Deposit Plan. There is created a public body corporate and politic to be known as the Student Educational Enhancement Deposit Plan. The plan shall be within the State Treasury, but shall exercise its prescribed statutory powers, duties and functions independently of the Treasurer of State.

2. Powers and duties. The powers and duties of the Student Educational Enhancement Deposit Plan are vested in and shall be exercised by a board of directors."

Section 12610 provides for appointment by the SEED Board members, presumably by the Governor. Section 12611 enumerates without limitation the powers of the Board.

The SEED Plan created by P.L. 1987, c.527 is a quasi-public corporation organized to perform limited governmental functions in a business setting. It is a semi-independent agency within the State Treasury authorized to engage in commercial activities for the public welfare as set forth in its legislative mandate. Perhaps the best known analogue in state government is the Finance Authority of Maine.

The creation of the SEED Plan as "a public body corporate and politic" establishes its dual status as a state agency and a

business entity. As a state agency, the SEED Plan and its directors are most likely covered by the protections from tort liability contained in the Maine Tort Claims Act, 14 MRSA section 8101, et seq. See the definition of "State" contained in 14 MRSA section 8102(4); cf. Fitzpatrick v. Greater Portland Public Development Commission, 495 A.2d 791 (Me. 1985). As directors of a corporate body, SEED Board members presumably enjoy the same immunity from personal liability for the debts or obligations of the SEED Plan as enjoyed by shareholders of a business corporation or members of a non-profit corporation.

The corporate status of the SEED Plan is self-implementing. Nothing need be filed with the Secretary of State. See 13-B MRSA section 102(4)(C), which excludes "[a]n instrumentality, agency, political subdivision or body politic and corporate of the State" from the definition of a nonprofit corporation.

Contracting Procedures

Title 20-A MRSA section 12611(5) authorizes the SEED Plan to:

> "Contract for goods and services and engage personnel as is necessary, and engage the services of private consultants, actuaries, managers, legal counsel and auditors for rendering professional, management and technical assistance and advice, payable out of any money of the plan;"

Title 5 MRSA sections 1811-1824 requires that all purchases of products and services by "the State Government or by any department or agency thereof" be made through the State Purchasing Agent. See, e.g., 5 MRSA section 1812. As you know, the hallmark of the state purchasing law is the requirement of competitive bidding contained in 5 MRSA section 1816. The Contract Review Committee assists the State Purchasing Agent in evaluating bids.

I believe that the SEED Plan is a department or agency of state government subject to the state purchasing law, even in the absence of any explicit reference to the state purchasing law in 20-A MRSA section 12611(5). Therefore, all contracts for goods and services made by the SEED Plan are subject to the competitive bidding requirement and must be approved by the Contract Review Committee.

JF:lm