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DEPARTMENT OF THE ATTORNEY GENERAL
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August 18, 1988

Rep. Omar P. Norton
Narrows Pond Road
Winthrop, ME 04364

Dear Representative Norton:

This will respond to your May 9 request regarding the legality of the new rules 1/ governing certification of educational personnel adopted by the State Board of Education on March 31. Your letter seeks advice on three issues. These are:

(1) Whether the new rules can legally require previously-certified teachers "to take three credits in special education";

(2) Whether the new rules can establish major and minor requirements of 36 and 18 credit hours for veteran teachers previously certified under prior law and rules that required only 30 and 12 credit hours for majors and minors; and

(3) Whether the new rules interfere with or jeopardize the Interstate Agreement on Qualifications of Educational Personnel ("Interstate Compact") which Maine has signed pursuant to 20-A M.R.S.A. section 13901 et seq. (1983 and Supp. 1987-88).

1/ The certification rules at issue consist of five chapters: Chapter 114, "Policy, Procedures and Standards for the Review and Approval of Educational Personnel Preparation Programs" (amendments only); Chapter 115, "Certification of Educational Personnel: Standards and Procedures"; Chapter 115-A, "Recertification of Educational Personnel"; Chapter 118-A, "Support Systems: Standards and Procedures for Operation"; and Chapter 119, "Adjudicatory Proceedings on Certification Issues". These rules were adopted by the State Board pursuant to 20-A M.R.S.A. Chapter 502 (sections 13011-13021) (Supp. 1987-88), entitled "Certification of Educational Personnel". The Department of Attorney General takes no position on the advisability of the new rules, but only answers your question as to whether the Board acted legally in carrying out the legislative mandate.

For the reasons which follow, it is the opinion of this Department that the additional educational requirements imposed by the rules are not illegal, are not unconstitutional and do not interfere with the ability of the State to comply with the Interstate Compact.

I
Exceptionality Requirement

Chapter 115-A deals with the recertification of existing teachers, educational specialists and administrators. Section 1.1 of that chapter provides:

1.1 Scope of Rule: Recertification

Title 20-A M.R.S.A., Chapter 502 requires that all certificates issued to educational personnel after June 30, 1988 be issued in accordance with new rules prescribing more comprehensive standards and procedures than certificates issued under the pre-existing law (Title 20-A, Chapter 501). This chapter establishes standards and procedures applicable to the holders of expiring certificates during the transition from the old certification law and rules to the new certification law and rules. This process of "recertification", as that term is used in 20-A M.R.S.A., sections 13018 and 13019-D, encompasses only the initial re-issuance under the new law of those certificates issued under the old law which expire on or after July 1, 1988.

Sections 2.5(d), 5.3, 6.2, 7.2 and 7.4(c) require teachers and other educators to document "three credit hours of approved study in teaching the exceptional student in the regular classroom." ^{2/} As described in Chapter 115, section 1.4(h), "approved study" can take the form of academic coursework, an in-service training program or an individual study program. Veteran teachers who cannot demonstrate three credits are not denied

^{2/} Chapter 115, section 1.4(pp) defines "teaching the exceptional child in the regular classroom" to be "approved study for administrators and regular education teachers emphasizing the education of exceptional students in regular public school programs with the addition of supportive assistance and/or the modification of teaching methods/materials. The content shall include the following topics: overview of applicable state and federal laws and regulations; eligibility for special education; characteristics of exceptional students; learning styles/instructional strategies; classroom management; parental involvement; classroom modification/accommodation; effective use of supportive assistance services."

recertification, but are obligated to fulfill this requirement during the initial 5-year term of the Chapter 502 certificate issued upon recertification. The consequence of not satisfying the exceptionality requirement during the initial 5-year term is non-renewal of the Chapter 502 certificate.

A. Legality of Exceptionality Requirement

In evaluating as a matter of substance the legality of the exceptionality requirement of Chapter 115-A, this office applies the same standard as would a reviewing court: "whether the rule exceeds the agency's rulemaking authority, or whether the rule is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 M.R.S.A. section 8058(1) (Supp. 1987-88). As long as agency rulemaking stays within these bounds, a reviewing court will not overturn the agency's implementation of its discretionary statutory authority.

The first question, therefore, in assessing the legality of the Board's exceptionality requirement is whether it "exceeds the agency's rulemaking authority". In this regard, the State Board's general rulemaking authorization for Chapter 502 of Title 20-A requires that body "to adopt rules . . . to carry out the purposes of this chapter under which the commissioner shall:

(A) Certify teachers and other professional personnel for service in a public school or in an approved private school.

. . . "

20-A M.R.S.A. section 13011(1).

Neither section 13011(1) nor the many other grants of rulemaking authority found in Chapter 502 differentiate between teachers first certified under Chapter 502 and veteran teachers who were previously certified under the prior law, 20-A M.R.S.A., Chapter 501 (sections 13001-13006) (1983 and Supp. 1987-88).^{3/}

Chapter 502 contains a fairly precise format for the issuance of provisional, professional and master certificates to teachers who first enter the profession as of July 1, 1988. Chapter 502 is less precise in dealing with teachers already certified under Chapter 501. Title 20-A M.R.S.A. section 13018, part of Chapter 502, provides:

Recertification of 5-year and 10-year teacher certificates.

Teachers, who hold certificates issued in accordance with chapter 501, shall continue to hold

³ Sections 13001 and 13002, the core of Chapter 501, were repealed simultaneously with the adoption of Chapter 502.

those certificates until their termination dates. All certificates issued after June 30, 1988, shall be issued in accordance with this chapter. Teachers who held 5-year or 10-year certificates prior to June 30, 1988, shall be considered to have held professional teacher certificates for the purpose of recertification under this chapter. 4/

This section deals with the transition, on a teacher-by-teacher basis, from the old law to the new. It contains, however, several conflicting elements. The thrust of its second sentence is that no certificate under Chapter 502 can be issued to a teacher whose Chapter 501 certificate has expired unless that teacher has met all the requirements for entry-level certification set forth in the Board's new rules. The third sentence nonetheless suggests that teachers who were regularly certified under Chapter 501 are to be recertified with 5-year professional certificates (see section 13013) under Chapter 502.

In its Basis Statement to Chapter 115-A of its rules, the State Board indicated that it considered three possible interpretations of section 13018: (1) that no existing teacher could be recertified unless he or she satisfied in toto the certificate and endorsement standards for new teachers promulgated by the State Board in Chapter 115, Part II of the new rules, (2) conversely, that all existing teachers would be automatically recertified under Chapter 502 as their Chapter 501 certificates expired, unaffected by the new certificate and endorsement standards, and (3) that existing teachers would be recertified at the professional level under Chapter 502 as their Chapter 501 certificates expired, subject to their meeting, over time, new requirements designed to assure that they, as veteran teachers, nonetheless satisfied the new educational requirements to teach their assigned courses.

The State Board opted for this third approach, which includes the imposition of the exceptionality requirement on veteran teachers. Neither the express provisions of Chapter 502 nor anything in its legislative history speak to the scope of the new law's applicability to previously-certified teachers. Nonetheless, the State Board concluded: "In the absence of any indication to the contrary, we do not believe that the Legislature intended to insulate existing teachers from the upgrading of credentials which constitutes the undeniable thrust of Chapter 502." (Chapter 115-A, Basis Statement, p. 24).

4/ Similar provisions governing recertification of administrators and other educational personnel (i.e., educational specialists) are found in 20-A M.R.S.A. sections 13019-D and 13019-E, respectively.

An administrative agency's interpretation of a statute, though not binding on a court, is entitled to "great deference" and is to be upheld unless the statute "plainly compels a contrary result." Lucas v. Maine Commission of Pharmacy, 472 A.2d 904, 907 (Me. 1984); see also Littlefield v. State Department of Human Services, 480 A.2d 731, 739 (Me. 1984); Bar Harbor Banking and Trust Co. v. Superintendent, Bureau of Consumer Protection, 471 A.2d 292, 296 (Me. 1984); Maine Human Rights Commission v. Local 1361, AFL-CIO, 383 A.2d 369, 378 (Me. 1978). In the view of this Department, the State Board's construction of the statute here is consistent with the language of 20-A M.R.S.A. sections 13013 and 13018 and hence warrants this judicial deference. 5/

Nor is the exceptionality requirement of Chapter 115-A an arbitrary or capricious exercise of the Department's rulemaking authority. The State Board's decision to re-examine the educational background of existing teachers upon expiration of their Chapter 501 certificates reflects a policy decision that the application of more rigorous professional requirements to new teachers alone could have at best only a very gradual influence on the overall caliber of teaching performance throughout the State. By contrast, the coupling of stiffer entry-level requirements for new teachers with increased standards of academic preparation for many veteran teachers can reasonably be expected to have a much greater impact on education in Maine. This is particularly significant in the field of special education. Federal and state law 6/ require that exceptional students be educated in regular classrooms to the maximum extent possible (state law) or appropriate (federal law). The exceptionality requirement provides some assurance that new and veteran classroom teachers will be able to meet the educational needs of these students. See Chapter 115, Part II, Basis Statement and Response to Comments, pp. 2, 5. Thus, since it has a rational basis, the exceptionality requirement cannot be characterized as arbitrary.

B. Constitutionality of Exceptionality Requirement

Finally, the application of the exceptionality requirement to veteran teachers is not unconstitutional. The issue here is whether the imposition of additional education requirements as a condition of the renewal of teaching certificates constitutes a

5/ Compare 20-A M.R.S.A. Chapter 502-A (sections 13031-13036), entitled "Qualifying Examinations for Initial Teachers" (Supp. 1987-88), where the Legislature clearly indicated its intent that only new teachers be required to pass an examination as a condition of certification.

6/ 20-A M.R.S.A. section 7201(2) (1983); 20 U.S.C. section 1412(5)(B) (1978); 34 C.F.R. section 300.550(b) (1987).

deprivation of property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution and Article I, section 6-A of the Maine Constitution.

In the case of Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) the Supreme Court discussed the fundamental considerations relevant to a determination of whether a property right in a governmental benefit exists:

. . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not arbitrarily be undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits

408 U.S. at 577

In applying these principles in the context of government licensing, the Supreme Court has made clear that the holder of such a license has a sufficient property interest in it to protect him from its deprivation in the absence of adequate procedural safeguards. Barry v. Barchi 443 U.S. 55, 65 (1979) (horse trainer license); Bell v. Burson, 402 U.S. 535 (1971) (driver's license). Less clear, however, is the extent to which a licensee holds any property interest in the renewal of that license. There, lower courts have held that a person who has complied with all necessary preconditions of license renewal holds a legitimate expectation, in the constitutional sense, that renewal will be forthcoming. See Trumbull Division, Owens-Corning Fiberglass Corp. v. City of Minneapolis, 445 F. Supp. 911 (D. Minn. 1978) (substantial long-term investment in asphalt plant to satisfy pollution control requirements created "natural assumption" that annual license would be renewed); cf. Leone v. Town of New Shoreham, 534 A.2d 871 (R.I. 1987) (long-term investment in moped rental business created property interest in license renewal). However, there does not appear to be any precedent suggesting that once it initially issues a license, the government is forever barred from altering the terms upon which renewal may be granted.

To the contrary, in the area of teacher recertification, at least two state courts of last resort have held that the imposition of additional educational requirements for teaching certificate renewal was not unconstitutional. In State v.

Project Principle, Inc., 724 S.W.2d 387, 390 (Tex. 1987), the court upheld a provision of Texas' education reform act which required in effect that practicing teachers successfully take a competency exam within the following three years. To similar effect is Guthrie v. Taylor, 185 S.E.2d 193 (N.C. 1971), cert. denied 406 U.S. 920 (1972). There the court ruled that the State Board of Education did not deprive a certified teacher of due process of law by adopting a rule which limited the term of existing certificates to five years, required earning of six credit hours within the preceding five years for certificate renewal, and imposed a salary penalty of \$20 per school month on any teacher teaching under an expired certificate.

In other contexts, also, courts have held that additional licensing or continuing education requirements did not impair the property interests or otherwise violate the rights of the holder. Brown v. McGarr, 774 F.2d 777 (7th Cir. 1985) (restriction of trial practice to licensed attorneys who by experience or continuing education qualify for certification as trial attorneys); Verner v. State of Colorado, 716 F.2d 1352 (10th Cir. 1983), cert. denied 466 U.S. 960 (1984) (continuing education requirement for attorneys sustained); Baranan v. State Board of Nursing Home Administrators, 239 S.E.2d 533 (Ga. Ct. App. 1977) (continuing education requirement for renewal of nursing home administrators sustained); R.W. Wineblad, P.A. v. Department of Registration and Education, 515 N.E.2d 705 (Ill. App. Ct. 1987) (new requirement that physician's assistants licensed upon inauguration of licensing program the previous year also obtain national certification within next two years in order to maintain license); see Kennedy v. Hughes, 596 F.Supp. 1487 (D.Del. 1984) (tattoo parlor which procured requisite business license from town was not denied due process of law by subsequent enactment of ordinance requiring presence of physician or osteopath during tattooing). cf. Sullivan v. Carignan, 733 F.2d 8 (1st Cir. 1984) (Maine State Board of Accountancy did not deny procedural due process of law in connection with refusal to renew accountant's license due to his failure to comply with continuing education requirement). Nor does the holder of an expired license have any property interest in the requirements for reinstatement of that license. Like renewal requirements for existing licenses, reinstatement requirements may be amended and given retroactive application, all as the public interest may require. Graham v. New Jersey Real Estate Commission, 524 A.2d 1321 (N.J. App. Div. 1987).

However, although the imposition of continuing education requirements has been consistently sustained, the Supreme Court has made clear that due process requires that a licensee have an adequate opportunity to meet any additional requirements prescribed for renewal of a license. In Harrah Independent School District v. Martin, 440 U.S. 194 (1979) a local contract required teachers to earn five credits of continuing education every three years. The sole penalty contained in the contract for violation of this provision was forfeiture of periodic pay

raises. Teacher Martin for many years refused to take the required coursework and forfeited the pay raises without protest. When the state Legislature barred differential payment, the District consequently gave Martin seven months notice that unless she accumulated the necessary credits within the next seven months,^{7/} her contract would not be renewed due to willful neglect of duty. The Supreme Court ultimately affirmed the ensuing non-renewal of Martin's contract. One key factor in its decision was the fact that the District applied the sanction of nonrenewal "prospectively so that those who might have relied on its past practice would nonetheless have an opportunity to bring themselves into compliance with the terms of the contracts." Id. at 199.

Applying these principles to the rule in question, it is clear that Chapter 115 withstands constitutional scrutiny. As noted above, a veteran teacher need not satisfy the exceptionality requirement until five years after that teacher's Chapter 501 certificate expires. Under Chapter 501 and its implementing rules, plenary certificates were issued for periods of 5 or 10 years. Thus, a teacher whose Chapter 501 certificate was issued in 1983 and expires in 1988 has until 1993 to earn three credits in exceptionality training. At the other extreme, a teacher whose Chapter 501 certificate was issued in 1987 and expires in 1997 has until 2002 to earn three credits in exceptionality training. If the State Board on March 31, 1988 had adopted a rule refusing as of July 1, 1988 to re-license teachers for failure to meet a new certification requirement which they could not have anticipated and which many of them could not immediately meet, teachers might in that circumstance have had a valid due process claim. But unlike this hypothetical scenario, the situation at issue falls within Harrah Independent School District rather than outside it. Chapter 115-A institutes the three-credit exceptionality requirement on a prospective basis only, and affords currently certified teachers anywhere from five to fourteen years to earn those credits. Whatever property interests holders of Chapter 501 certificates possess with respect to renewal or recertification of those certificates are not unconstitutionally impinged by this timetable. And, of course, the Legislature was not constitutionally prohibited from requiring, or allowing the State Board to require, upgraded credentials from practicing teachers as a quid pro quo for re-licensure.

^{7/} See the opinion below, Martin v. Harrah Independent School District, 579 F.2d 1192 (10th Cir. 1978).

II
Requirement of Increased Credit Hours
for Majors and Minors

Your second inquiry states in full:

Secondly, teachers meeting past certification requirements had subject majors and minors of 30 and 12 credit hours respectively. I question whether the newly adopted provisions involving endorsements can now establish majors and minors of 36 and 18 credit hours for these veteran professionals. It seems to me we should honor the standards over the years and not subject our previously certified personnel to the new requirements.

In answer to this question, it should first be noted that, in assuming that the 36 hour major must be met by all veteran teachers, your inquiry does not accurately summarize the effect of the new major requirement on veteran teachers. Chapter 115, Part II includes, among other things, requirements for the various subject-area endorsements (e.g., mathematics, social studies) to the secondary teaching certificate. As a general matter, persons who have not graduated from an approved teaching program in that subject area must demonstrate a major of 36 hours in that field to be eligible for that endorsement. The endorsement requirements contained in Chapter 115, Part II, including the 36 hour major, apply primarily to teachers first certified under Chapter 502-- that is, teachers entering the profession on or after July 1, 1988. See Chapter 115, Part I, sections 8.2 and 8.3. They do not apply to veteran teachers. 8/

The only situation in which a veteran teacher is subject to the 36 hour major arises if he or she applies for a transitional endorsement in a year subsequent to the veteran teacher's year of recertification. See Chapter 115, Part I, section 11. The transitional endorsement permits a teacher to teach a subject for which he or she lacks academic preparation under a timetable requiring the teacher to earn the necessary credits over a five-year period. In no other situation must a veteran teacher demonstrate a 36 hour major. 9/

8/ We were unable to find any reference to a 12 hour minor in the former rules. The standards for the (former) Chapter 501 secondary certificate do, however, speak to an 18 hour minor. The only Chapter 502 endorsements which incorporate a minor requirement are science-life, science-physical and foreign language. The minor in these three endorsements also consists of 18 hours.

9/ Pursuant to Chapter 115-A, section 2.2, holders of Chapter 501 elementary teacher certificates are eligible for

For the reasons discussed in response to your first inquiry, the State Board's rules are not unlawful in requiring veteran teachers to obtain 36 hours in connection with the transitional endorsement. This judgment lies within the State Board's expertise and delegated authority to make, and does not constitute an unconstitutional burden on the teacher's certificate.

(Footnote 9 cont'd) recertification under Chapter 502 as professional teachers with an elementary endorsement. These teachers need not satisfy the 36 hour major requirement of the new endorsements.

Holders of Chapter 501 secondary teacher certificates are eligible for recertification under Chapter 502 as professional teachers under Chapter 502 with secondary endorsements corresponding to their major and minor areas of undergraduate study. (The 18 hour minor may consist of up to 6 hours of approved study other than coursework. See Chapter 115-A, section 2.2(d).) These teachers need not satisfy the 36 hour major requirement of the new endorsements.

If the holder of a Chapter 501 secondary certificate wishes to be recertified to teach a subject outside his or her major or minor, the teacher may apply for a transitional endorsement pursuant to Chapter 115-A, section 2.3 at time of recertification. In contrast to transitional endorsements applied for subsequent to recertification, the recertifying teacher can teach the new subject under a timetable requiring only 18 hours of approved study in that area (only 12 hours of which must consist of coursework) over a period not to exceed five years. See Chapter 115-A, section 2.3(b). Thus, teachers applying for a transitional endorsement at time of recertification need not satisfy the 36 hour major requirement of the new endorsements.

The 18 hour standard for issuance of endorsements and transitional endorsements at time of recertification was chosen in large part in recognition of the experience of veteran teachers. See Chapter 115-A, pp. 24-25 (Basis Statement). The thrust of the 18 hour requirement is that upon recertification a veteran teacher will need to show or begin acquiring 18 hours in order to begin or continue teaching a subject for which he or she does not have formal academic preparation.

III
Effect on Interstate Compact

Your third inquiry asks if the certification rules are inconsistent with the Interstate Compact.

The State Board considered this issue in the Basis Statement to Chapter 115:

One commenter inquired as to the impact of the new endorsement package on out-of-state teachers applying for Maine certification.

The endorsements themselves will not substantially affect the certification of out-of-state teachers under the Interstate Compact. Among signatories to the compact, the receiving state must issue an entry-level certificate to a teacher certified in the sending state who has taught at least 27 months during the 7 years preceding application. At least 18 months of this required experience must be under the certificate applied for. Under Chapter 501, Maine was bound to issue such teachers a 5-year certificate in the gradespan or subject taught. Under Chapter 502, Maine is bound to issue such teachers a 2-year certificate with the endorsement that corresponds to the gradespan and subject taught. The applicant need not satisfy the specific criteria for issuance set out in sections II and III of the endorsement.

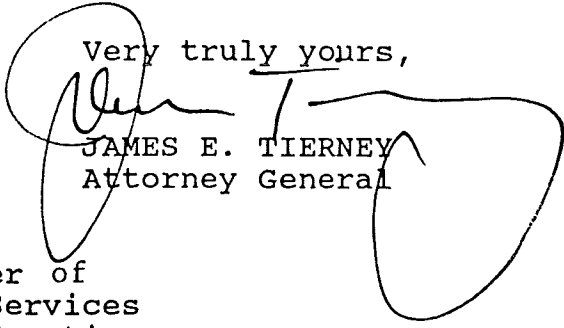
In Chapter 502 the Legislature did liberalize this practice. Title 20-A MRSA section 13017 permits the Commissioner, upon recommendation of the local support system, to issue a 5-year certificate to teachers coming in under the Interstate Compact at time of application, or at any time prior to expiration of the 2-year certificate. Out-of-state teachers applying for Maine certification are, however, subject to the same rules regarding qualifying examinations (sections 2.4 and 10.2) that apply to all other teachers not previously certified in this State.

Chapter 115, Part I, pp. 55-56 (Basis Statement)
(emphasis in original).

This analysis is correct. The new rules are not inconsistent with the Interstate Compact.

If you have any additional questions concerning teacher certification, please feel free to contact me.

Very truly yours,



JAMES E. TIERNEY
Attorney General

cc: Eve M. Bither, Commissioner of
Educational and Cultural Services
Members, State Board of Education