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March 30, 2005

Representative Barbara E. Merrill
Maine House of Representatives
122nd Maine Legislature
2 State House Station
Augusta, ME 04333-0002

Dear Representative Merrill:

In correspondence dated March 7, 2005, you asked me to address a series of questions regarding L.D. 1, now P.L. 2005, c. 2 (hereafter "Chapter 2") and the interplay of that bill with the school funding initiative approved by voters in June, 2004 (IB 2003, c.2; hereafter, "the Initiative"). As a general matter, your questions concern the power of the Legislature to amend the terms of an initiated measure that has been approved by the voters. The Legislature does possess this power as a matter of law, because the Legislature's constitutional authority to amend or repeal existing law applies equally to initiatives. Moreover, where an initiative makes no provision for raising the revenue required for its implementation, Maine's Constitution delays the initiative's operative date until 45 days after the Legislature has next convened, thus expressly recognizing a role for the Legislature. In this instance, the Initiative left the Legislature with the responsibility of determining how to fund an increase in state aid to education within existing budget constraints. The Legislature's resolution of this funding issue, as embodied in Chapter 2, reflects a lawful exercise of its constitutional authority to enact laws and make appropriations.

I. Background

The legislative history recounted in your letter agrees with my understanding of events. Briefly restated, in June of 2004 the voters approved a citizen initiative pursuant to Me. Const. art. IV, pt. 3, § 18. The Initiative provided that the State should pay 55% of the cost of public ucation, and 100% of special education costs. [1] Because the Initiative contained unfunded financial obligations, it did not become operative until January, 14, 2005.[2]

[1] The Initiative allocated these requirements to 20-A M.R.S.A. §§ 15682 and 15683. The Revisor has noted a conflict with P.L. 2003, c. 504, Part A, § 6, which enacted different language as §§ 15682-15683. The pertinent text of § 15682 (as enacted by the Initiative) reads:

After the operative date of the Initiative, the Legislature passed *An Act to Increase the State Share of Education Costs, Reduce Property Taxes and Reduce Government Spending at All Levels*, P.L. 2005, c. 2 (Chapter 2). Signed by the Governor on January 21, 2005, Chapter 2 is a comprehensive law that attempts to address and harmonize education laws relating to finance, programs and services. It contains state-share funding provisions different from those established by the Initiative, in that Chapter 2 contemplates a phase-in period spanning five years before the 55% goal is reached. Because Chapter 2 was not enacted as an emergency measure it will not become effective until 90 days after the Legislature adjourns. It is important to note, however, that once effective, Chapter 2 will retroactively *apply* to school budgets passed for the fiscal year beginning July 1, 2005.[3]

II. Questions[4]

Question 1: Article IV of the Maine Constitution reserves for the people the right to enact into law initiatives which the Legislature has rejected. When the people enact such a law, as they did in the present case, does the Legislature have the power to repeal the law before it is ever implemented?

The short answer to this question is yes; the Legislature does have the power to repeal or amend an initiated law, and may do so either expressly or by implication. *Farris ex rel. Dorsky v. Goss,* 143 Me. 227, 60 A.2d 908(1948); *Opinion of the Justices,* 673 A.2d 693, 695 (Me. 1996), citing to *Manigault v. Springs,* 199 U.S. 473 (1905) and other cases; Op. Me. Att'y Gen. (April 26, 1976). Your letter is correct in pointing out that Article IV reserves for the people the right to initiate legislation and to nullify, by way of a "people's veto" laws they do not approve of. At the same time, there is nothing in Maine's Constitution that forbids the people's elected representatives, when gathered in legislative session, from reconsidering, amending, or repealing initiated laws.

"Notwithstanding any other provision of law, the Legislature each year shall provide at least 55% of the cost of the total allocation for kindergarten to grade 12 education from General Fund revenue sources." The pertinent text of § 15683 reads: "Notwithstanding any other provision of law, the Legislature shall provide 100% of the state and local cost of providing all special education services mandated under federal or state law, rule or regulation."

[2] Me.Const. art. IV, pt. 3, Sec. 19 (when initiative entails expenditure in excess of available and unappropriated state funds, measure will remain inoperative until 45 days after convening of next regular legislative session).

[3] P.L. 2005, ch. 2, § D-72: "This Part applies to school budgets passed for the fiscal year beginning July 1, 2005 and thereafter." *See also* § D-73: "This Part applies retroactively to July 1, 2005."

[4] Your letter posed six questions, but omitted a "5." Your numbers 6 and 7 appears here as questions 5 and 6.

This is so because, while citizen-initiated laws take a different route towards adoption and are subject to different enactment procedures from those followed by the Legislature, at the end of the day, initiated laws are like any other. Maine's Law Court has described this principle as follows: "This [initiated] bill, if enacted, will be on equal footing with every other law passed by the Legislature. Subsequent sessions of the Legislature may choose to follow it, or they may choose to repeal it, either expressly or by implication." This principle is also reflected in an earlier Attorney General Opinion, which states the same idea as follows:

> Once referendum legislation becomes law, it must be regarded as having the same posture as any other law. That is, the Legislature in a subsequent action or the electorate in a subsequent referendum may amend or repeal it.

Op. Me. Att'y Gen. (April 26, 1976), p.8. *See also* 33 A.L.R. 1118, 1121.

The authority of the Legislature to amend laws, including initiated laws, rests further upon the well-settled principle that neither acts of the Legislature nor initiated legislation can bind the lawmaking powers of future State Legislatures, including the future power to amend. *Opinion of the Justices,* 673 A.2d 693, 695 (Me. 1996). Such powers are entirely in keeping with the Legislature's plenary power under the Maine Constitution to establish reasonable laws and regulations, Article IV, pt. 3, § 1, so long as such acts are not repugnant to the constitution.[5]

Question 2: Are the provisions of law enacted by the people in June 2004 still in effect, or is current law nullified even before the new law becomes effective?

The effective date of any non-emergency enactment of the Legislature is ninety days after the recess of the legislative session in which it was enacted.[6] Thus, any provision of current law, including the Initiative, is not nullified before the effective date of any new law that amends or repeals it. In the present case, assuming that the Legislature does not repeal or amend Chapter 2 before the end of this session (which it clearly has the power to do), and further assuming that the voters do not exercise the post-recess 90 day "people's veto" under Article IV, pt. 3, § 17 (which they clearly have the power to do), then Chapter 2 will take effect 90 days after the end of this legislative session and will then replace the terms of the Initiative, with retroactive application to July 1, 2005. Until the effective date of Chapter 2, the Initiative will remain in effect.

However, it is important to note that "current law" regarding educational funding includes not only the presently-effective School Finance Act of 1995, 20-A M.R.S.A. § 15651 *et. seq.*, and the Initiative, but also the budget appropriations approved by the Legislature to fund education. The power to appropriate and deappropriate funds is, of course, a core legislative function, *Op. Me. Att'y Gen.* 95-6 at p. 4, and financial appropriations and allocations of the

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[5] *SC Testing Technology, Inc. v. Department of Environmental Protection,* 684 A.2d 421 (Me. 1996); *League of Women Voters v. Secretary of State,* 683 A.2d 769 (Me. 1996); *Opinion of the Justices,* 623 A.2d 1258 (Me. 1983).

[6] Me. Const. art. IV, pt. 3, § 16.

Legislature are themselves laws. Consequently, if, through the budget process, the Legislature funds education at a level different from statutory targets, such a decision falls within the Legislature's power to amend those targets, regardless of whether they were established by the Legislature or by the citizens through the initiative process.

Question 3: Does the fact that the Legislature has passed a different law even though it is not yet in effect excuse the Legislature from adhering to current law and not funding education at 55%? If the answer to the question is yes, how far does this license extend?

If I understand this question correctly, I believe you are essentially asking whether or not the Initiative requires the Legislature to fund education at 55% immediately; and, at a minimum, to continue funding education at 55% from January 14, 2005 (the Initiative's operative date) until Chapter 2 becomes effective. The answer to this question is closely related to my answers to Questions 1 and 2 above.

First, nothing in the language of the Initiative suggests that it was intended to require an increase in state funding in the middle of the school year or fiscal year. The language of the Initiative on its face indicates that allocations would be made *from year to* year, not for portions of years, or retroactively. "Notwithstanding any other provision of law, the Legislature *each year* shall provide at least 55% of the cost of the total allocation for kindergarten to grade 12 education from General Fund revenue sources."[7] The Initiative also provides: "For the purpose of this chapter, and until such time as the Legislature may implement an alternative school funding system, 'total allocation' means the foundation allocation *for a year*, the debt service allocation *for that year*, the sum of all adjustments *for that year*, and the total of the additional local appropriations *for the prior year*". (emphasis added). For the purposes of establishing appropriations for special education, the Initiative requires the Commissioner to provide a recommendation based upon total costs for the school year *concluding on the previous June 30th*. In summary, the language of the Initiative itself is inconsistent with an interpretation that it should be applied to require an increase in funding midway through the school year.[8]

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[7] 20-A M.R.S.A. § 15682, as enacted by the Initiative (*see* fn.1).

[8] It is also worth noting that the Initiative as written contemplated that funding for the delivery of efficient services would commence for the months *beginning on or after July 1, 2004* (the start of the 2004-2005 fiscal year). That date had passed by the time the Initiative became operative in January, 2005, perhaps because the drafters did not anticipate that a second vote of the people would be necessary before it was approved. The reference to July 2004 suggests that the Initiative was intended to apply to the school year (and fiscal year of the State) beginning the July after its approval by the voters. The language is also consistent with past practice, where the year-to-year appropriations coincide with the State's fiscal year. This is also in keeping with all recent iterations of the School Finance Act. *See, e.g.* P.L. 2003 c. 504, 20-A M.R.S.A. §§ 15670 *et. seq.*, "Chapter 606-B, Essential Programs and Services," (allocations identified from fiscal year to fiscal year); *See also,* P.L. 2003 c. 11 (local cost of education mill rate determined from fiscal year to fiscal year).

Even if the Initiative expressly required immediate state funding of education at the 55% level, the Legislature has the power to change that requirement by enacting a statute or budget provision. The Maine Constitution clearly rests power of appropriation in the Legislature. *See* Me. Const. art. IV, pt. 3, § 1, and art. V, pt. 3, § 4. While the citizens do have the valued right to initiate laws, the Constitution specifically recognizes the Legislature's power over appropriations with respect to initiatives. Specifically, Article IV, pt. 3, §19 precludes initiatives that entail expenditures (unless the measure provides revenues to cover those expenditures) from becoming operative until 45 days after the convening of the next legislative session. This provision allows the Legislature time to consider the potential budgetary impact of any initiative, budget accordingly, or amend it as it deems necessary.

Consequently, if, through the budget process, the Legislature funds education at a level different from statutory goals, such a decision is a lawful exercise of the Legislature's appropriation power. In this instance (as noted earlier), at least for the time period extending from January 14, 2005 (the Initiative's operative date) to June 30, 2005 (the end of this Fiscal Year), by enacting the emergency supplemental budget the Legislature has determined that education funding shall not be increased to the levels prescribed by the Initiative.

Overall funding for education for the current fiscal year was established by the biennial budget enacted by 121st Legislature. In enacting the supplemental budget,[9] the 122nd Legislature chose not to provide the additional appropriations required to fund education at the level called for by the Initiative. As a result, the 122nd Legislature has implicitly re-affirmed the education funding that is found in the biennial budget enacted by the 121st, which is current law notwithstanding the provisions of the Initiative. To the extent that education allocations for the approaching fiscal biennium may differ from the targets of the Initiative, or from any education laws that are scheduled to go into effect on July 1, 2005, any such decision falls within the Legislature's power to amend those targets.

Question 4: If L.D. 1 is currently not in effect, and will possibly not go into effect before some if not all schools adopt their budgets, how should the school districts proceed, and what problems might this confusion cause with regard to actions necessary to operate our schools, such as raising money and selling bonds, or meeting other requirements such as the obligation of a school district to receive the approval of the voters if the district's costs exceed those defined as necessary under the Essential Programs and Services Program?

This question appears to raise practical concerns, rather than questions of law that are the appropriate subject of an opinion.[10] School districts should consult with their counsel and with

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[9] *See* L.D. 508 (Emergency), *An Act to Make Supplemental Appropriations and Allocations for Expenditures of State Government and to Change Certain Provisions of Law Necessary to the Proper Operation of State Government for the Fiscal Year ending June 30, 2005*, enacted as P.L. 2005, c. 3 (eff. March 11, 2005).

[10] 5 M.R.S.A. §195 directs that the Attorney General "shall give his written opinion upon questions of law submitted to him by the Governor, by the head of any state department or any of

local officials concerning the implementation of Chapter 2. In the absence of further amendment of Chapter 2 during this legislative session, it seems reasonable to assume that Chapter 2 will, in fact, go into effect as currently scheduled. Therefore, it seems prudent for the school districts to begin building their budgets on the assumption that Chapter 2 will become effective retroactive to July 1, 2005. In the case of any school district that chooses to implement a budget that anticipates the 55% share contained in the Initiative notwithstanding the pendancy of Chapter 2, that district will need to evaluate the impact and timing of any potential shortfall as the school year progresses, and consult with its attorneys about possible legal consequences.

An observation of perhaps equal importance, however, is that regardless of the annual funding targets contemplated in Chapter 2 or any other law, funding for schools must be established within the limits of available State resources. As noted earlier, the State budget for any biennium is a law in and of itself which, to the extent it differs from the provisions of other laws, effectively amends those laws. Thus, any budget statute that funds education at a level lower than 55% (the Initiative's goal) or lower than 52.6% (the target set forth in 606-B, 20-A M.R.S.A. §15671 (7)(B)), will have amended those laws.

Question 5: If the Legislature passes an emergency budget with a two thirds vote then it can set aside current law, but failing that, if the Legislature passes a budget which fails to meet the requirements of a law in effect at the time the budget is passed would you advise the Governor that signing such a budget would be consistent with his oath to uphold and defend the Constitution and laws of the State of Maine? If such a budget passed what would your office do to uphold the laws and the Constitution of Maine?

The Governor would be free to request an opinion on this matter pursuant to 5 M.R.S.A. § 195, as you have done in this case. Absent some material revision in the present state of Maine law on these topics, I would anticipate providing an opinion consistent with this one.

Regarding your second question, for the reasons discussed above, the Legislature is violating neither the statutes nor the Maine Constitution by amending the terms of the Initiative, either directly through enactment of Chapter 2 or indirectly through enactment of a budget that does not immediately meet the Initiative's funding targets. The duties of my office and the limits of my powers are set out in 5 M.R.S.A. § 191. In the event of a challenge, my obligation and duty is to defend statutes enacted by the Legislature. Moreover, acts of the Legislature carry a heavy presumption of constitutionality. *See, e.g., League of Women Voters et .al v. Secretary of State, et. al.* 683 A.2d 769 (Me. 1996); *Spare-Time Recreation v. State,* 666 A.2d 81 (Me., 1995); *Maine Milk Producers, Inc. v. Commissioner of Agric.,* 483 A.2d 1213, 1218 (Me. 1984).

Question 6: Because the law in question was enacted by the people in a free election, what remedy does a member of the voting public have to insist that the bill passed in exercise of their constitutional right be enforced?

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the state agencies or by either branch of the Legislature or any members of the Legislature on legislative matters."

In many respects, this question invites the same analysis as contained in my responses to Questions 1, 2 and 3 above. Because citizen-initiated laws and legislative enactments are co-equal, the Legislature can amend initiatives, and the citizens can amend acts of the Legislature. The "people's veto" provided under Art. IV, pt. 3, § 17 is a powerful tool, and may be freely exercised by the voters. Citizens seeking to challenge the constitutional validity of acts of the Legislature are also free to petition the courts for redress.

I hope these answers are helpful to you. If you have any further questions, please feel free to contact me.

Sincerely,

G. Steven Rowe
Attorney General

GSR:djp