

MAINE STATE LEGISLATURE

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February 14, 2008

Honorable Richard M. Sykes
House of Representatives
2 State House Station
Augusta, Maine 04333-0002

RE: Student Voting

Dear Representative Sykes:

You have requested a legal opinion of this office regarding a bill (L.D. 203), rejected by the First Regular Session of the 123rd Legislature, that would have prohibited college students from claiming residency in Maine for voting purposes if the students were living in housing owned by the college or university and did not reside in that municipality prior to attending the college or university. In particular, you have suggested that L.D. 203 was designed to implement Article II, section 1 of the Maine Constitution and that voting against it would seem to violate a legislator's oath to support the Constitution. Based on the court cases discussed below, it is our opinion that the provisions of L.D. 203 are not required by Article II, section 1 of the Maine Constitution. Moreover, L.D. 203, if enacted, might very well be found by a court to violate the Equal Protection Clauses in Article I, section 6-A of the Maine Constitution and the Fourteenth Amendment of the United States Constitution.¹

Article II, section 1 of Maine's Constitution provides in relevant part (emphasis added):

Section 1. Qualifications of electors; written ballot; military servicemen; students.

Every citizen of the United States of the age of 18 years and upwards, ... having his or her residence established in this State, shall be an elector for Governor, Senators and Representatives, in the city, town or plantation where his or her residence has been established, if he or she continues to reside in this State; ... But persons in the military, naval or marine service of the United States, or this State, shall not be considered as having obtained such established residence by being stationed in any garrison, barrack or military place, in any city, town or plantation; *nor shall the residence of a student at any seminary of learning entitle*

¹ While your specific question concerns the actions of legislators voting against L.D. 203 and the terms of their oath of office, it is our practice to focus on the legal issue presented by the terms of a bill in issuing an opinion.

the student to the right of suffrage in the city, town or plantation where such seminary is established. No person, however, shall be deemed to have lost residence by reason of the person's absence from the state in the military service of the United States, or of this State.

This provision does not say that no student may establish a voting residence in the municipality where they attend an educational institution. The word "entitle" in this context simply means that residing in a municipality to attend college or university does not automatically establish that location as the student's voting residence.

Maine's highest court articulated this interpretation of Article II, section 1 in *Sanders v. Getchell*, 76 Me. 158, 165 (1884), stating in pertinent part:

It is clear enough that residing in a place merely as a student does not confer the franchise. *Still a student may obtain a voting residence, if other conditions exist sufficient to create it.* Bodily presence in a place coupled with an intention to make such a place a home will establish a domicile or residence. But the intention to remain only so long as a student, or only because a student, is not sufficient ... He [the student] gets no residence because a student, but *being a student does not prevent his getting a residence otherwise...*

Each case must depend largely upon its peculiar facts.

(Emphasis added).

In 1972, in response to a lawsuit contesting the Town of Gorham Board of Registration's refusal to allow students at the University of Maine's Gorham campus to register to vote, Attorney General James Erwin issued an opinion concluding:

In essence, the Court in the *Sanders* case has said that the fact of being a student is a *neutral factor*; that a student gains nothing nor loses anything with respect to his voting residence from the fact of being a student. Consequently, under Maine law, local Registrars and Boards of Registration should not place students in any better nor in any worse position than non-students when making a determination as to whether a voting residence has been established.

This opinion was provided to Secretary of State Joseph T. Edgar, who was a named defendant in the lawsuit that had been filed in the United States District Court. *Conti v. Board of Registration of the Town of Gorham*, Civil Docket No. 12-167.² It was issued pursuant to the terms of a stipulation, entered into by the parties and approved by the court, which also called for Secretary Edgar to distribute the Attorney General's opinion to all registrars in the State. On the basis of the stipulation and upon distribution of this opinion, the lawsuit was dismissed. We are not aware of any other judicial decisions in Maine interpreting the provisions on student voting in Article II, section 1.

² A copy of this opinion is attached hereto since it does not appear in the published opinions and is not available on LEXIS or Westlaw.

Thus, consistent with the courts' interpretation of the Maine Constitution, a student attending college or university in Maine may establish a voting residence in Maine by the same means as any other citizen of the United States, who is age eighteen or older. By statute, a voting residence is defined as "that place where the person has established a fixed and principal home to which the person, whenever temporarily absent, intends to return." 21-A M.R.S.A. § 112(1) (Supp. 2007). This definition of voting residence has been held to be equivalent to domicile, which means living in a locality with the intent to make it a fixed and principal home. *Poirier v. City of Saco*, 529 A.2d 329, 330, n.2 (Me. 1987) (citations omitted). Determining whether a particular individual, including a student, has established a voting residence in a particular municipality requires the registrar to evaluate a number of factors listed in statute, including the individual's statement of intent.³ As the Secretary of State made clear in guidance issued in 1974, a voter registration applicant is not required to declare an intention to "remain forever" as a permanent resident of the community in order to be eligible. "All that is required is the applicant's residency within the community plus the present intention to claim that community as the applicant's sole residence." Office of the Secretary of State, Guidelines for Voter Registration (copy attached hereto).⁴

We believe this guidance is consistent with Article II, section 1 of the Maine Constitution. It is also consistent with the holdings of most courts that have addressed issues of student residency for voting purposes. It is not permissible for registrars to subject student applicants to a different substantive standard than is generally applied to other categories of voter registration applicants. *See Williams v. Salerno*, 792 F.2d 323, 328 (2nd Cir. 1986). Determining residency for voting purposes requires examining the facts and circumstances and intentions of each voter, and such determinations cannot be based entirely on presumptions.⁵ Thus, in *Symm*

³ 21-A M.R.S.A. § 112 (1)(A) lists a number of factors that may be offered by an individual registering to vote and considered by the registrar in determining a person's voting residence. In addition to the direct statement of intention by the person, these include:

- the location of any dwelling currently occupied by the person;
- the place where any motor vehicle owned by the person is registered;
- the residence address, not a post office box, shown on a current income tax return;
- the residence address, other than a post office box, at which the person's mail is received;
- the residence address, other than a post office box, shown on any current resident hunting or fishing licenses held by the person;
- the residence address, other than a post office box, shown on any motor vehicle operator's license held by the person;
- the receipt of any public benefit conditioned upon residency, defined substantially as provided in this subsection; *or*
- any other objective facts tending to indicate a person's place of residence.

⁴ The written guidance currently provided by the Office of the Secretary of State notes that "when registering students, the registrar must make the determination of residency as he or she would for any potential voter." *See*, <http://www.maine.gov/soc/cec/elec/resident.htm>.

⁵ *See, e.g., Williams*, 792 F.2d at 328 (irrebuttable presumption that dormitory cannot be voter residence held unconstitutional); *Whatley v. Clark*, 482 F.2d 1230, 1235 (5th Cir. 1973) (striking down statutory presumption of non-residency for college students), *cert. denied sub nom., White v. Whatley*, 415 U.S. 934 (1974); *Levy v. Scranton*, 780 F. Supp. 897, 903 (N.D.N.Y. 1991) (presumption that on-campus

v. *United States*, the United States Supreme Court summarily affirmed the judgment of a three-judge panel of the District Court which held that a county voting registrar's practice of using a special questionnaire for students and refusing to register college dormitory residents unless they established their intention to remain in the community after graduation violated the federal Constitution. 439 U.S. 1105 (1979), *aff'g by a divided court, United States v. Texas*, 445 F.Supp. 1245 (S.D. Tex. 1978). Indeed, courts generally have rejected states' attempts to require proof of intent to remain permanently in the municipality where the student wants to register.⁶

There exist in Maine currently, as you point out in your letter, different definitions of residency for different purposes, such as to qualify for in-state tuition in the University of Maine System, or to obtain a resident hunting or fishing license. There is no constitutional requirement that definitions of residency be the same for all purposes, however. The state's interests may be different in different contexts. The University's guidelines provide that if the student is enrolled full-time in an academic program as defined by the University, "it will be presumed that the student is in Maine for educational purposes and that the student is not in Maine to establish a domicile." These presumptions may be overcome, but the guidelines place the burden on the student to "prove that he or she has established a Maine domicile for other than educational purposes." Under the guidelines, "[a]n individual who has lived in the State of Maine, for other than educational purposes, one year prior to registration or application to the University is considered an in-state student."

The statutory definition of "resident" for purposes of determining eligibility for a resident hunting or fishing license provides that an individual must have "been domiciled in this State continuously during the 3 months" prior to applying for the licenses. 12 M.R.S.A. § 10001(53) (2005). A person who is a full-time student at a college or university in the state and who has resided in the state continuously for three months may qualify, provided they have: a) if registered, registered to vote in Maine; b) if licensed to drive a motor vehicle, made application for a Maine driver license; c) if owning a motor vehicle, registered such vehicle in Maine; and d) complied with State income tax laws. A full-time student who has satisfied these requirements "is rebuttably presumed to have been domiciled in the State during that period." *Id.* These statutory requirements include many of the same factors to be considered in determining

living quarters cannot be residence for voting purposes held unconstitutional); *Sloane v. Smith*, 351 F. Supp. 1299, 1304-05 (M.D.Pa. 1972) (imposing higher burden on students to prove residence held unconstitutional); *Bright v. Baesler*, 336 F. Supp. 527 (E.D.Ky. 1971) (presumption that student remains domiciliary of parents' home held unconstitutional); *cf. Lloyd v. Babb*, 251 S.E.2d 843, 865 (N.C. 1979) (use of rebuttable presumption held permissible where it placed burden on student to present evidence to prove domicile).

⁶ See, e.g., *Whatley*, 482 F.2d 1230 (requirement that student prove intent to make college town his or her home indefinitely after college held unconstitutional); *Newburger v. Peterson*, 344 F.Supp. 559, 563 (D.N.H. 1972) (striking down New Hampshire statute requiring voter to establish intention to remain permanently or indefinitely); *Ramey v. Rockefeller*, 348 F.Supp. 780, 788 (E.D.N.Y. 1972) (only constitutionally permissible test is one which focuses on individual's present intention and does not require individual to pledge to remain for indefinite future); and *Scolaro v. District of Columbia Board of Elections and Ethics*, 691 A.2d 77, 92-93 and n.19 (D.C. App. 1997) (student who consciously decides to reside in municipality where he or she attends college may establish residency for voting purposes and need not intend to remain in district after graduation in order to prove residency).

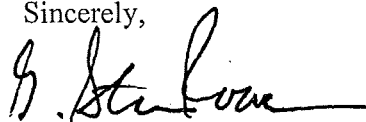
residency for voting purposes. The chief difference is that while all four requirements of 12 M.R.S.A. § 10001(53) must be met to qualify for a fishing or hunting license, the corresponding elements in Title 21-A M.R.S.A. § 112(1) are simply factors to be considered by the registrar in evaluating whether an individual has established a residence for voting purposes. The registrar need not find all of them to be present in order to conclude that the individual qualifies to register to vote in that municipality.

Where a fundamental right, such as the right to vote, is at issue, the state has to meet a higher burden in order to justify any limitations on that right. Restrictions on the right to vote must be justified by a compelling state interest and must be narrowly tailored to serve that interest. *See Dunn v. Blumstein*, 405 U.S. 330, 336-37 (1972) (striking down durational residency requirement for registering to vote in Tennessee). The conditions under which the right to vote may be exercised must be applied in a non-discriminatory manner. *See Carrington v. Rash*, 380 U.S. 89 (1965) (striking down statute prohibiting members of military from establishing a voting residence in Texas while in military service). States are free to “take reasonable and adequate steps...to see that all applicants for the vote actually fulfill the requirements of bona fide residence,” 380 U.S. at 96-97, but they may not single out a group of citizens and preclude them from proving a bona fide residence.

Thus, local registrars in Maine may inquire into all the factors that are relevant to determining domicile or voting residency, as defined in 21-A M.R.S.A. § 112, when considering whether a student is a bona fide resident and, therefore, qualified to register to vote. However, a state law that prohibited students living in college dormitories from having the opportunity to prove a bona fide residence for voting purposes in the municipality where they attend college would likely be struck down as unconstitutional.

I hope this is helpful. If you need further clarification, please let me know.

Sincerely,



G. STEVEN ROWE
ATTORNEY GENERAL

January 4, 1972

Joseph T. Edgar, Secretary of State

Secretary of State

James S. Erwin, Attorney General

Attorney General

Interpretation of Article II, § 1 of the Constitution of the State of Maine and 21 M.R.S.A. § 242(4)

As a result of my office's participation in a legal action, in the United States District Court for the District of Maine, Judge Gignoux has requested that I issue the following memorandum, at this time, which specifically interprets the provisions of Article II, section 1 of the Constitution of the State of Maine and Title 21, section 242(4) of the Maine Revised Statutes as they pertain to the establishment of a Maine voting residence by students.

I am addressing my comments to you, because it is my understanding that, in connection with your participation in the same legal action, you have agreed to distribute copies of this memorandum to all of the Voting Registrars and Boards of Voter Registration in the State so that they may all be advised concerning this matter.

The pertinent provision of Article II, section 1 of the Constitution of the State of Maine reads as follows:

"... nor shall the residence of a student at any seminary of learning entitle him to the right of suffrage in the city, town or plantation where such seminary is established

and Title 21, section 242(4) of the Maine Revised Statutes provides that,

"A student may not establish a voting residence by attending an educational institution."

The Maine Supreme Judicial Court has had occasion only once to interpret the above-quoted language of the Maine Constitution. The Court's interpretation of the Constitutional provision occurred in the case of Sanders v. Getchell, 76 Me. 158 (1884). The Court stated in its decision that,

"The constitutional interdiction is in these terms: 'The residence of a student at any seminary of learning shall not entitle him to the right of suffrage in the town where such seminary is situated.' It is clear enough that residing in a place merely as a student does not confer the franchise. Still a student may obtain a voting residence, if other conditions exist sufficient to create it. Bodily

presence in a place coupled with an intention to make such place a home will establish a domicile or residence. But the intention to remain only so long as a student, or only because a student, is not sufficient. . . . He (the student) gets no residence because a student, but being a student does not prevent his getting a residence otherwise. . . . Each case must depend largely upon its peculiar facts. (Emphasis supplied)

In essence, the Court in the Sanders case has said that the fact of being a student is a neutral factor; that a student gains nothing nor loses anything with respect to his voting residence from the fact of being a student. Consequently, under Maine law, local Registrars and Boards of Registration should not place students in any better nor in any worse position than non-students when making a determination as to whether a voting residence has been established.

Although the Maine Supreme Judicial Court has never had occasion to interpret Title 21, section 242(4) of the Maine Revised Statutes, it is my opinion that this statutory provision is, in effect, a re-statement or reiteration of the pertinent part of Article II, section 1 of the Maine Constitution which was interpreted by the Court in the Sanders case and, therefore, that interpretation may also be applied to section 242(4).

James S. Erwin
Attorney General

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VOTER REGISTRATION-MAINE

OFFICE OF THE SECRETARY OF STATE

Issued
April 1974

GUIDELINES FOR VOTER REGISTRATION

Title 21 of the Maine Revised Statutes (Election Laws) places on the Registrars or Boards of Voter Registration in each community in Maine the responsibility for determining whether an applicant for registration as a voter in a given community meets the qualifications for voter registration. However, the Statute does not place upon the registering authority the responsibility for determining what those qualifications are. These qualifications are created by the law itself and by various court decisions relating to the subject.

In the interests of uniformity as among the various communities within this State the Office of the Secretary of State has compiled a brief summary of the qualifications for registration as a voter in the State of Maine.

The guidelines to be followed in determining the qualifications of an applicant for voter registration are summarized as follows, and it should be borne in mind that they are to be applied equally to all applicants regardless of whether those applicants are students living on or off campus, members of the Armed Forces living on or off military bases, or other citizens in general.

1. An applicant must, of course, meet the requirement of United States citizenship and be at least 18 years of age.

2. The applicant must be a resident in the community in which he or she seeks to register to vote, and must claim the community as his or her sole residence. It should be noted that, by Statute, the words "residence" and "domicile" are defined as that place where habitation is fixed and to which a person returns whenever absent.

(As far as students are concerned, if a student intends to claim residency in his or her college community, then that is where his or her habitation is fixed and where he or she returns whenever temporarily absent. We wish to stress the fact that the intention to remain in a community forever is no longer a requirement for eligibility to register as a voter within that community. All that is required is the applicant's residency within the community plus the present intention to claim that community as the applicant's sole residence.)

3. It is not required that the applicant shall have had a residence within a community for any specified period or time prior to registration as a voter.

4. An applicant is not required to declare an intention to permanently remain a resident of the community.

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5. Even if the applicant knows that he or she will be moving from the community at a certain time in the future, such applicant must be allowed to register to vote provided, as stated above, the applicant does, at the time of application, have a domicile within the community and indicates that the community shall be his or her sole voting residence during the time in which he or she shall be domiciled within the community.

6. In the case of students attending an educational institution, there should be no distinction between students living on campus or off campus.

7. In the case of members of the Armed Forces, there should be no distinction between those living on the base or off the base to which he or she may be stationed.

8. As per a recent ruling by the Attorney General, married women no longer need to register to vote under their married name.

9. Dual registration and dual voting, either within or without the State, now is prohibited by Statute and proven allegations can and will result in prosecution.