

JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

June 18, 1985

Honorable Thomas W. Murphy
Maine House of Representatives
House Minority Office
State House Station #2
Augusta, Maine 04333

Dear Representative Murphy:

You have inquired into the power of the Commissioner of Mental Health and Mental Retardation to permit a nonprofit corporation to make use of unused space in a building at the Augusta Mental Health Institute and to provide that organization with free utilities services. For the reasons which follow, it is the opinion of this Department that while the Commissioner may have the authority to permit the use of unused portions of State buildings committed to his jurisdiction, he may not provide free utilities services to organizations using those buildings.

The facts concerning your inquiry, as this Department understands them, are as follows. During the summer of 1982, the Southern Kennebec Child Development Corporation, a nonprofit corporation which receives State funds for the operation of child day care centers, became aware that certain space in the Greenlaw Building at the Augusta Mental Health Institute was not being used. Accordingly, the corporation, seeking to expand its day care services, inquired with the Department of Mental Health and Mental Retardation, which is responsible for the management of the building, whether the space, which constitutes approximately one-half of the third floor of the three story building, could be used for such purposes. Following an exchange of correspondence during the fall between the Executive Director of the corporation and members of the staff of the Department, the two entities entered into an agreement, on December 22, 1982, whereby the corporation would be permitted to use the space to operate a

day care center, on condition that it maintain the premises in a suitable manner and that it yield possession of it to the Department upon 60 days written notice. The corporation has operated the center on the premises since then at no cost. The center has, however, received heat, light, water, and sewer services at an estimated cost to the Department of \$7,582 in 1983 and \$8,753 in 1984.

Your first question is whether the Commissioner has the authority to permit the use of this space at all. The Commissioner's powers over the buildings entrusted to his care are set forth at 34-B M.R.S.A. § 1203(1):

The Commissioner shall have general supervision, management and control of the research and planning, grounds, buildings, property, officers, employees and clients of all state institutions. (emphasis added).

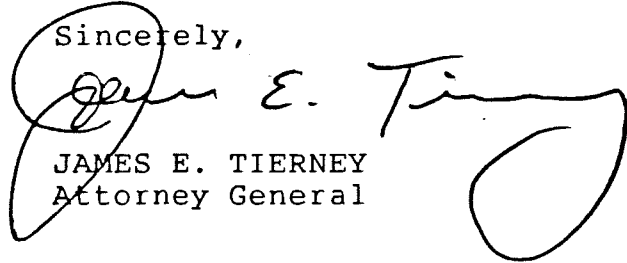
The issue, thus presented, is whether the Legislature intended, in granting the "management" of State mental health "buildings" to the Commissioner, that he be able to permit private persons to make use of unused space in such buildings. In the opinion of this Department, such discretion is arguably within the Commissioner's power under the statute. While it is generally true that a State agency is without power to sell or lease land without express legislative authority, see, e.g., 12 M.R.S.A. § 558 (authority of Director of Bureau of Public Lands to lease or grant easements to State-owned submerged land), the action of the Commissioner of Mental Health and Mental Retardation in this case did not involve the conveyance of any interest in land. Rather, the Commissioner granted permission to an outside party to use a portion of a building the management of which has been legislatively committed to his control. It is important also to note that in permitting such use, the Commissioner was not preventing his Department from discharging its other statutory obligations; the space in question was excess. Nor did the Commissioner's action violate the competitive bidding laws, 5 M.R.S.A. § 1811 et seq. Those laws apply only to the "purchase" of "services, supplies, materials and equipment." The action in question here is clearly not a "purchase" of anything, in addition to which the State Purchasing Agent has long regarded the leasing of space as not involving the acquisition of "services, supplies, materials and equipment," and therefore not subject to the competitive bidding laws.

A different result obtains, however, with regard to the provision of utilities services to the Southern Kennebec Child Development Corporation in the Greenlaw Building. There, the

Commissioner has apparently expended funds which he would not otherwise have spent, for purposes which have not been authorized by the Legislature. Accordingly, it is the opinion of this Department that such expenditures are contrary to law, should be discontinued, and reimbursement from the corporation sought.

I hope the foregoing answers your questions. Please feel free to reinquire if further clarification is necessary.

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Tierney". The signature is written in a cursive style with a large, sweeping loop at the end.

JAMES E. TIERNEY
Attorney General

JET/ec

cc: Kevin Concannon

Commissioner, Department of Mental Health
and Mental Retardation