

Newman, Kathleen

From: Nass, Jonathan
Sent: Monday, November 26, 2012 10:23 AM
To: Newman, Kathleen
Subject: FW: Meeting with Gov.
Attachments: Memo to Governor LePage on December 2012 issues.docx

FYI. Some of the education issues we may be discussing with the boss over the next couple days.

From: Bowen, Stephen
Sent: Sunday, November 25, 2012 2:20 PM
To: Nass, Jonathan
Subject: Meeting with Gov.

In the event that we get the chance to sit down with him, I pieced together the attached memo covering a whole pile of stuff. If you could get that to him ahead of time, that would be helpful, otherwise we can just go through it with him. I'll bring some copies. See you down there.

Memo to Governor LePage
From Steve Bowen
CC: Jon Nass
RE: Tying up some issues

Governor,

As we head into December, we have a few big issues on which we need some feedback. Most have to do with legislation, budget, and so forth, but I have plugged in a couple of other issues as well as part of your "homework."

Here is what we need to get squared away:

- We need to know how you would like to spend the +/- \$10million in **casino money** flowing to GPA in FY 13,14, and 15.
- We need to know whether you intend to propose a **mid-year cut to GPA for schools** for the current school year, as our team needs to be doing the work preparing your proposal.
- In another budget-related matter, we need to know what you want to propose with regard to **CDS**.
- We have a proposal on **school choice** we would like to bounce off you. We need to that language drafted as soon as we can.
- We need some feedback on the **school accountability bill** we are putting together. Specifically, we need to know what you would like the state to be able to do in the event that a school fails to improve after being identified as underperforming.
- We need some feedback on **school construction**, and specifically on the extent to which you want us encouraging regionalization.
- I have some memo pieces for you as well, just to keep up updated.

Issue 1: The Casino money

Based on our discussions with you, our plan at this point is to flat fund the GPA distributed to districts, then take the \$10 million in casino money that we are budgeted to receive and target that to various pieces.

The question is what do you want to do with the FY 13 money? The money is coming in at a clip of about \$1 million a month. We can put some the pieces in place for FY13 that we planned to spend it on for FY 14 and FY 15, but not all of it (See next page).

You have two options, basically.

1. Spend it all on education pieces – we keep looking and find some things for it or carry it forward into FY14 and spend it there.
2. Balance the budget with it by spending it on something else. It is meant to go to GPA under statute, so we'd have to do a language change and would likely get criticized for redirecting the money to balance the budget.

One option under the “spend it now” category would be to use it for some one-time use – encouraging regionalization through a one-time program (to form those CTE-based districts we have been discussing) or for something like a “governor’s challenge” of some kind.

Take a look at the next page and let us know what you think.

Proposed Uses of Casino money in FY '13, '14 and '15

Projected Casino revenue		\$10,000,000	\$10,819,969	\$11,036,368
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Proposed Adjustments to Current GPA Spending				
	Current	FY 2013 Sup. budget	FY 2014	FY 2015
Distribution to Districts through the funding formula, including debt service	\$844,000,000		\$844,000,000	\$844,000,000
Proposed Changes to current Misc. Costs elements in GPA				
Increase in funding for Aspirations program	\$400,000		+\$600,000	+\$600,000
Increase in funding for Jobs for Maine's Graduates	\$2,300,000		+\$450,000	+\$600,000
Restore EPS and MEPRI contract costs from one-time cut	\$200,000		+\$300,000	+\$300,000
Cut to Learning Results fund to fund GF positions	\$725,000		(\$227,000)	(\$233,000)
Cut to GWH residential funding	\$530,000		(\$530,000)	(\$530,000)
Total changes to existing GPA spending			+\$600,000	+\$740,000

Proposal for new targeted spending initiatives in GPA				
	Current		FY 2014	FY 2015
Funding for Adult Education College Readiness programs			+\$550,000	+\$550,000
Funding for Malaga Island Scholarship		+\$500,000		
Funding to put an Office of School Accountability into place to parallel the legislation we'll advance empowering the state to take over failing schools.			+\$2,000,000	+\$2,000,000
Funding to assist CTE centers in attaining industry certification. (equipment upgrades, training, etc.)		+\$2,000,000	+\$2,000,000	+\$2,000,000
Funding to building Bridge Year-type models in other CTE regions		+\$1,200,000	+\$1,200,000	+\$1,200,000
Funding to assist districts in implementing educator evaluation systems. Required by LD 1858.			+\$2,500,000	+\$2,500,000
Funding for to assist districts in the transition to standards-based high school diplomas. Required by LD 1422.		+\$2,000,000	+\$2,000,000	+\$2,000,000
Total of new GPA funding initiatives		\$5,700,000	\$10,250,000	\$10,250,000

Grand Total, adjustments to current + new initiatives		\$5,700,000	\$10,850,000	\$10,990,000
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Issue 2: Mid-year cuts to GPA

We talked about this at the last meeting – whether you intend to propose balancing the FY13 budget by cutting off GPA funds to schools at some point during the school year that is currently underway.

As you know, we have already run scenarios on this, one doing an across-the-board cut using the existing formula, another starting with the wealthiest districts and taking away all subsidy from them and continuing down the list until we get to the total amount of the shortfall. We can propose to do this any way you like, but some issues for you to consider:

- This has never been done before. When the federal stimulus funds showed up a few years ago, GPA was cut midyear and the amount flowing to schools was backfilled using federal stimulus dollars, but the state has never simply shut off GPA money midyear. This would be an unprecedented step.
- The impact on kids would vary dramatically across the state because the state's share of school spending varies so widely. Were the GPA money to run out, some school systems would make cuts and finish out the school year without very much impact, some would have to close their doors almost immediately. Those latter districts tend to be poorer and more rural.
- We/You do not have the authority to simply tell schools to close their doors at a certain point. You have said before that the instruction would be to end the school year on May 1 or whenever, but that is not a decision we as the Department or you as the governor have the authority to make. As noted above, were GPA funding simply shut off, some schools would close almost instantly for lack of funds, others would stay open as long as they could using local funds. To give the state the authority to force them to close would require statutory language that we would never get passed in this legislature.
- When running the spreadsheets, we ran into another complication, which is that we have already paid districts some of the money they would then owe us back. If we did the version of the cut where you start with the wealthy districts and worked down, we have already paid those districts more than what they would get after the cut was made. In such instances, we would not only cut their GPA entirely, we'd have to then bill the districts to get the money back from them that we already sent them.

In short, making this kind of a cut is sailing into uncharted waters and I would advise that we give it quite a bit of thought before committing to it. Please let us know your thoughts on this.

Issue 3: Dealing with CDS, Special Education

We discussed this last time we met and we need to make a decision about what you would like to do with CDS and with special education more generally. On CDS, you have basically three choices:

1. We can continue on the path we are on, which is strengthening state oversight and putting a host of initiatives in place to contain costs and improve the operation of the program. We have made headway and we do see costs coming more into line with where they should be. We have a hiring freeze in place and are reworking CDS policy as it regards the use of private providers. We are making progress, but it is coming slowly, given the changes needed.
2. We could propose to do the absolute legal minimum, which would mean the following:
 - a. Shutting down services for disabled students ages birth through 2. We are not under any federal mandate to provide those services, but we'd be the only state not to.
 - b. Limiting services to disabled preschoolers ages 3 through 5 to only those school districts that provide universal Pre-k programming. (Under federal law, services must be provided to students with learning issues if the resident school system is providing educational services to that age group more broadly). Again, we'd be the only state to do this, but we would be within federal law to do it. (See A.A.G. Sarah Forster's memo to me on this, which I have attached.)
3. We could turn the whole thing over to the school districts and make them responsible for providing the services to these students. They would have to comply with the law as outlined above and in Forster's memo, but there would be no need for CDS as an entity, as the districts would do the whole thing. If we took the second step of not funding them for it, we'd realize some budget savings as well.

One thing to remember: if we did turn the whole thing over to the districts, they would almost certainly provide services to those kids using their own special education staff, as opposed to private providers. Today, 70 percent of the services provided under CDS are provided by private providers. Public school systems, by contrast, use almost no private providers, preferring instead to hire their own staff. A move to shift the responsibilities of CDS to the districts would almost certainly be opposed by the private provider community as a result of this.

So those are the choices. On the pages that follow is my Associate A.G.'s memo to me on just what the state's requirements are under federal special education law. You will see that we

can scale back services to select groups of kids, but that we are required to provide these services to most kids. That is it is an unfunded federal mandate is inconsequential, since there is no prohibition against unfunded mandates in federal law. They can pass laws and make us do things. We do, though have some options, as Sarah outlines below in her memo to me from August:

Memorandum

**TO: Stephen Bowen, Commissioner
Department of Education**

FROM: Sarah Forster, Assistant Attorney General

DATE: August 27, 2012

SUBJECT: IDEA Issues

I understand that during your conversation with Governor LePage about the Department's zero-based budget proposal, the Governor raised concerns about IDEA, federal funding, and the continued need for CDS. I will attempt to summarize the legal landscape below; I take no position on the policy issues surrounding IDEA and CDS. Please feel free to share this memo as you feel appropriate, and, as always, I am available to discuss the matter further if that would be helpful.

1. The unfunded mandate issue.

One question that persists is whether IDEA is an unfunded mandate. There is a simple legal answer: it is not. IDEA is a statute enacted pursuant to Congress' authority under the Constitution's General Welfare or Spending Clause. The Supreme Court has told us repeatedly that Spending Clause statutes are akin to a contractual arrangement between the Federal and State governments. The Federal government offers the State government money in exchange for the State's agreement to do, or not do, certain activities. Stemming from the contract analogy, the Court has been clear that the State reserves the right to accept the federal money or not, and that in order for the State to make an informed decision whether to accept the funds, the statute at issue must be clear as to what the conditions of acceptance are. See *Arlington Central School Dist. v. Murphy*, 548 U.S. 291, 296 (2006) (States cannot knowingly accept conditions of which they are "unaware" or which they are "unable to ascertain.") (internal citation omitted). The courts have had no use for mandate arguments when it comes to Spending Clause statutes. You might recall that an attempt to challenge the No Child Left Behind Act was unsuccessful, even though NCLB – unlike IDEA – has some explicit language that suggests that it must not require states to expend additional funds. So when it comes to IDEA, if Maine decides to accept the Federal money, it must comply with the requirements of the IDEA. If Maine were to choose not

to accept IDEA funds, it would be relieved of its IDEA obligations -- but not the requirements of other statutes as described below.

2. The legal consequences of declining IDEA funds.

In order to analyze the legal consequences of declining IDEA funds, it is critical to recognize that there are essentially three separate streams of IDEA funds that Maine can elect to accept or not. I will address each separately.

Part C funds: Receipt of Part C funds obligates Maine to provide a coordinated system of early intervention services to infants and toddlers birth to age three experiencing developmental delay and their families. If Maine were to elect not to receive Part C funds, and as a result did not provide the early intervention services currently being provided by CDS, there would not be any ancillary legal consequences. Families would remain eligible to receive early intervention services to the extent that other public entities or programs are statutorily obligated to provide or pay for them (e.g. MaineCare).

Part B funds: Receipt of Part B funds obligates Maine to provide special education and related services to children with disabilities ages three through twenty one to the extent that their non-disabled peers are entitled to a public education. Specifically, the IDEA regulations state that a State which receives IDEA funds is not obligated to make a free, appropriate public education (FAPE) available to "children aged 3, 4, 5, 18, 19, 20, or 21 to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children of those ages." 34 C.F.R. 300.102(a)(1). In Maine, children are entitled to a public education starting at either "school age five," or, if their school unit offers a four-year-old program, at age four. Students "age out" of public school eligibility after the year in which they turn 20. So Maine's Part B obligation under IDEA is to provide a FAPE to students age five to twenty in all school units, and age four to twenty in units with a four-year-old program. (Although I do not believe Title 20-A address three-year-old programs, I have heard that there are units either contemplating or piloting such programs; in that case, the three-year-olds in that unit would be entitled to a FAPE under Part B).

If Maine were to choose not to accept Part B funds, and as a result did not provide special education and related services to students ages five (or four) to twenty with disabilities currently being provided by a combination of CDS and the public schools, there could be significant legal consequences. Another federal statute, Section 504 of the Rehabilitation Act of 1974, prohibits the exclusion from, or discrimination against persons with disabilities in, any program that receives federal funds. Every public school receives multiple types of federal funds. Section 504 does not itself come with any federal funds to facilitate compliance. Many if not most students who are served under IDEA would be entitled to similar services in order to comply with Section 504. In addition, State law prohibits educational discrimination, but excludes children receiving special education from coverage under the state law. 20-A M.R.S.A. §4602. If Maine no longer participated in IDEA that law would take on additional significance. As a result, to the extent Maine might contemplate declining IDEA Part B funds, the legal liabilities of Section 504 and state statute, which do not come with a funding stream, appear to make it more sensible to take the IDEA money and satisfy IDEA's requirements.

Section 619 funds: Apart from the general Part B funds discussed above, Section 619 of the

IDEA provides additional funds in exchange for Maine's promise to provide a FAPE to all three, four and five-year-olds with disabilities regardless of whether a public education is available to their non-disabled peers. 34 C.F.R. 300.804(b). If Maine were to choose not to accept Section 619 funds, three, four, and pre-"school age five"-year-olds with disabilities would only receive FAPE if they reside in a school unit which provides public education to children without disabilities. Unlike the discussion above about Part B funds, declining 619 funds would not subject the State to legal liability as the students in school units with public education programs would continue to receive special education, while in the units without so-called "public pre-K," there would be no federally funded educational program for the students with disabilities to be excluded from and potentially trigger Section 504 or state law liability.

In summary, Maine can decline Part C and Section 619 funds without ancillary legal consequences, but if Maine declines Part B funds, Maine would bear legal liability under other federal and state laws without any funding stream to assist with compliance.

3. What are the implications for CDS?

Finally, there is the issue of whether CDS is necessary to comply with some or all of the IDEA requirements. With respect to Part C, if Maine elects to continue to receive Part C funds, IDEA requires that the Governor designate a "lead agency" to coordinate a statewide system of early intervention services. Currently, DOE serves as the lead agency, and CDS is the statutory vehicle through which Part C is implemented. Both of these decisions could be changed by amending 20-A M.R.S.A §7209. With respect to Part B funds, federal law requires that Part B funds go to the state education agency (the "SEA") which must then give subgrants to local education agencies ("LEAs") such as CDS. That money could go to school administrative units, or any other public agency that meets the definition of an LEA, instead of CDS, and those public agencies would then be responsible for the services that CDS is currently providing. Finally, if Maine elects to continue receiving Section 619 funds, those funds would also flow through the SEA and Maine would continue to be obligated to serve all three, four and five-year-olds with disabilities regardless of whether public education is being provided to non-disabled students of those ages. Again, there is no federal legal requirement that CDS exist to provide those services, they could be provided by any other public agency that meets the definition of LEA. As with Part C, the replacement of CDS with another public agency for Part B and Section 619 would require amending 20-A M.R.S.A. §7209

Issue 4: School choice

We need to come up with a school choice bill for this session, what do you think about the following concept? (It also connects to the issue around what to do with Good Will Hinckley)

Goal: expand school choice opportunities for students by overcoming barriers to choice options.

Existing choice options and barriers to them:

Charter schools. Barriers: residential/transportation costs for some students.

Homeschooling. Barriers: Time and cost for parents and families.

Supt. Transfers. Barriers: Supt's sometimes block them, transportation costs for parents.

Town Tuitioning. Barriers: Only in some towns, parent costs for non-approved schools.

Core issue – We have lots of choice options, but money, not opportunity, is a barrier. Money would create far more choice options for students, especially low-income students

Bill concept – “The Choice and Opportunity Fund”

- Fund created in statute, in GPA. (This is how we redirect the Good Will Hinckley money while still allowing GWH to access it - through the students)
- Available for low-income students only. We will set certain income guidelines
- Can be used for the following purposes:
 - Fund some amount of transportation costs for students traveling to school outside their home district.
 - Fund a certain amount – based on some statewide average or something - of residential costs for low income students to attend a school (public, private or charter) that is outside a set commuting range (x number of miles) and which parents can demonstrate uniquely meets the needs of the student (this could fund residence programs at GWH, for instance)
 - Fund tuition to approved private schools for students that do not live in town tuitioning towns. (Supt. agreements cannot be made with private schools)
 - Provide funds to low-income homeschoolers, to be used for teaching materials, etc.
 - Other?

Let us know what you think of this approach. It is a kind of voucher approach that builds on what we have for choice options already. We could add in that it could be used for religious schools as well. We would have to find budget space for this and do rules governing the program, so would take a little bit of time to work out, but I think the low-income element makes it a good approach politically. Why should only the rich have school choice?

Issue 5: School accountability

As you know, we put forward an NCLB waiver to the feds and are working with them on it as we speak. You will be happy to know that if anything, they wanted us to be tougher on schools that have not made adequate progress. We would, though, need some additional authority to do that.

Because NCLB governs the use of Title I money, one of the features of most state accountability plans is that the state gets to dictate to failing Title I schools how they are to spend their Title I money. That piece we already have in there. The trick is that a lot of schools are not Title I schools, and so we need more authority under law.

The biggest step by far would be to authorize some kind of takeover of a school by the state. We do not have the authority to do that under current law. What we could do is propose legislation that takes a school out from under the authority of the school district and puts it under state control. We have some models out there like this – Louisiana and Tennessee, for instance – so we have some models to look at. I don't know if we have the votes for something like this with the legislature we have coming along, but I think we should push for some kind of consequence for schools that fail to improve.

A step that is not quite as dramatic as a state takeover would be to allow students in failing schools to have school choice. We could try to add that in, but again, I don't know if we have the votes.

So the real question is, how hard do you want to push on this? Let me know. Accountability is a good issue politically, I think.

Issue 6: School construction

As you know, we have approved 6 projects on the school construction list to move forward, we have been talking with school officials in those communities and we think we are ready to begin moving at least some of those projects forward.

Specifically, we have two elementary school projects that we think are ready to move ahead, one in Fryeburg that may end up being a regional elementary school that will result in the closure and consolidation of two other small elementary schools, and one in Corinth which will also likely end up as a consolidated project that will could close four other schools as well.

Knowing that cost containment on these projects is a major priority, we have taken steps in three main areas that we think will result in significant cost savings.

- First, we did pass a rule change last legislative session that significantly strengthens the state's oversight of these projects. The rule change allows the state to have a designated project manager assigned to each project to much more carefully manage these projects on behalf of the state. We feel that this will result in significant cost savings and better oversight of projects.
- Second, we have been reaching out to other state agencies with which we partner on these projects, such as DEP, DOT and BGS. We've had very productive discussions about how we can better work together on these projects so we don't end up having one state agency creating costs for another agency on these projects.
- Third, we have been reviewing the construction standards and feel we have come up with an approach on this, which is to follow what we are calling the "Chelsea school" model. You may remember that you visited the Chelsea school last year when it first opened, and the team feels that the Chelsea school project was a good example of a very basic, no-frills school. The local community did not add any bells and whistles to the school, and we thought the best way to move forward on scaling back these projects was to identify a model school that is a very basic no-frills school building without all the vaulted ceilings and so forth we find in some of the bigger schools. What we'll do is develop construction standards, based on the Chelsea school model, that we'll then use for the other projects and we'll have a model school for communities to look at that is a basic school model for others to follow.

One last element we are working on is consolidation of schools. Most of the projects that have been moved forward at this point will involve building or renovating a single school to expand capacity and then closing other schools to cut down on costs. The question for you is how hard do you want us pushing for regionalized school projects across districts lines? For instance, Nokomis High School is up for renovation and we'd like to see a big regional high school up there that will mean the closure of two other high schools. Are you okay with us pushing on these communities a little to think regionally? They are already pushing back a little...

Other brief issues:

Adult Ed: As you know, we see Adult Ed as playing a more central role in workforce development than it does now. We passed a bill last session that really requires the Adult Ed's to up their game and focus on workforce development skills rather than enrichment courses. We are getting some pushback as we move to restrict the use of state Adult Ed dollars to workforce development courses, with some Adult Ed directors arguing that most everything they teach COULD be workforce development (basket weaving, etc.) if people go into those businesses. We are saying that unless the Adult Ed's have taken the time to sit with these folks and lay out a career path with the coursework laid out to complete that path, we're not allowing state Adult Ed funding to support every course that comes down the road. I have a meeting with them next week, want to be sure you are okay with us holding this position.

GED: Jon and I continue to work on this. The GED folks are really pushing us not to go an RFP as we plan to do, and have put a deal on the table that we'll need to discuss with you. We're getting a meeting together to look at where we are.

IVF: I know the Town Academies came to you looking to increase Insured Value Factor. We are looking at how the IVF amount compares to what the public schools get for facilities funding, and the initial look suggests they are getting about the same amount already. We'll have something more concrete on this later this week.

Digital Learning: The task force on this met last week, we are getting some ideas together for you. Basically, we're thinking of a two-prong approach where the state bulk-purchases online courses on behalf of districts, but also makes targeted fund available to districts to help them expand online and digital learning options. Funds would go to districts with approved plans that expand access for students.

Local share of school funding: One issue we will need to address this next session is that ever since the recession hit, the state has allowed districts to raise less than their required local share in order to get their state funding. The argument was that the state was not at 55 percent state funding, so it should not require local districts to raise their entire local share to draw down state GPA money. The result of this is that some districts are raising quite a bit less locally and still pulling down their state share. We're thinking we need to slowly raise that required local share so that we eventually get them back up to raising their full local share as determined by the EPS system.

Bridge Year: As you know, President Fitzsimmons has pulled the Community College system out of the Bridge Year project in Hermon- the current group of kids will be the first and only cohort of kids to go through the program. I am meeting with him soon to hear about his counter-proposal to the Bridge Year, which he says will be closer to what you want in a five-year high school model. I'll let you know what I find out.