The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

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October 27, 2011

The Honorable Theodore C. Speliotis
Massachusetts House of Representatives
State House, Room 43
Boston, MA 02133-1020

Dear Representative Speliotis:

RE: Emergency Assistance Program, Education Cost Impacts

This letter is in response to your request to the State Auditor's Division of Local Mandates (DLM) regarding "the Commonwealth's policy to house homeless families in hotels and motels." In particular, you cite the costs of providing school transportation and education services for children whose families are placed in motels in the Town of Danvers by the Department of Housing and Community Development (DHCD). Because the cost of busing and educating these children is substantial, and the plight of these homeless families is severe and heartbreaking, it is important to frame the context within which the issues arise before addressing your specific questions.

Serving Homeless Families in Massachusetts and in the Town of Danvers

From the early 1980's when homeless families were first placed in motels by the Department of Public Welfare (now known as the Department of Transitional Assistance), the number of homeless families placed in motels by Massachusetts state agencies has varied as prevailing economic conditions waxed and waned. The attached spreadsheet, entitled "EA (Emergency Assistance) Historical Data," prepared by the Department of Transitional Assistance (DTA) and DHCD illustrates this fact. The spreadsheet includes data back to fiscal year 2000 on the numbers of homeless families residing in various settings, including congregate family shelters, scattered site family shelters, and, most relevant to your inquiry, the numbers of families placed in motels dating back to 2003. The data shows a remarkable drop in the numbers of families placed in motels through fiscal year 2007, followed by an equally remarkable increase that began with the stock market crash in 2008, ending with a monthly average of 855 families in motels in fiscal 2011. According to the attached DHCD report, "EA families in Hotels, 10.11.11 – by Community, Hotel, Children" (herein referred to as the "Homeless Families Report"), that number has spiked to 1,410 families living in motels in 33 communities throughout the Commonwealth. Six of these communities are each hosting over 100 families.

In an effort to address this trend, beginning in fiscal year 2011, the Legislature and the Governor approved major funding, approximately $165 million, for family shelters and services and for a short term housing transition program known as "HomeBase." Fiscal year 2012 allocations for these programs exceed $136 million, and DHCD anticipates that the need for supplemental appropriations may arise. *See*

St. 2011, c. 68, § 2, line items 7004-0101 and 7004-0108. As stated by DHCD, HomeBase "is a flexible resource designed to help families avoid shelter and maintain a home while pursuing an appropriate long-term housing placement." Pending the anticipated results of these programs, however, a significant educational cost impact continues at the local level.

Focusing on the Town of Danvers, the recent Federal census records indicates that this is a community of approximately 26,000 citizens. Three major highways -- Routes 1, 128, and 95 -- run through this Town. Due to this geographical configuration, there are four budget hotels located on or near those highways. According to the Homeless Families Report, there are 117 homeless families residing in the four motels with 80 school-aged children. Including several transported in from other communities, 62 homeless children are attending the Danvers Public Schools as of this September. Although the number of students is tilted to the younger grades, as younger mothers appear to sustain a greater incidence of homelessness, the overall average impact is an additional five students per grade. Twenty-two of the children in Danvers motels are being transported back to their schools of origin in Chelsea, Everett, Haverhill, Lawrence, Lynn, Malden, Peabody, Revere, Salem, and Somerville.

With less than one half of one percent of the population of the Commonwealth, Danvers is hosting eight percent of the homeless families in this program. Despite this manifest disproportionate burden, the residents of Danvers have embraced these families. With donations from local businesses, the good will of many Town departments, and volunteer high school students, local leaders launched "Project Sunshine" this past summer. This summer camp program offered breakfast, lunch, and a variety of recreational and enrichment activities that got these parents and children out of the highway motel rooms to visit a water resort, parks, and beaches.

Within this context, you note that the Commonwealth pays for the cost of renting the motel rooms as emergency shelter for these families, and you question whether the State is also obligated to pay for the related transportation and school services that Danvers must provide.

Issues under the Local Mandate Law

When there is no feasible alternative, DHCD may place eligible families in temporary emergency shelter, including hotels and motels, pursuant to 106 CMR 309.040(C). When the emergency shelter is located outside of the community where the family lived prior to becoming homeless, in some instances the new or "host" community must assume or share financial responsibility for the school transportation and/or educational needs of any school-aged children. In other instances, the community where the family lived and a child attended school prior to becoming homeless (school of origin) must assume or share these obligations. Described in more detail below, these requirements are embodied in the State Plan for the Education for Homeless Children and Youths Program (State McKinney-Vento Plan) adopted by the Massachusetts Department of Elementary and Secondary Education (DESE) to support its request to the Federal Department of Education for funds under Title VII, Subtitle B of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11431 et seq.

Specifically, you ask whether these requirements are unfunded state mandates subject to the provisions of the Local Mandate Law, M.G.L. c. 29, § 27C. As further explained below, it is my opinion that M.G.L. c. 29, § 27C applies to the requirement in the State McKinney-Vento Plan that school departments must arrange and pay for transporting certain homeless children back to the schools that they attended prior to becoming homeless. This mandate imposes costs upon the school departments both in the host community and in the community where the school of origin is located. Additionally, it is my opinion that M.G.L. c. 29, § 27C applies to the education costs imposed upon a school of origin when DHCD places a homeless family in a motel in a host community, and a child's parent/guardian elects to keep the child in the school of origin. However, I have concluded that M.G.L. c. 29, § 27C does not

apply to costs that may be incurred by a host community when a parent elects to enroll a child in the host community's school system.

The following discussion explains these positions, first addressing threshold issues, then turning to the school transportation questions. This is followed by an analysis of the education cost questions, and a determination of the amount of the cost imposed upon the Town of Danvers. The final portion of this letter provides options for plausible remedies.

I. Threshold Matters:

In general terms, the Local Mandate Law provides that any post-1980 state law, rule, or regulation that imposes additional costs upon any city or town must either be fully funded by the Commonwealth, or subject to local acceptance. Pursuant to M.G.L. c. 29, § 27C (e), any community aggrieved by an unfunded state mandate may petition the superior court for an order exempting the community from complying with the mandate until the Commonwealth provides funding to assume the cost. DLM's determination of the compliance cost shall be prima facie evidence of the amount of state funding necessary to sustain the mandate. Alternatively, a community may seek legislative relief.

To determine whether the local cost impacts stemming from the State McKinney-Vento Plan are subject to the Local Mandate Law, two threshold matters must be addressed: (A) whether the plan is a federal mandate and, therefore, is exempt from the Local Mandate Law; and (B) whether the costs at issue are the result of a Massachusetts state law, rule, or regulation.

A) The McKinney-Vento Act is not a federal mandate.

According to documents supplied by DESE, on May 29, 2002, DESE (then known as the state Department of Education) applied for Federal McKinney-Vento funds from the United States Department of Education (USDOE). In support of that application, DESE filed certain assurances and certifications, including statements that DESE was adopting the congressional policies and definitions provided in the McKinney-Vento Act and the Massachusetts State McKinney-Vento Plan. DESE agreed to ensure that each school department provides transportation "to and from the school of origin" when requested by the student's parent/guardian. Additionally, DESE pledged to ensure that "…local school districts…either continue the child/youth's education in the school of origin, or enroll the child/youth in school in a public school that non-homeless students who live in the attendance area where the child/youth [has been placed in emergency housing] are eligible to attend." As a result of this voluntary decision, Massachusetts has received over $10,000,000 in Federal financial assistance to support school services for homeless students over the last ten years. Because DESE accepts this aid, the requirements of the McKinney-Vento Act apply in Massachusetts.

Most relevant to the issue at hand, when a homeless family is moved into emergency housing in another city or town, school placements must be made to further a child's best interests. For the duration of the family's homelessness, this allows for placement in the new community's (host community's) schools, or in the community from which the family moved (school of origin). The child's parent/guardian makes this choice, unless plainly against the child's best interests. When the parent chooses the host community schools, that city or town provides and pays for the education of the child, as it provides transportation that is provided to other children who live in the attendance area. When the parent chooses the school of origin, the city or town where the school of origin is located provides and pays for the education of the child, and the two communities share the cost of transportation to and from the school of origin—unless the two communities reach an alternative payment agreement.

It should also be noted that there are circumstances where a host community school system may become a school of origin. DLM has been advised of several instances where families placed in Danvers motels initially chose to enroll their children in Danvers schools (host community schools). When these families were subsequently relocated to DHCD-sponsored shelters or other settings in community "X," Danvers then became their community of origin, being the most recent school system to serve the students prior to their relocation. After moving to a shelter in community X, the parents then chose to keep their children in Danvers schools, having become the schools of origin. These "coming and going" placements resulting from state agency decisions add to the numeric and financial burden on impacted communities.

It is DLM's long-held position that the Local Mandate Law does not apply to costs imposed upon cities and towns by Federal law. However in this case, there is no Federal mandate, because DESE has voluntarily accepted McKinney-Vento aid. Even though this aid does not cover the cost of compliance, the amount of the aid is significant, and would be difficult to turn down. Nonetheless, this difficult choice is a choice whereby DESE invites the programmatic and financial obligations on local school departments that go along with it. "The language of these provisions is sufficiently clear to put the States on notice of the obligations they assume when they choose to accept grants made under the [McKinney-Vento] Act." *Lampkin v. District of Columbia*, 27 F.3d 605, 611 (D.C. Cir.), cert. Denied 513 U.S. 1016 (1994), citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). "Quite clearly, the [McKinney-Vento] Act is meant to apply only to those states that receive grants." *Lampkin v. District of Columbia*, 886 F.Supp. 56, 61 (D.D.C. 1995).

Notwithstanding the view of the D.C. Circuit Court of Appeals in *Lampkin*, DESE has advised DLM that, at least with respect to homeless children who are enrolled in special education programs, the Federal Individuals with Disabilities Education Act (IDEA) requires compliance with the relevant provisions of the McKinney-Vento Act. See IDEA, 20 U.S.C. § 1412 (a) (11). However, like the McKinney-Vento Act, IDEA is explicitly voluntary to the states, and compliance is required in exchange for federal financial assistance. "The receipt of this federal money [under IDEA] is contingent upon the state's performing certain affirmative duties with respect to the education of [students with disabilities.]" *New Mexico Association for Retarded Citizens v. State of New Mexico*, 678 F.2d 847, 853 (10th Cir. 1982). Nonetheless, DESE further asserts that states are bound to comply with IDEA (and consequently the IDEA requirement relative to McKinney-Vento) under the provisions of Section 504 of the Rehabilitation Act of 1973, which applies to states that receive any type or amount of Federal financial aid. DESE cites the U.S. Court of Appeals analysis in *New Mexico*, addressing the extent of state educational obligations to disabled students when the state had declined Federal IDEA aid (at that time known as the Education for All Handicapped Children Act).

> Section 504 regulations unambiguously require that elementary and secondary schools receiving federal funds provide handicapped students with appropriate education services suited to their *unique* needs. 34 C.F.R. § 104.33(a), and (b) (1980). These special education programs must serve handicapped students adequately, in the same way that traditional education programs serve nonhandicapped students. 34 C.F.R. § 104.33(b) (1980).

New Mexico Association for Retarded Citizens, 678 F.2d at 854 (citations omitted).

Although I agree that *New Mexico* underscores the Section 504 special obligations to disabled students in states that receive any form of Federal assistance, this section does not require total compliance with the literal terms of IDEA. "Neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds." *Id*. at 852, quoting *Southeastern Community College v. Davis,* 442 U.S. 397, 411-412 (1979). The case was remanded to the

Federal District Court for, among other things, a determination of whether the education programs in the State of New Mexico precluded "the handicapped from enjoying program benefits realized by the nonhandicapped." *Id.* at 855. Even absent the provisions of the state McKinney-Vento Plan, it is likely that homeless students with disabilities would be "appropriately" served, and certainly at least as adequately, as nonhandicapped, nonhomeless students are served in Massachusetts schools. Accordingly, I do not agree that Section 504 automatically requires literal compliance with all components of IDEA. Even if it did, the requirements of Section 504, like the obligations of the McKinney-Vento Act and IDEA, are imposed upon the states as a condition to the receipt of Federal financial assistance. While it would be impracticable for any state to forego all Federal aid and thereby avoid Section 504, acceptance of Federal monies with the strings that go along with it is nonetheless a voluntary state action.

As a threshold matter, I conclude that the school transportation and education requirements at issue are not mandated by Federal law. Rather, these obligations apply in Massachusetts as a result of the state application for and acceptance of Federal aid that partially funds the State McKinney-Vento Plan.

B) The State McKinney-Vento Plan is a rule or regulation within the meaning of the State Administrative Procedures Act, M.G.L. c. 30A.

As noted above, the Local Mandate Law applies to post-1980 state laws, rules, or regulations. Although there is no codified state law or regulation that requires local school departments to provide the levels of services defined in the State McKinney-Vento Plan, DLM has long recognized the definition of the term "regulation" provided in M.G.L. c. 30A, § 1(5) that includes "the whole or any part of every rule, regulation, standard or other requirement of general application and future effect." Although DESE has awarded McKinney-Vento subgrants to an average of 20 school districts per year, the language of the Massachusetts State McKinney-Vento Plan applies generally to every district throughout the Commonwealth. Clearly, a number of communities have no facilities for housing homeless families, and the State Plan will have *de facto* minimal impacts in these locations. This happenstance, however, does not diminish the *de jure* standard that all districts must be prepared to implement the requirements of the State Plan should the need arise.

Additionally, data from the USDOE show McKinney-Vento payments to Massachusetts dating back to 2001; the Massachusetts State McKinney-Vento Plan was filed with the USDOE in 2002. There is no indication that DESE plans to suspend the State Plan or withdraw from the program. Accordingly, the State Plan is a long-standing requirement on school systems with future effect. I conclude, therefore, that the Massachusetts State McKinney-Vento Plan is a state "regulation" as defined in M.G.L. c. 30A, § 1(5) for the purposes of M.G.L. c. 29, § 27C.

II. M.G.L. c. 29, § 27C and the Transportation Requirements of the State McKinney-Vento Plan

As noted above, the Local Mandate Law applies to new financial obligations imposed upon cities, towns, and school districts by the state government after 1980. Importantly, it must be determined that a post-1980 law or regulation imposes substantive new obligations that did not exist under prior law. This principle is fully developed in *City of Worcester v. the Governor*, 416 Mass. 751 (1994).

As DESE filed the Massachusetts State McKinney-Vento Plan with the USDOE on May 29, 2002, this is clearly a post-1980 requirement. Moreover, the requirements in the State Plan relative to transporting homeless pupils back to their schools of origin impose obligations upon host communities and schools of origin beyond the provisions of pre-1981 or current state law. To the extent that state law

(pre-1981 and current) requires school departments to provide transportation to regular school programs[1], as a rule, this obligation ends at the boundary of the school district. *Murphy v. School Committee of Brimfield*, 378 Mass. 31 (1979). Although there are exceptions, including out-of-district transportation that may be required under special education law, or for a small community that does not maintain public schools, these exceptions do not encompass the scope of transportation obligations imposed by the State McKinney-Vento Plan. On these facts, I conclude that the State McKinney-Vento plan is a post-1980 regulation that imposes substantive new obligations upon host communities and schools of origin that must share the expense of school transportation for homeless students.

III. M.G.L. c. 29, § 27C and the Education Requirements of the State McKinney-Vento Plan

The education requirements of the State McKinney-Vento Plan may impact schools of origin or host communities, depending upon which school system a homeless child's parent/guardian elects.

A) When a homeless parent chooses the school of origin, it is my opinion that the Local Mandate Law applies to the additional cost incurred by the school of origin to provide an educational program for the child. The requirement to provide school services to a person who no longer resides within the school district is clearly a post-1980 obligation. Consistent with the standards enunciated in *Worcester*, this is not a mere clarification of a pre-1981 requirement that would fall beyond the scope of M.G.L. c. 29, § 27C. *Worcester, supra* at 754–757. Rather, this is a substantive new obligation with no discernible history in pre-1981 law.

As far back as the colonial era, Massachusetts law has required communities to provide education for school-aged residents. The current text of related law remains unchanged from at least as far back as 1966: "Every town . . . shall maintain a sufficient number of schools for the instruction of all children who may legally attend a public school therein." M.G.L. c. 71, § 1. Dating at least as far back as 1921, M.G.L. c. 76, § 1 provides that every school-aged child is entitled to attend a public day school in the town where she or he resides. As a rule, under Massachusetts General Law, a given community's obligation to school-aged children is limited to those children that live within the boundaries of the school district. Although there may be exceptions, including the circumstance where a school system voluntarily admits nonresidents, these exceptions do not encompass the scope of educational obligations imposed by the State McKinney-Vento Plan. Accordingly, I conclude that this aspect of the State Plan is subject to M.G.L. c. 29, § 27C.

B) When a homeless parent chooses to enroll a child in the host community school system, it is my opinion that this expense is not subject to the Local Mandate Law. In this instance, the child is living in the host community – albeit in temporary emergency housing. The long pre-1981 history of the duty to provide education for school-aged residents is cited in part A of this discussion. Because the Local Mandate Law applies only to state laws and regulations that impose obligations that did not exist under pre-1981 law, the facts in this instance do not support a determination of state mandate.

That said, it should be noted that there are reasonable arguments to support the opposite conclusion. It has been suggested that the historical notion of duty to school-aged residents did not contemplate the modern state practice of temporarily placing homeless families in motels and the scope of the State McKinney-Vento Plan. Akin to law that has recognized a particular state obligation to fund the cost impact on local schools when a state agency places a state ward in a temporary home (M.G.L. c. 76,

[1]Regional school districts must provide transportation within the borders of the regional district for students in kindergarten through grade 12 that live more than 1 ½ miles from school. Local school districts must provide transportation within the borders of the city or town for students in kindergarten through grade six that live more than 2 miles from school. M.G.L. c. 71, § 68.

§ 7), a similar state financial obligation may be appropriate when DHCD places homeless children in temporary housing, i.e. motels. The Legislature may therefore choose to provide educational support in these circumstances, but it is my opinion that it is not required by the Local Mandate Law.

IV. The Local Financial Effect: Town of Danvers

A) Transportation Requirements of the State McKinney-Vento Plan

The Danvers School Department provided data regarding its share of the cost of complying with the school transportation requirements of the State McKinney-Vento Plan. In some cases, the costs are incurred as a host community that shares in the expense of transporting pupils back to schools of origin. In other cases, the costs are incurred as a school of origin that shares in the expense of transporting pupils in from other host communities. We note that there is no set number of days for this service; it varies depending upon how long a given student resides in a given temporary emergency shelter placement—some as little as one month or less, others for the full school year. The data provided for school years 2009-2010 and 2010-2011 will serve the basis for projecting costs for 2011-2012.

School year 2009-2010:

Transporting 51 students living in Danvers motels to other communities	$ 93,780
Transporting 16 students living in other communities to Danvers Public Schools	$ 51,360
	$145,140
Per pupil average cost	$ 2,166

Note: The Danvers School Department also transported pupils from Danvers motels to Danvers schools; 3 utilized established bus routes at no added cost, and the additional cost for the other pupils was $12,582. This cost is not included because pre-1981 law required communities to provide transportation to community schools for children residing within the community. Accordingly, this amount is not subject to the Local Mandate Law.

School year 2010-2011:

Transporting 56 students living in Danvers motels to other communities	$ 36,727
Transporting 12 students living in other communities to Danvers Public Schools	$ 25,250
	$ 61,977
Per pupil average cost	$ 911

Note: The Danvers School Department transported 22 additional pupils from Danvers motels to Danvers schools; 18 utilized established bus routes at no added cost, and the additional cost for the other 4 pupils was $10,202. This cost is not included because pre-1981 law required communities to provide transportation to community schools for children residing within the community. Accordingly, this amount is not subject to the Local Mandate Law.

School year 2011-2012:

The numbers of homeless students that may be transported from Danvers motels to other communities and to Danvers Public Schools from other communities throughout the school year are unknown at this time. Also unknown is the number of days each student will require transportation service and the destination or pick-up location. With these unknowns, cost projections must rely on past experience. From data presented above, the two-year average per pupil cost of providing transportation service pursuant to the state McKinney-Vento Plan was $1,534. The Danvers School Department reports that at the start of this school year, the parents of 22 homeless children living in Danvers motels had elected to have them transported back to their schools of origin. Nine homeless pupils were being transported from other communities to attend Danvers schools. On these variables, DLM projects the cost to the Town of Danvers to comply with the transportation mandates of the state McKinney-Vento Plan for the current school year to be approximately $47,500.

B) Education Requirements of the State McKinney-Vento Plan

As a school of origin, the Danvers Public Schools enrolled 9 homeless pupils that were living in DHCD-sponsored temporary housing in other communities at the beginning of the 2011-2012 school year. Although I have concluded that the additional cost of providing school programs for pupils who do not live in the community pursuant to the state McKinney-Vento Plan is subject to the Local Mandate Law, Danvers school officials have advised that up to this point, the Town has been able to accommodate these pupils within existing class size limits negotiated with teacher union representatives. Notwithstanding Danvers' position, other communities may not be equally able to absorb costs associated with educating students who do not live in the community.

Conclusion and Recommendations

There is no provision for local acceptance relative to the requirements of the State McKinney-Vento Plan, and the Commonwealth has not provided for assumption of the cost "by general law and by appropriation." "Requiring the specific allocation of funds for each mandated service best effectuates the fiscal protection of local government that Proposition 2 ½ was designed to achieve." *Town of Lexington v. Commissioner of Education*, 393 Mass. 693, 701 (1985). In light of the factors set out above, it is my opinion that M.G.L. c. 29, § 27C applies to costs imposed upon cities and towns – in this case, upon the Town of Danvers – by the stated elements of the State McKinney-Vento Plan.

As explained earlier, the M.G.L. c. 29, § 27C remedy for an unfunded state mandate is a court-ordered exemption from compliance. As a practical matter, however, such an opt-out would be neither adequate nor helpful given the dimension of the problem. Alternatively, a municipality may seek a legislative remedy, which may involve state funding or repeal/modification of the mandate. As you know, the primary issue in this case is the shortage of appropriate temporary housing pending more permanent arrangements for families that lose their homes. The legislative effort to address this problem, HomeBase, is in the process of implementation. In the meantime, state leaders may wish to take additional steps to address the school-related financial consequences of these important state policies. In summary, if DESE, DHCD, the Governor, the Legislature and the impacted school systems determine that the best interests of homeless children and the schools that educate and transport them are better served by a solution other than an exemption from compliance, these steps should be considered:

- The Legislature and the Governor should consider approving appropriations to assume the cost of school transportation services shared by host communities and schools of origin as mandated by the State McKinney-Vento Plan. DESE data collected from school districts indicates that the statewide fiscal 2011 local cost impact was approximately $10.4 million. While it appears from the latest breakdown that homeless students residing in motels represent just over ten percent of the population served by the $10.4 million, the remainder was for homeless students residing in shelters, other homes and venues, or for those awaiting foster care.

- The Legislature and the Governor should consider establishing a fund to assume any incremental costs imposed upon schools of origin for the education of children who no longer reside in the community. It appears that data is not available on a statewide basis to determine how many of the 1,056 school-aged children living in motels are attending schools of origin v. host community schools. Twenty-two of the 84 homeless children served to some degree by the Danvers school system (26%) are attending schools of origin outside of Danvers. But there is no reason to expect this ratio to carry over statewide. Even if 100% of the homeless families were to choose schools of origin, the statewide cost would be approximately $5.3 million if the Legislature chose to apply the School Choice Law's[2] funding increment of $5,000 per pupil. Note that these numbers do not include homeless children residing in other settings, such as DHCD-sponsored congregate shelters. DESE should initiate a data collection effort to identify the numbers of homeless students served by schools of origin statewide to inform any legislative efforts to fund these mandated costs.

I look forward to working with you and the other members of the Legislature and the Patrick-Murray administration to address the important issues raised by your inquiry on behalf of the Town of Danvers and this determination.

Sincerely,

Enter Sender's Name

Enter CC person
Enter additional CC people

[2] Per the "School Choice Law," a school district that votes to participate may enroll students that live outside the district, and receive tuition payments not to exceed $5,000 per student. M.G.L. c. 76, § 12B. The tuition payments are deducted from the M.G.L. c. 70 school aid otherwise payable to the school district where such students reside.