



The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, BOSTON 02133

June 24, 2013

SUZANNE M. BUMP, ESQ.
AUDITOR

TEL: 617-727-2075

The Honorable Josh S. Cutler
Massachusetts House of Representatives
State House – Room 39
Boston, Massachusetts 02133-1054

The Honorable Geoffrey G. Diehl
Massachusetts House of Representatives
State House – Room 167
Boston, Massachusetts 02133-1054

**RE: M.G.L. c. 71, § 38R as amended by St. 2012, c. 459 Relative to
Fingerprinting and Background Checks of Certain School Employees**

Dear Representatives Cutler and Diehl:

This letter is in response to your request, on behalf of the Whitman-Hanson Regional School District (WHRSD) and other local officials from your districts, that the State Auditor's Division of Local Mandates (DLM) determine whether the Local Mandate Law, M.G.L. c. 29, § 27C, applies to elements of the above-referenced law. You cite new provisions that school employees must undergo fingerprinting and national background checks, and express concern that these requirements will impose additional costs upon school departments already struggling to provide essential educational services with limited resources. As I mentioned in a recent letter to you regarding federal stormwater management law, concern for the local impact of unfunded state mandates was also evident during the meeting you hosted in April with individuals who work on the front lines of local government. Again, I would like to state how deeply impressed I was by their earnest efforts to enhance the quality of community life under difficult fiscal circumstances.

There are instances in which the Local Mandate Law can be applied to support these efforts, but this is not the case relative to M.G.L. c. 71, § 38R (Section 38R), based upon information about the operation of this program available to us at this time. This is primarily because the Local Mandate Law applies to certain new costs imposed upon *cities and towns*, and the significant costs in this case will be imposed directly upon prospective and current school employees. My staff discussed this and the administrative cost aspects of Section 38R during a meeting in late April hosted by the WHRSD Superintendent of Schools. The Superintendent of Avon Public Schools, a legislative aide and WHRSD support staff also participated. On separate occasions, my staff also conducted telephone interviews of the General Counsel of the Executive Office of Education (EOE) and the Assistant General Counsel of the Department of Criminal Justice Information Services (CJIS). From these contacts and other print sources, my staff deduced that the administrative activities supporting employee background checks are likely to be relatively minor expenses that would fall within the exception stated in the Local Mandate Law for "incidental administration expenses." For these reasons, it is my opinion that the Local Mandate Law does not apply to M.G.L. c. 71, § 38R. The basis for this conclusion is further explained below.

The Local Mandate Law

In relevant part, the Local Mandate Law provides that any post-1980 law imposing additional costs upon any city, town, regional school district or educational collaborative must be subject to local acceptance, "...unless the general court, at the same session in which such law is enacted, provides, by general law and by appropriation, for the assumption by the commonwealth of such cost, exclusive of incidental local administration expenses...." Any municipality aggrieved by a law or regulation adopted contrary to these standards may petition the Superior Court to be exempted from compliance, until the Commonwealth assumes the cost. Prior to taking this step, a city or town may request an opinion from DLM as to whether the Local Mandate Law applies in a given case, and if so, to determine the amount of the cost imposed by the law or regulation at issue. DLM's determination of the amount of the compliance cost shall be prima facie evidence of the amount of state funding necessary to sustain the mandate. See M.G.L. c. 29, § 27C(a), (d) and (e).

Fingerprinting of Certain School Employees

By explicit terms, the Local Mandate Law applies to any post 1980 law that imposes a "...direct service or cost obligation upon any city or town..." M.G.L. c. 29, § 27C(a), emphasis added. Section 38R does not state in direct terms that school employees subject to the law must submit fingerprints. Nonetheless, the session law that adds this requirement to the General Laws provides that the fingerprinting requirement "...shall apply to new employees hired for the 2013-2014 school year. Employees hired before that time shall submit fingerprints for federal background checks prior to the beginning of the 2016-2017 school year." See St. 2012, c. 459, § 9. Employees subject to these requirements include prospective and current "...public and private K-12 school employees... subcontractors/laborers commissioned by schools to perform work on school grounds [and] individuals who regularly provide school-related transportation to children..." See Executive Office of Education, "An Act Relative to Background Checks (Chapter 459 of the Acts of 2012) Frequently Asked Questions" at <http://www.mass.gov/edu/2013newsupdates/frequently-asked-questions-regarding-background-checks.html>. Further, Section 38R states that:

The applicant [the school employee] shall pay a fee...to offset the costs of operating and administering a fingerprint-based criminal background check system. The fee shall not exceed \$55 for employees who are certified pursuant to section 38G [of Chapter 71 of the General Laws] and shall not exceed \$35 for employees who are not certified pursuant to section 38G. The fee may increase accordingly if the Federal Bureau of Investigation increases the fee for its fingerprint background check service. The school committee, superintendent or principal may reimburse applicants all or part of the fee on the grounds of financial hardship.

The anticipated cost for approximately 70,000 teachers currently licensed in Massachusetts will approach \$4 million. This does not include the additional cost for thousands of unlicensed school personnel and subcontractors subject to fingerprinting. The WHRSD Superintendent explained that the aggregate cost of fees for 240 teachers and 80 other staff members required to comply with the law will total about \$16,000. Because the text explicitly provides that applicants (employees) must pay the fingerprinting fee, this cost is imposed directly upon individuals, not upon cities, towns and districts. In the case of financial hardship, the law does authorize school officials to reimburse employees for this

cost. Nonetheless, this is not mandated, and the costs are not imposed *upon cities and towns* within the meaning of the Local Mandate Law. See related DLM decision for the Town of Paxton, DLM 09-19. (Local Mandate Law does not apply to mandate on public employees to complete online training program every two years pursuant to the so-called Ethics Reform Act, St. 2009, c. 28.)

Administrative Costs

At the April meeting with DLM staff, WHRSD and Avon school officials expressed concern regarding the extra administrative duties imposed by Section 38R. Additional duties will result from the requirement that public and private school administrators must "...obtain a state and national fingerprint-based criminal background check...to determine the suitability of current and prospective employees of the school department who may have direct and unmonitored contact with children." This will require that school administrators obtain, review and maintain an additional record for each prospective and current employee subject to the law.

As noted above, the Local Mandate Law provides that the Commonwealth is not obliged to assume the cost of state mandates that impose no more than "incidental administration expenses." See M.G.L. c. 29, § 27C(a), and (c). The Supreme Judicial Court defines this term as "...relatively minor expenses related to the management of municipal services...subordinate consequences of a municipality's fulfillment of primary obligations." *City of Worcester v. the Governor*, 416 Mass. 751, 758 (1994). In *Worcester*, the Court did not further define "relatively minor expenses," but did conclude that the cost of a parental notice requirement that averaged approximately \$28,000 per year for the Worcester school department fell within this "relatively minor" parameter. *Id.*

Although no cost estimates have been offered at this time, for a number of reasons, it appears that compliance with the administrative requirements of Section 38R will impose no more than relatively minor administrative expenses. Primary among these, school administrators already have in place protocols to obtain, review and maintain criminal offender record information (CORI) from CJIS. It is expected that administration of the national fingerprint-based criminal background checks will enhance the existing process for administering CORI obligations. Further, the law provides for a phase-in of DESE regulations under Section 38R, and allows a schedule spanning from September 1, 2013 to the beginning of the 2016-2017 school year to achieve compliance relative to employees hired before the 2013-2014 school year. See St. 2012, c. 459, §§ 8C and 9. As such, it is expected that the need to obtain and review national background checks for current employees will occur over time, so that these tasks may be accommodated within the regular routine of existing administrative staff. Finally, the obligation to obtain and review fingerprint-based national background checks of school employees is not a substantive new duty, but rather, a "subordinate consequence" of the primary pre-1981 requirement that public schools "...shall be taught by teachers of competent ability and good morals..." See fourth sentence of M.G.L. c. 71, §1, added by St. 1966, c. 187. Accordingly, it appears that the administrative costs of complying with Section 38R will fall within the exception to the Local Mandate Law for incidental administration expenses, as defined in the *Worcester* case. *Id.* See also DLM 09-19. (Record-keeping and other administrative requirements of St. 2009, c. 28, the so-called Ethics Reform Act, fall within the exception to the Local Mandate Law for "incidental local administration expenses.")

Conclusion

In light of the above discussion, I have reached the initial conclusion that the Local Mandate Law, M.G.L. c. 29, § 27C, does not apply to the fingerprinting and national background checks of school personnel required by M.G.L. c. 71, § 38R. Nonetheless, I reserve the right to revisit this matter as the Legislature addresses proposed amendments to the law, and responsible agencies draft regulations to detail implementation procedures.

I have instructed my DLM to monitor further developments in this issue over the coming months. According to sources at CJIS, following the selection of a vendor, it is expected that the fingerprinting process should begin in the fall. In the meantime, EOE General Counsel James DiTullio has offered to assist the WHRSD and other school districts should they have questions or encounter problems in implementing Section 38R. Also, CJIS Assistant General Counsel Laura Weierman would be a good source of information on the new law.

I regret that this opinion does not aid local officials in your district in their efforts to control school spending. Nonetheless, I must apply the Local Mandate Law consistently to each issue, as interpreted by the courts. Please be aware that this initial opinion is subject to revision in the event that you offer factors that we may not have considered that would change the result. Additionally, this opinion does not prejudice the right of any city or town to seek independent review of the matter in Superior Court in accordance with Section 27C(e) of Chapter 29.

I thank you for bringing this issue to my attention, and encourage you to contact me with further concerns you may have on this or other matters impacting state and local finance.

Sincerely,



Suzanne M. Bump

Auditor of the Commonwealth

cc: Superintendent Ruth C. Gilbert-Whitner, Whitman-Hanson Regional School District
Superintendent Margaret Frieswyk, Avon Public Schools
General Counsel James DiTullio, Executive Office of Education
Assistant General Counsel Laura Weierman, Department of Criminal Justice Information Services