



The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

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January 31, 2013

Mr. Richard P. Brazeau, Chairman
Mr. Peter d'Errico, Member
Ms. Julia Shively, Member
Leverett Board of Selectmen
9 Montague Road
Leverett, Massachusetts 01054

**RE: Chapter 222 of the Acts of 2012 --
An Act Relative to Student Access to Educational Services and Exclusion from School**

Dear Chairman Brazeau and Members of the Board:

This letter is in response to your request to the State Auditor's Division of Local Mandates (DLM) regarding the anticipated costs to be incurred by the Town of Leverett in implementing the requirements of Chapter 222 of the Acts of 2012 (Chapter 222). As you know, the School Committee of the Ashburnham-Westminster Regional School District (AWRSD) also petitioned my Office on this matter. Accordingly, my staff met with officials representing the Town of Leverett (along with a representative of the Amherst-Pelham Regional School District as it serves Leverett's students in grades 7-12) and the AWRSD to hear their specific concerns. Although Chapter 222 encompasses a number of provisions relative to student attendance and discipline, the officials with whom my staff met identified the requirement to provide alternative educational services to students who are under extended exclusion from school (more than ten consecutive school days), set forth in Section 9 of Chapter 222, as the most controversial component of the Act. As a result, you have agreed that the focus of DLM's review under M.G.L. c. 29, § 27C (the Local Mandate Law) is limited to this aspect of Chapter 222.

At the outset, it is important to note that Chapter 222 does not address suspension or expulsion of students enrolled in special education programs; these matters are governed by federal and state law, and are not affected by Chapter 222. Additionally, the financial impact in this case will vary from one school system to the next and from one school year to the next, depending upon the number and duration of student suspensions and expulsions. If a school system does not impose any extended exclusions from school in a given year, there will be no additional costs that might implicate the Local Mandate Law.

It is clear from our review that student exclusions present a significant issue to Massachusetts educators. Based on data that my staff received from the Department of Elementary and Secondary

Education (DESE), Massachusetts school districts reported that approximately 51,500 non-special education students were excluded from school, for time periods spanning a fraction of one school day to permanent expulsions, in the 2011-2012 school year. Of those exclusions, 20,834 were in-school suspensions, and 30,748 were out-of-school suspensions or expulsions. Of those out-of-school exclusions, 673 were for more than 10 school days and resulted from “assigned offenses” set forth in M.G.L. c. 71, § 37H, such as possession of a dangerous weapon or assault on school personnel. Of those 673 exclusions, 114 were expulsions for offenses involving weapons, drugs, or assaults.

Nonetheless, after my review of the law, I have reached the conclusion that, when there are additional costs imposed by Section 9 of Chapter 222 that are not assumed by the Commonwealth by specific appropriation, the Local Mandate Law will apply. The following explains my conclusion.

The Local Mandate Law

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 exemption from complying with the mandate until the Commonwealth provides funding to assume the cost. DLM’s determination of the compliance cost of any unfunded mandate 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 anticipated local cost impact of a state law is subject to the Local Mandate Law, we apply the framework for analysis developed by the Supreme Judicial Court in *City of Worcester v. The Governor*, 416 Mass. 751 (1994). As an initial matter, the challenged law must take effect on or after January 1, 1981. Additionally, the law must effect a genuine change in law, and be more than a clarification of existing obligations. It must also result in direct service or cost obligations that are imposed upon the municipality by the Commonwealth, not voluntarily undertaken at the local level. Finally, it must impose more than “incidental local administration expenses,” as these are explicitly exempted from the Local Mandate Law. *Worcester*, 416 Mass. at 754–755.

When the State Auditor determines that the Local Mandate Law applies in a given case, the analysis then turns to the question of whether the Commonwealth has provided appropriate state funding to assume the mandated costs. The Supreme Judicial Court set the framework for this analysis in *Town of Lexington v. Commissioner of Education*, 393 Mass. 693 (1985). In summary, the *Lexington* case does not sanction state reimbursement after the fact; it requires that state “funding be provided at the same time the mandate is imposed on cities and towns.” *Lexington*, 393 Mass. at 701; see M.G.L. c. 29, § 27C(a) (law mandating costs for city or town must be accompanied by appropriation “at the same session in which such law is enacted”). Moreover, the *Lexington* decision requires a “specific allocation of funds for each mandated service” -- increases in unrestricted local aid will not satisfy the standards of the Local Mandate Law. *Lexington*, 393 Mass. at 701. Finally, any state funding for mandated costs may not be subject to appropriation. *Id.* at 700.

Application of the Local Mandate Law to Chapter 222, Section 9

Because Section 12 of Chapter 222 provides that most of its requirements, including Section 9, shall take effect on July 1, 2014, Chapter 222 is a law taking effect after 1980. Further, Chapter 222, Section 9 effects a genuine change in law, not a mere clarification -- for example, for student suspensions lasting more than 10 consecutive school days and expulsions, each school principal must develop a school wide "education service plan" to ensure excluded pupils the "opportunity to make academic progress." These plans may include "tutoring, alternative placement, Saturday school, and online or distance learning." School officials must provide each student excluded for an extended period (and parents/guardians) a "list of alternative educational services," and "facilitate" enrollment in the alternative selected by the student (and parents/guardians).

Consistent with the *Worcester* analysis, Chapter 222 will clearly effect a substantive change in the obligations of local school officials. Neither pre-1981 nor current law includes the concepts of "opportunity to make academic progress" and school wide "education service plans" in relation to student exclusions. While pre-1981 law was silent on such things, current law (in effect until July 2014) explicitly states that no school department need admit or provide alternative educational services to expelled students. M.G.L. c. 71, § 37H and 37H½. The Supreme Judicial Court has affirmed this limitation on several occasions. *See, e.g., Doe v. Worcester*, 421 Mass. 117 (1995) (exclusion without alternative educational services not unconstitutional); *Board of Education v. Quincy*, 415 Mass. 240 (1993) (Board of Education did not have authority to order school committee to provide alternative programming for expelled student); *Nichols B. v. School Committee of Worcester*, 412 Mass. 20, 21 (1992) ("School committees have wide discretion in school discipline matters"). Because it is clear that school committees had no financial obligation to excluded students under pre-1981 law, and still have no obligation under current law, this aspect of Chapter 222 is a "new law changing existing law" that will impose direct service obligations on school districts within the scope of the Local Mandate Law.

Continuing with the *Worcester* framework, we find that the obligations of Chapter 222, Section 9 will be imposed by the State, and will not be undertaken voluntarily at the local level. Chapter 222 is not a local option law that will apply only in cities, towns, or districts that vote to accept it. The requirements are imposed by state law and will apply uniformly throughout the Commonwealth. Granted, numerous school departments have been providing alternative educational programming for excluded students, voluntarily without a state mandate. However, once Chapter 222 takes effect on July 1, 2014, school systems may no longer choose to discontinue or decline to offer these services; what is now voluntary will become mandatory and may have a lasting effect upon many school budgets. Finally, when school districts incur costs to provide alternative programs in compliance with these requirements, these costs will be in support of direct student services, not the type of minor administrative expenses exempted from the Local Mandate Law. Accordingly, I conclude that Chapter 222, section 9 falls within the scope of the Local Mandate Law.

State Funding Approach Insufficient

Moreover, it is my opinion that the level and method of state funding contemplated by Chapter 222, Section 9 does not satisfy the state funding standards of the Local Mandate Law. The statute provides that the instructional cost elements of alternative programs may be reimbursed pursuant to the so-called special education circuit breaker formula set forth in M.G.L. c. 71B, § 5A, in addition to state aid provided under M.G.L. c. 70 (Chapter 70). Subject to appropriation, the circuit breaker provides state reimbursement for 75% of amounts that exceed four times the state average foundation budget per pupil -- \$9,729 in fiscal year 2012. Accordingly, if the law were in effect this year, based on fiscal year 2012 data, school departments would be entitled to additional assistance equal to 75% of amounts spent for alternative services for excluded students that exceed \$38,916. Apparently, the statute also intends that Chapter 70 state aid for schools be applied to fund the cost of alternative programming. In fiscal year 2012, Chapter 70 appropriation provided an average of approximately 37% of actual school spending at the local level, or approximately \$4,319 per pupil (using foundation enrollment). This approach falls short of the standards of the Local Mandate Law in several ways.

First, the methodology will utilize formulas that calculate reimbursement amounts based upon the prior year's cost data and that will not reimburse school departments for their costs until a year after those costs are incurred. The *Lexington* decision, cited above, calls for "same session" funding in the fiscal year in which costs are incurred. *Lexington*, 393 Mass. at 700-701. Additionally, the methodology would seem to indicate that the Chapter 70 per pupil allotment would be available to "follow" the student to the alternative service, when in fact, school committees budget Chapter 70 funds prior to the start of the school year to support the full range of costs necessary to operate their public schools. This would not be a "specific allocation of funds" for the mandated services as required by the *Lexington* decision. *Id.* at 701. As for the M.G.L. c. 71B, § 5A circuit breaker aid formula, the new maximum suspension of 90 days for certain infractions would need to cost \$432 per day to reach the fiscal 2012 threshold for assistance (\$38,916.) This daily rate approaches eight times the fiscal 2012 foundation budget per pupil on a daily rate (approximately \$55.) Based on our current information, it seems unlikely that the cost of alternative programming would reach this threshold on a regular basis. We also note that transportation and other potential cost elements are excluded. Finally, Chapter 222 expressly states that this funding mechanism will be "subject to appropriation." Taking all of these factors into consideration, Chapter 222, Section 9 does not call for the full funding specifically targeted to assume the costs of the mandated services required by the *Lexington* Court's interpretation of the Local Mandate Law.

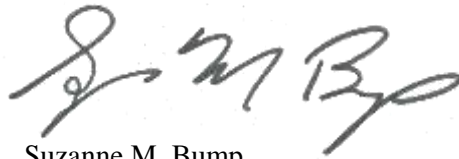
Conclusion

In summary, I have reached the conclusion that, when there are additional costs imposed upon a school department by St. 2012, c. 222, § 9 that are not assumed by the Commonwealth by specific appropriation, the Local Mandate Law, M.G.L. c. 29, § 27C, will apply. However, as the new law does not take effect until July 1, 2014, it is premature to determine compliance costs. I urge you to contact DLM's Director, Vincent McCarthy, when you have cost data. In the meantime, several sections of Chapter 222 call for the Department of Elementary and Secondary Education (DESE) to issue regulations further defining aspects of the law. When my staff met with DESE officials on this matter, they received the clear impression that the agency intends to demonstrate sensitivity to local cost concerns in its rule-making. Additionally, Sections 10 and 11 of Chapter 222 direct DESE to file a report with the

Legislature on the cost of implementing the law by November 30, 2013, subsequently followed by annual reports “on the cost of providing reimbursement for instructional costs associated with providing alternative educational services” under the law. These provisions demonstrate that the Legislature is aware of and intends to continually monitor the local cost impact of Chapter 222, and may consider additional state funding as compliance costs become known.

In closing, please be advised that this opinion does not relieve the Town of Leverett from the duty to comply with Chapter 222. As explained above, the Local Mandate Law allows an aggrieved community to petition the Superior Court for an exemption from compliance. Alternatively, a locality may seek a legislative remedy, which may involve state funding or repeal/modification of the mandate. I thank you for bringing this matter to our attention, and I hope that you will keep us apprised of your experience as the law takes effect. I have directed my staff to keep in touch with you and to follow legislative and agency actions over the coming months. I hope that this decision contributes to the further development of state policy that demonstrates respect for local budget constraints and the standards of the Local Mandate Law.

Sincerely,

A handwritten signature in black ink, appearing to read 'Suzanne M. Bump', written in a cursive style.

Suzanne M. Bump
Auditor of the Commonwealth