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September 23, 2014

The Honorable Thomas M. Stanley
Massachusetts House of Representatives
State House, Room 167
Boston, MA 02133

RE: Mandated National and International Academic Assessments

Dear Representative Stanley:

Massachusetts leads the nation in providing students with a high quality education, which is highlighted in a recent report by WalletHub which ranked Massachusetts schools second in the nation.¹ Massachusetts schools also rank highly in international assessments, with eighth grade students ranking second in science and sixth in mathematics.² In 1993, the Legislature and Governor Weld enacted the Massachusetts Education Reform Act of 1993 (the Education Reform Act) to ensure the quality of the Massachusetts public education system. As part of the Education Reform Act, new laws were enacted that required Massachusetts to assess and evaluate the performance of Massachusetts schools and districts. St. 1993, c. 71, § 29.

This letter is in response to your request on behalf of the Waltham Public Schools to the State Auditor's Division of Local Mandates (DLM). You indicated that two Waltham public schools have been selected to administer national and international assessments mandated by the Department of Elementary and Secondary Education (DESE). The Kennedy Middle School was selected to administer the National Assessment for Education Progress (NAEP) and the Fitzgerald Elementary School was selected to administer the Trends in International Mathematics and Science Study (TIMSS). You asked DLM to determine whether the requirement that the Waltham Public Schools administer NAEP and TIMSS under the Education Reform Act and the No Child Left Behind Act triggers the anti-mandate provisions of the Local Mandate Law, M.G.L. c. 29, § 27C. In preparation for this response, DLM staff met with Waltham

¹ Claire McNeil, *Mass. Tops US in Study of Children's Well-Being*, BOSTON GLOBE, July 22, 2014, available at <http://www.bostonglobe.com/metro/2014/07/22/massachusetts-ranks-first-tally-children-well-being/afnL0ajfOSpPT517A56j0M/story.html>; Richie Bernardo, *2014's States with the Best and Worst School Systems*, WalletHub, available at <http://wallethub.com/edu/states-with-the-best-schools/5335/>.

² Kenneth Chang, *Expecting the Best Yields Results in Massachusetts*, N.Y. TIMES, Sept. 2, 2013, available at <http://www.nytimes.com/2013/09/03/science/expecting-the-best-yields-results-in-massachusetts.html?pagewanted=all>.

Public School Superintendent Susan Nicholson. DLM also spoke with staff from DESE, including Deputy General Counsel Dianne Curran and NAEP State Coordinator Rebecca Bennett.

Although we understand that administering the NAEP and TIMSS assessments may impose a moderate administrative cost on the Kennedy Middle School and the Fitzgerald Elementary School, DLM concludes that the Local Mandate Law does not apply to the Education Reform Act's requirement that schools participate in NAEP and TIMSS. The Education Reform Act exempts the Act's requirements from the Local Mandate Law. Moreover, the costs associated with the administration of NAEP and TIMSS constitute incidental local administration expenses and, thus, are exempt from the Local Mandate Law.

Application of the Local Mandate Law to NAEP and TIMSS

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 the Local Mandate Law, 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 sufficient funding. 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, the compliance cost of any unfunded mandate. Pursuant to the Local Mandate Law, DLM's cost determination is *prima facie* evidence of the amount of funding necessary to sustain the local mandate. *See* M.G.L. c. 29, § 27C (e). Alternatively, a community may seek legislative relief.

To determine whether the anticipated local cost impact of a state law, rule, or regulation 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). Of particular relevance to your petition, the challenged law must take effect on or after January 1, 1981, and the law must result in a direct service or cost obligation that is imposed by the Commonwealth, not merely an incidental local administration expense. *Id.* at 754-755. Moreover, the challenged law must not have been expressly overridden by the Legislature. *Town of Lexington v. Commissioner of Education*, 393 Mass. 693, 698 (1985); *School Committee of Lexington v. Commissioner of Education*, 397 Mass. 593, 595 (1986).

Applying this analysis to the issue that you raised, DLM has determined that the administration of NAEP and TIMSS does not trigger the anti-mandate provisions of the Local Mandate Law, because the costs associated with the administration of NAEP and TIMSS are exempt from the Local Mandate Law. Additionally, the cost of administering NAEP and TIMSS only imposes an incident local administrative expense upon the schools.

In the *Town of Lexington* and the *School Committee of Lexington*, the Supreme Judicial Court noted that the Massachusetts Legislature can override the Local Mandate Law by express terms. *Town of Lexington*, 393 Mass. at 698; *School Committee of Lexington*, 397 Mass. at 595-96. In addition to an override of the Local Mandate Law, the Local Mandate Law also exempts from its scope "incidental local administration expenses." M.G.L. c. 29, § 27C(a). The Supreme Judicial Court, in the *City of Worcester*, sought to define incidental local administration expenses and concluded that incidental local administration expenses "are relatively minor expenses related to the management of municipal service and that they are subordinate consequences of a municipality's fulfillment of primary obligations." *City of Worcester*, 416 Mass. at 758. At issue in *City of Worcester* were changes in regulatory requirements for parental notice regarding student referrals for special education evaluations and reporting requirements of school committees regarding accessibility of services and facilities. *Id.* at 757-58. The Court found that the primary obligations imposed by the regulations were the identification of students in need of special

education and providing school accessibility to students with limited mobility. *Id.* at 758-59. Consequently, the Court found that that the parental notification and the submission of building accessibility plans imposed administrative expenses that were subordinate to the primary obligation and did not need to be funded by the Commonwealth. *Id.*

While NAEP and TIMSS are assessments which the Federal government encourages states to participate in, the Federal government does not mandate participation. The National Assessment of Education Progress requires the Federal Commissioner for Education Statistics to conduct a national assessment every two years of student performance in reading and mathematics in grades 4 and 8 in both public and private elementary and secondary schools. 20 U.S.C. § 9622(b)(2)(B). States that receive grants under Title I are required to participate in the NAEP assessment. *Id.* § 6311(c)(2). The National Center for Education Statistics is authorized to conduct TIMSS under the Education Science Reform Act of 2012 codified in 20 U.S.C. § 9543. However, a state's participation in TIMSS is voluntary.³

DESE bases its authority to require participation in NAEP and TIMSS on the Education Reform Act.⁴ Section 29 of the Education Reform Act amended Chapter 69 of the Massachusetts General Laws by adding eleven new sections, including Section 1I, pertaining to public school performance. St. 1993, c. 71, § 29. Section 1I requires DESE to establish a system for evaluating the performance of public school districts and individual public schools. M.G.L. c. 69, § 1I. In addition, Section 1I specifically requires Massachusetts to participate in NAEP stating, “the board [of DESE] shall take all appropriate actions to bring about and continue the commonwealth’s participation in the assessment activities of the National Assessment of Education Progress. . .” *Id.* Section 1I also provides that the system that DESE adopts to evaluate public schools shall have assessment instruments that can compare student performance in Massachusetts to student performance in other countries. *Id.* Moreover, Section 1I authorizes the Commissioner of DESE to “gather information, including information specified herein and other information as the board shall require, for the purposes of evaluating individual public schools, school districts, and the efficacy and equity of state and federal mandated programs.” *Id.* Even though statewide participation in NAEP and TIMSS is a post-1980 state mandate that could fall within the scope of the Local Mandate Law, it does not because the Education Reform Act exempts the provisions of the Act from the Local Mandate Law. St. 1993, c. 71, § 67. The Education Reform Act states, “this act shall apply to all cities, towns, and regional school districts notwithstanding section twenty-seven C of chapter twenty-nine of the General Laws and without regard to any acceptance or appropriation by a city, town, or regional school district or to any appropriation by the general court.” *Id.* Since the Education Reform Act specifically exempted its provisions from the Local Mandate Law any local cost associated with administering NAEP and TIMSS falls outside the scope of the Local Mandate Law.

Even if the Education Reform Act were not exempted from the Local Mandate Law, the requirements of Section 1I of Chapter 69 of the Massachusetts General Laws fall outside the scope of the Local Mandate Law because the costs associated with the administration of NAEP and TIMSS constitute an incidental local administration expense. The majority of the costs associated with the administration of NAEP and TIMSS are borne by the National Center for Education Statistics. NAEP and TIMSS are administered to the selected students by National Center for Education Statistics field staff, not the local

³ Letter From Peggy Carr, Associate Commissioner, Nat’l Center for Education Statistics, Assessment Division, to Mitchell Chester, Commissioner, Massachusetts Department of Education (Apr. 24, 2014); *Trends in International Mathematics and Science Study (TIMSS)* (Nat’l Ctr. for Education Statistics, Washington, D.C.), available at http://nces.ed.gov/TIMSS/pdf/TIMSS_2015_Brochure.pdf.

⁴ Letter from Mitchell Chester, Commissioner, Massachusetts Department of Education, to Susan Nicholson, Superintendent, Waltham Public Schools (May 20, 2014).

schools.⁵ The field staff provide all the required testing material and equipment as well as staff to administer the assessments.⁶ Nevertheless, the National Center for Education Statistics does require some assistance from the local schools in the administration of NAEP and TIMSS, including appointment of a school coordinator, teacher and principal participation in a contextual questionnaire, and parental notification letters.⁷ The responsibilities of the school coordinator are to help coordinate pre-assessment tasks, like scheduling the assessment, arranging an assessment location, coordinating principal and teacher completion of questionnaires, and distributing parent notification letters to the parents of selected students.⁸ DESE Deputy General Counsel Dianne Curran estimated that the tasks required of the school coordinator will take approximately three to four hours. The principal and teacher questionnaires take approximately twenty to thirty-five minutes.⁹ Rebecca Bennett, NAEP State Coordinator, stated typically 22 to 25 students are selected for NAEP and TIMSS respectively, and schools are required to send parental notification letters to the parents of those students. Ms. Bennett stated that, with regards to the cost of the parental notifications, many schools opt to send the notifications by electronic mail or give the notifications to the students to bring home to their parents to minimize the cost of mailing the notification.

The National Center for Education Statistics provides schools and school coordinators that participate in TIMSS with a minimal monetary benefit. Schools that participate in TIMSS receive \$200.00 and the school coordinator receives \$100.00. Ms. Bennett stated that some schools have used part of the \$200.00 the school receives for its participation to compensate teachers for the teacher's participation in the questionnaire.

Ms. Curran stressed that Massachusetts participates in NAEP and TIMSS because DESE believes that participation in these assessments is integral in assessing the performance of Massachusetts schools and students and helps DESE to determine how and where to make improvements to the curriculum. Additionally, Massachusetts students compete against many other students in attaining higher levels of education and employment. DESE believes that having the data to illustrate the performance of Massachusetts students is extremely important, especially in light of the minimal time and costs associated with the administration of NAEP and TIMSS on the local school districts.

The primary obligation of M.G.L. c. 69, § 11 is to assess how Massachusetts schools are performing. The obligations imposed by the assessment, such as scheduling the assessment, providing a room for the assessment, principal and teacher questionnaires, and sending parental notifications are all subordinate to the primary obligation, which is the assessment of school performance. Consequently, because the obligations imposed by the M.G.L. c. 69, § 11 constitute incidental local administration expenses, the costs fall outside the scope of the Local Mandate Law.

⁵ *NAEP 2015: Facts for Districts* (Nat'l Ctr. for Education Statistics, Washington D.C.), available at <http://nces.ed.gov/nationsreportcard/subject/about/pdf/schools/2015factsdistricts.pdf>; *TIMSS: Frequently Asked Questions* (Nat'l Ctr. for Education Statistics, Washington D.C.), available at https://nces.ed.gov/timss/pdf/TIMSS_2015_FAQ.pdf.

⁶ *Id.*

⁷ *NAEP 2015: Facts for Districts; TIMSS: Frequently Asked Questions; Summary of School Activities: Trends in International Mathematics and Science Study (TIMSS) 2015* (Nat'l Ctr. for Education Statistics, Washington D.C.), available at <http://www.fldoe.org/asp/naep/pdf/TIMSS2015-SchoolActivities.pdf>.

⁸ *Summary of School Activities: Trends in International Mathematics and Science Study (TIMSS) 2015; NAEP 2015: Facts for Districts.*

⁹ *NAEP 2015: Facts for Districts; TIMSS: Frequently Asked Questions.*

Conclusion

The ability to assess district, school, and student performance is an integral part in providing a quality education to students. We realize that schools are facing difficult fiscal decisions and that even small costs have an effect on budgets.

Nevertheless, DLM has concluded that the administration of NAEP and TIMSS does not trigger the anti-mandate provisions of the Local Mandate Law, because the costs associated with the administration of NAEP and TIMSS are exempt from the Local Mandate Law. Additionally, the costs of the administration of NAEP and TIMSS only impose an incidental local administration expense upon schools, which falls outside the scope of the Local Mandate Law.

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. Although we are sympathetic to the fiscal constraints facing all cities and towns, DLM must apply the Local Mandate Law consistently to each issue, as interpreted by the courts. We thank you for bringing this matter to our attention, and encourage you to contact DLM with further concerns on this or other matters impacting your district.

Sincerely,

A handwritten signature in black ink, appearing to read "Vincent P. McCarthy". The signature is written in a cursive style with a large initial "V" and "M".

Vincent P. McCarthy, Director
Division of Local Mandates

cc: The Honorable Jeannette A. McCarthy, Mayor of the City of Waltham
Susan Nicholson, Superintendent, Waltham Public Schools
Mitchell Chester, Commissioner, Mass. Department of Elementary and Secondary Education
Dianne Curran, Deputy General Counsel, Mass. Department of Elementary and Secondary Education
Rebecca Bennett, Massachusetts NAEP State Coordinator, Mass. Department of Elementary and Secondary Education