



The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

DIVISION OF LOCAL MANDATES

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SUZANNE M. BUMP, ESQ.
AUDITOR

July 10, 2014

Mr. Christopher Farmer
Superintendent of Schools
Triton Regional School District
112 Elm Street
Byfield, MA 01922

RE: Criminal History Checks for Certain School Employees

Dear Superintendent Farmer:

Since 1647, Massachusetts has required its cities and towns to provide public education to the children of the Commonwealth.¹ The schools of the Commonwealth take their duty to provide a safe learning environment most seriously. In order to provide such an environment for students, Massachusetts schools perform criminal history checks on certain school employees who have unsupervised contact with children. M.G.L. c. 71, § 38R. In order to provide better protection, states throughout the country expanded protection by requiring their schools to perform national criminal history checks on certain school employees. Following suit, Massachusetts expanded criminal history checks to include national criminal history checks in 2012. St. 2012, c. 459, § 7.

This is the second mandate determination petition involving the Criminal Background Check Statute that the Office of the State Auditor has received -- the first was a petition by State Representatives Josh Cutler and Geoffrey Diehl, on behalf of the Whitman-Hanson Regional School District (WHRSD), regarding the cost of fingerprinting and performing background checks on certain school employees.² Regarding the WHRSD petition, the Auditor determined that this was not a mandate within the meaning of the Local Mandate Law because the cost of fingerprinting and background checks is imposed directly upon individuals, not the municipalities or districts. The Auditor further determined that the costs associated with the fingerprinting and background check program, such as the cost to obtain, review, and maintain additional records, did not fall within the Local Mandate Law because it appeared that the administrative costs would impose no more than an incidental administrative expense, which the Local Mandate Law exempts from its scope.

¹ Old Deluder Satan Law of 1647, Laws and Liberties of Massachusetts, p. 47 (1647), *available at* <http://www.lawlib.state.ma.us/docs/DeluderSatan.pdf>.

² M.G.L. c. 71, § 38R as amended by St. 2012, c. 459 Relative to Fingerprinting and Background Checks of Certain School Employees (Office of the State Auditor June 24, 2013), *available at* <http://www.mass.gov/auditor/docs/dlm-mandate/2013/fingerprinting-background-checks-cert-school-employees.pdf>.

This letter is in response to your request on behalf of the Triton Regional School District to the State Auditor's Division of Local Mandates (DLM). You indicated that employees, most frequently teachers, sometimes transfer from one school district to another school district. You asked DLM to determine whether the fees that a school pays to perform a new national criminal history check on any such transferee triggers the anti-mandate provisions of the Local Mandate Law, M.G.L. c. 29, § 27C. You expressed concern that a school that relies on a previous determination of suitability, as permitted by 603 CMR 51.06 (Section 51.06), without being able to see the information on which the suitability determination was based, creates a possible liability issue. This was of particular concern to you because the Department of Elementary and Secondary Education (DESE) requires schools that "choose to perform a new national criminal history check on an individual rather than rely on a previous favorable suitability determination" to pay the cost of the new check, rather than the individual who is seeking employment. M.G.L. c. 71, § 38R; 603 CMR 51.06(5)(c). In preparation for this response, DLM staff met with you and Assistant Superintendent Brian Forget on June 9, 2014. DLM also spoke with Deputy Commissioner Jeffrey Wulfson of DESE, James DiTullio, General Counsel for the Massachusetts Executive Office of Education (EOE), and Glenn Koocher, Executive Director of the Massachusetts Association of School Committees.

Although we understand that the fee for performing a new national criminal history check is a significant concern for the Triton Regional School District, especially during these difficult fiscal times, DLM concludes that the Local Mandate Law does not apply to the issue that you raised. A school that chooses to perform a national criminal history check, when the school may rely upon a previous favorable suitability determination, has voluntarily assumed the cost of that check, and, thus, it is not a mandate within the meaning of the Local Mandate Law.

Application of the Local Mandate Law to the Criminal History Check Regulation, 603 CMR 51.00 et seq.

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 rule must take effect on or after January 1, 1981, and the rule must result in a direct service or cost obligation that is imposed by the Commonwealth, not voluntarily undertaken at the local level. *Id.* at 754.

Applying this analysis to the issue that you raised, DLM has determined that 603 CMR 51.06 does not constitute a new regulation that imposes additional costs on the Triton Regional School District. Rather, a school that chooses to perform a new national criminal history check, even though the school may rely upon a previous suitability determination as provided by Section 51.06, constitutes a voluntary assumption of costs that does not trigger the anti-mandate provisions of the Local Mandate Law.

The Supreme Judicial Court made clear in *Norfolk v. the Department of Environmental and Quality Engineering*, 407 Mass. 233 (1990), that the Local Mandate Law applies only in situations where the Commonwealth has imposed an involuntary direct service or cost obligation on a city or town. *Id.* at 239. The Court in *Norfolk* stated that the Local Mandate Law “applies to regulatory obligations in which the municipality has no choice but to comply.” *Id.*

DESE, in its regulations pertaining to criminal history checks, allows schools to rely on favorable suitability determination made by another school or DESE, as long as certain criteria are met, including

- (a) The suitability determination was made within the last seven years; and
- (b) The individual has not resided outside Massachusetts for any period longer than three years since the suitability determination was made; and either
- (c) The individual has been employed continuously for one or more school employers or has gaps totaling no more than two years in his or her employment for school employers; or
- (d) If the individual works as a substitute employee, the individual is still deemed suitable for employment by the school employer who made a favorable suitability determination. Upon request of another school employer, the initial school employer shall provide documentation that the individual is still deemed suitable for employment by the initial school employer.

603 CMR 51.06 (3)(a)-(d).

If a school cannot rely on a previous determination because either (1) the favorable suitability determination did not meet the criteria outlined by DESE for reliance on a previous favorable determination, or (2) the previous school deemed the employee unsuitable, then the cost of the national criminal history check is paid by the individual. *Id.* at 51.06(5)(a) and (b). However, if a school may rely on a previous favorable suitability determination but the school chooses to perform a new national criminal history check, then the school is responsible for the cost of the new check. *Id.* at 51.06(5)(c).

Viewing Section 51.06 in light of *Norfolk* decision, this regulation does not constitute a mandate under the Local Mandate Law, because the regulation only requires a school to assume the cost of the national criminal history check when the school chooses to perform a new national criminal history check that is not required by the regulations. The Supreme Judicial Court has interpreted “imposition of additional costs” to mean “compulsion and involuntariness.” *Norfolk*, 407 Mass. at 239. Section 51.06 does not require schools to perform national criminal history checks if a favorable suitability determination is available and meets the qualifying criteria. Since a school is given a choice as to whether to accept a previous favorable determination or to perform a new criminal history check, the fee does not constitute a mandate within the meaning of the Local Mandate Law.

Triton Regional School District has a legitimate concern that relying on a favorable suitability determination of another school, without being able to review the documentation that the determination was based on, may create liability for the District. In the past three months, several communities, including Cambridge, Attleborough, North Attleborough, and Andover, have had teachers or school administrators arrested on charges involving sexual misconduct with minors or child pornography.³ In

³ Alyssa Creamer, *Cambridge Parents Seek Answers After Teacher’s Arrest: Man Arrested on Charges of Taping in Locker Room*, BOSTON GLOBE, Apr. 20, 2014, available at <http://www.bostonglobe.com/metro/2014/04/19/cambridge-parents-school-officials-meet-discuss-teacher-facing-child-pornography-charges/Zcx8IJy1jfZmAC1uzyAwCK/story.html>; Rick Foster, *School Locally, Across Country Dealing with Teacher-Student Sex Abuse Allegations*, SUN CHRON., June 9, 2014, available at

particular, an Andover teacher was arrested on charges involving sexual assault of a juvenile that occurred in New Hampshire.⁴

However, in drafting 603 CMR 51.00 *et seq.*, EOE and DESE attempted to balance the liability and cost concerns for both schools and teachers. General Counsel DiTullio stated that EOE and DESE tried to limit liability and costs to schools by narrowing the scope of when a school can rely on a previous favorable suitability determination. EOE and DESE believed that the narrow instances in which a school can rely on a previous favorable suitability determination, combined with a school's ability to perform a Massachusetts Criminal Offender Record Inquiry (CORI) at no cost to the school, sufficiently limits a school's liability risk. Moreover, a school can contact the school that made the previous determination of suitability to determine the criteria that the school uses to determine suitability.

We are acutely aware that even small costs to schools can have an impact on budgets. You stated in our meeting that these regulations may affect approximately five positions a year. Even at the highest fee charged for employees certified under M.G.L. c. 71, § 38G, the total cost to the Triton Regional School District would be approximately \$275. While the cost may not be optimal, a school that is concerned about the liability of accepting another school's determination may consider absorbing the cost of the national criminal history check to alleviate any concerns.

Conclusion

Providing a safe learning environment is an important duty that Commonwealth's schools take most seriously. We realize that schools are facing difficult fiscal decisions and that even small costs can have an effect on budgets.

Nevertheless, DLM has concluded that 603 CMR 51.06 does not implicate the Local Mandate Law. As discussed above, Section 51.06 does not require schools to perform a new national criminal history check if a previous favorable suitability determination meets the criteria laid out in the regulation. Thus, a school that choose to perform a new national criminal history check, even though one is not required by the regulations, constitutes a voluntary assumption of costs that does not trigger the anti-mandate provisions of the Local Mandate Law.

http://www.thesunchronicle.com/news/local_news/schools-locally-across-country-dealing-with-teacher-student-sex-abuse/article_67aa4a13-89f1-5c23-ac94-3f5a2cadd9bc.html; *News Center 5: Andover Teacher Arrested at School on Sexual Assault Charges* (WCVB television broadcast May 20, 2014), available at <http://www.wcvb.com/news/andover-teacher-arrested-at-school-on-sex-assault-charges/26076808#!4glOV>.

⁴ *News Center 5: Andover Teacher Arrested at School on Sexual Assault Charges* (WCVB television broadcast May 20, 2014), available at <http://www.wcvb.com/news/andover-teacher-arrested-at-school-on-sex-assault-charges/26076808#!4glOV>.

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 budget.

Sincerely,

A handwritten signature in black ink that reads "Vincent P. McCarthy". The signature is written in a cursive style with a large, prominent initial "V".

Vincent P. McCarthy, Director
Division of Local Mandates

cc: Matthew Malone, Secretary of Education, Mass. Executive Office of Education
James DiTullio, General Counsel, Mass. Executive Office of Education
Mitchell Chester, Commissioner, Mass. Department of Elementary and Secondary Education
Jeffrey Wulfson, Deputy Commissioner, Mass. Department of Elementary and Secondary Education
Brian Forget, Assistant Superintendent, Triton Regional School District