LEGAL ALERT

To: All School Committee Members and Superintendents
From: Stephen J. Finnegan Esq., MASC General Counsel
Re: **Legality of Certain School Committee Expenditures/Role of SRO's**
Date: October 15, 2018

THE LEGALITY OF SCHOOL COMMITTEE EXPENDITURES TO DEFRAY THE EXPENSES OF A LAWSUIT TO COMPEL ADEQUATE FUNDING FOR K-12 EDUCATION

During the course of my research on the above captioned matter I contacted the agency which oversees municipal finance, the Massachusetts Department of Revenue, Division of Local Services (DLS). Massachusetts Courts generally give deference to the opinion of the agency invested with such oversight. The Bureau of Municipal Finance Law of (DLS), in 1994 issued an opinion to the Town Accountant of Greenfield File No. 94-1050, which determined that a Greenfield School Committee donation to the Council of Fair School Finance was not permited under the Massachusetts Constitution, Article 46, the "Anti-aid" amendment. The Council of Fair School Finance was the entity that directed the *McDuffy* case, 415 Mass. 545 (1993) and received funds to help pay for the cost of the litigation. The Greenfield School Committee may pay for general legal services under G.L. Ch. 71, S. 37F. The DLS concluded that S.37F provides authority for a school committee to pay for litigation counsel, which it employs itself for a case in which it is a party, but that the school committee cannot pay for legal counsel of another school committee or for private parties. The DLS appears to carve out an exception for the filing of an amicus brief on a matter that could have a direct affect on the school committee. The Greenfield opinion concludes that if such authority to challenge the school funding mechanism exists at all for a city or town, it is a general town responsibility and would seem to require a specific appropriation for that purpose by the city or town. I recommend that you share this DLS opinion with the school committee legal counsel and the town counsel or city solicitor. I have been informed recently by DLS that they have not issued a superseding opinion, and that the Greenfield opinion remains its view on this matter. The complete Greenfield opinion may be found on the MASC website.

THE ATTORNEY GENERAL'S OFFICE, THE EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY AND DESE RECENTLY HAS RELEASED A MODEL MEMORANDUM OF UNDERSTANDING GOVERNING THE ROLE OF SCHOOL RESOURCE OFFICERS.

As part of the criminal justice reform law (C. 69 of the Acts and Resolves of 2018, S.27) enacted in April, MOU'S between school districts and police departments must provide new details about school resource officers' roles and responsibilities, ensuring that school resource officers do not take the place of appointed school disciplinarians, enforcers of school regulations, or school based mental health providers. The new law ensures that school resource officers do not use police powers to address traditional school discipline issues and restricts law enforcement action in response to certain school-based offences.

The MOU is drafted in contract form (12 pages) and should be reviewed by school counsel. It is important to note that this document may serve as a guide to school districts and municipalities and is not required to be adopted. I have been informed that the revisions to C. 71, S.37P or other relevant provisions of law are found in bold type in the proposed draft and should be addressed. It is my view that while the MOU requires the signatures of the superintendent of schools and the chief of police, the final document should be subject to school committee review and approval. The MOU addresses school policy, budget matters and designation of office space for the SRO among other matters that impact school committee powers and duties. The following link will allow access to the MOU, https://www.mass.gov/doc/sro-mou-final-9-5-18

LEGAL UPDATE
Learn more about these and other important school-related legal issues at the MASC/MASS Joint Conference, November 7-10.
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December 28, 1994

Betty L. Rice
Town Accountant
Town Hall
Greenfield, MA 01301

Re: Donation to Council for Fair School Finance
Our File No. 94-1050

Dear Ms. Rice:

You have requested a legal opinion concerning the authority of the Greenfield School Committee to expend funds from the school committee budget as a donation to what appears to be a private, non-profit organization, the Council for Fair School Finance. We have had occasion to render such a legal opinion to another town on precisely this issue and involving this same organization and we concluded that such a payment would not be permitted under the **Massachusetts Constitution, Article 46**, the "Anti-aid" amendment, which forbids the:

> use of public money...for the purpose of...aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents.

Nevertheless, we have been advised that attorneys for the Council for Fair School Finance have provided written opinions supporting the legal authority of a school committee to make such a payment to the Council and have also been advised that up to 30 cities and town have in fact donated amounts ranging from $200 to $3000 to the Council for purposes of paying the litigation expenses involved in bringing a lawsuit to challenge the school funding mechanism provided under the 1993 Education Reform Law. Greenfield's town counsel has indicated that there are no by-laws or charter provision prohibiting the expenditure but that there are statutes of some concern, which he was not asked to address. He alluded to your letter to us. Given these circumstances, as well as the passage of some ten years since our previous opinion and the evolution of the law on this issue, we believe it appropriate to review the issue again.

At least two legal bases have been suggested which would authorize the payment to the Council in this case. The first is that the committee may pay for general legal services under **G.L. Ch. 71, S. 37F**, which is the claimed purpose of this expenditure. The second basis is that this payment to the non-profit is for public educational purposes, does not benefit the charitable organization or its officers in any particular or significant manner, does not implicate the political and economic abuses which prompted the passage of the anti-aid amendment and therefor does not violate it.

We have had occasion to look at the issue of payment of legal fees by a school committee when that committee is paying for legal expenses incurred by another municipality in a case to which the first school committee may or may not have been a party and had only a marginal legal interest. We concluded that **G.L. Ch. 71, S. 37F** provides authority for a school committee to pay for litigation counsel which it employs itself for a case in which it is a party, but that the school committee cannot pay for legal counsel of another school committee or for private parties. That statute provides:

> The school committee of a city or town may employ legal counsel for the general purposes of the committee and may expend money therefor from the funds appropriated by said city or town for school purposes. Said legal counsel shall not be subject to the provisions of section nine A of chapter thirty or the provisions of chapter thirty-one.

The Supreme Judicial Court interpreted this section as permitting the school committee to hire legal counsel, without approval of the mayor, for its general purposes, as well as to hire separate counsel to proceed with litigation against the municipality for refusal to pay its general purpose attorney. School Committee of Chicopee v. Chicopee, 412 Mass. 593 (1992). In both situations, however, the school committee had a contract of employment or service contract with the attorneys.

In the circumstance proposed in your question, the school committee would "donate" funds to the Council for purposes of providing litigation expenses, including legal counsel, for a suit to be brought by the Council on behalf of school children in "disadvantaged" school districts, such as those making the donations. We understand the plaintiffs expect to claim that the funding formula provided by the general laws does not meet the requirements of the state constitution.

It does not appear that the school committees themselves will be parties to the lawsuit. See McDuffy v. Secretary of the Executive Office of Education, 415 Mass. 545 (1993). There is a serious legal question whether the committees would have standing to raise the constitutional issue, because no personal or property rights of the committees are at stake and the proposed case does not seem to involve the proper interpretation of the new Education Reform Law. Ordinarily municipalities and municipal officers have no authority to raise the issue of constitutionality of statutes, although the courts have relaxed this rule when the issue raised involves interpretation of statutes applicable to the officers' duties or are of pressing public importance, are likely to recur and have been fully argued to the court. Compare Quinn v. School Committee of Plymouth, 332 Mass. 410, 413 (1955); Assessors of Haverhill v. New

England Telephone & Telegraph Co., 332 Mass. 357, 362 (1955); Attorney General v. School Committee of Essex, 387 Mass. 326, 328-9 (1981); Spence v. Boston Edison Co., 390 Mass. 604, 607-11 (1983); Trustees of Worcester State Hospital v. The Governor, 395 Mass. 377, 380-1 (1985); Nashawena Trust v. Board of Assessors of Gosnold, 398 Mass. 821, 823-24 (1986); Brookline v. The Governor, 407 Mass. 377, 386-7 (1990)(Liacos, J. concurring) with School Committee of New Bedford v. Commissioner of Education, 349 Mass. 410, 412 (1965); School Committee of Boston v. Board of Education; 352 Mass. 693, 696-7 (1967); Wachusett Regional School Dist. Committee v. Erickson, 353 Mass. 77, 79-80 (1967); School Committee of Springfield v. Board of Education, 366 Mass. 315, 339-350 (1974)(Addendum by Tauro, C.J.) See also Commonwealth v. School Committee of Springfield, 382 Mass. 665 (1981) where the school committee raised the issue of constitutionality of a statute, but the issue of its standing to do so was never discussed. If school committees have no standing to raise the legal issue, they would not appear to have authority to expend public monies in order to fund the legal expenses of private parties affected by the alleged unconstitutional law. We are not faced here with the issue of payment of legal counsel to file an amicus brief, where arguably the school committee could expend such funds directly to support a legal position it would like the court to take in a matter which could have a direct affect on the committee.

Even if the school committees had the authority to hire legal counsel to litigate this issue themselves, by donating funds to the Council they are not employing such counsel themselves, but are paying for counsel under contract to a non-profit entity. There is no suggestion that the school committees have entered into a contract with the Council for the latter to provide such legal services either. It is our opinion, therefor, that the payment of this "donation" as a legal expense under **G.L. Ch. 71, S. 37F** would not be appropriate.

Turning to the second legal basis for payment, we recognize that there has been case law in recent years which might suggest that it is appropriate for a governmental body to donate funds to a private non-profit organization when the organization is providing an educational benefit for the general public. In Helmes v. Commonwealth, 406 Mass. 873 (1990) the Supreme Judicial court held that a statute passed by the general court authorizing the commissioner of education to expend up to $6,000,000 for the refurbishing of the USS Massachusetts, a battleship owned by a non-profit committee established for the purposes of maintaining the ship as a memorial, was not in violation of the anti-aid amendment. The commissioner entered into a contract with the non-profit committee for the latter to perform the necessary work, and that committee entered into a contract with a ship repair company to do the work. Id at 875.

The court in Helmes, in determining the anti-aid issue, used guidelines established in Commonwealth v. School Committee of Springfield, 382 Mass. 665, 675 (1981) where the court determined that a statute authorizing payment of public funds to private schools under contracts to provide educational services to children with special needs did not violate the anti-aid amendment. Those guidelines are (1) whether the purpose of the challenged statute is to aid a private charity; (2) whether the statute does in fact substantially aid a private charity; and (3) whether the statute avoids the political and economic abuses which prompted the passage of the anti-aid amendment.

The court in Helmes found that the purpose of the expenditures was to preserve the battleship as a memorial and to educate the public and school children with no evidence of a purpose to aid the committee as such. The court also found that the amount to be spent was substantial, in the sense that without it the purpose likely could not have been accomplished. Finally, the court found that the use of public funds under these circumstances was not politically or economically abusive or unfair given that no private person was likely to benefit from the expenditure which served a public purpose.

The current circumstance differs in significant respects from those in the Helmes and the Springfield cases. First, both cases involved governmental contracts with the private charitable entities for the provision of specific services required by the governmental entity for appropriate public purposes. Those contracts provided some method for the governmental body to control the expenditure of the funds as a means of insuring contract compliance. In this case the contributions are donations to the private charitable entity without any contractual provision requiring that the services be provided. Second, in both cases the general court had determined that the expenditure for those particular purposes was proper and necessary for the general public good. In this case the general court has determined that the current funding scheme for education is in the public good and the school committees are seeking to challenge that statutory scheme. It would appear, then, that the expenditure in this case would be a payment to the non-profit entity for the purposes of that organization and in direct contravention of the purposes for which the anti-aid amendment was passed.

In addition, we also suggest that the payment, even if otherwise lawful as a contract for services, would violate **G.L. Ch. 41, S. 56** since payment cannot be made in advance of the legal services being rendered. Since the justification for the payment rests with the services to be provided by the Council, the municipality would have to wait for billing for such services once they have been performed.

Finally, but not of least importance, we are concerned with whether such an expenditure may be made from the school committee's omnibus budget under **G.L. Ch. 71, S. 34** for purposes of recovering additional revenues for the support of schools. Although under that statute the school committee has authority to allocate expenditures from within its budget for educational purposes, we do not believe it could pay for legal expenses to bring a lawsuit which does not involve the duties or rights of the school committee as outlined in the general laws. That statute places the responsibility on the municipality to "annually provide an amount of money sufficient for the support of the public schools", not on the school committee. The school committee has no ability to enforce this obligation beyond the municipal appropriation. See Superintendent of Schools of Leominster v. Mayor of Leominster, 386 Mass. 114 (1982).

Even when the school committee had so-called "autonomy" over its budget, the committee itself had no authority under the statute to enforce payment and had to rely on a claim by ten taxable inhabitants, the mayor of a city or the attorney general as the remedy provided. See **G.L. Ch. 71, S. 34** as it read prior to **St. 1980, Ch. 580, S. 7.**

Currently the Attorney General or ten taxpayers may seek enforcement of the minimum school contributions required under the education reform law by suit in the superior court or supreme judicial court. **G.L. Ch. 214, S. 3(14)**. In addition, state funds provided for education for the most part are now subject to appropriation by the municipality. **G.L. Ch. 71, S. 6.**

When the municipality has the duty to provide a school related function, such as school transportation, it has no duty to appropriate such amounts to the school committee. Graves v. Fairhaven, 338 Mass. 290 (1959); Ring v. Woburn, 311 Mass. 679 (1942). In the case of the duty to provide suitable schoolhouses, for instance, **G.L. Ch. 71, S. 68** gives the duty to the municipality, but further states that if the municipality does not so provide, the school committee may procure a suitable place for the schools. See Simpson v. Marlborough, 236 Mass. 210 (1920).

Given the statutory duty of the municipality to provide sufficient funding for the schools by means of appropriations, and given the lack of statutory authority for the school committee to enforce such funding, it would appear outside the authority of the school committee to spend funds from its budget to challenge the statutory school funding mechanism. If such authority to challenge the funding mechanism exists at all for a city or town, it is a general town responsibility and would seem to require a specific appropriation for that purpose by the city or town.

We hope this addresses your concerns. If we may be of further service, please do not hesitate to contact us again.

Very truly yours,

Harry M. Grossman
Chief, Property Tax Bureau