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CITY OF CAMBRIDGE

Office of the City Solicitor
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November 9, 2015

Richard C. Rossi
City Manager
795 Massachusetts Avenue
Cambridge, MA 02139

***Re: Awaiting Report No. 15-99 re: Report on the Possible Applicability of the
Washington Decision to Cambridge Charter School Enrollment and Tuition
Reimbursement Issues***

Dear Mr. Rossi:

In the above Council Order, the City Council requested that you confer with City staff and the City Solicitor on the possible applicability of the decision *League of Women Voters of Washington v. State of Washington*, Case No. 89714-0 Supreme Court of Washington State (Sept. 4, 2015) to Cambridge charter school enrollment and tuition reimbursement issues. This letter responds to that request.

I. Background

On September 4, 2015, the Supreme Court of the State of Washington ruled that Washington State's Charter School Act, which had been enacted after a voter referendum, was unconstitutional under the education and common school funding clauses of the Washington State Constitution. The *League of Women Voters of Washington* decision does not have binding authority within the Commonwealth of Massachusetts. Therefore, Massachusetts courts are not required to follow the analysis and reasoning of this decision.

The Commonwealth of Massachusetts also has a charter school statute, M.G.L.c. 71, §89, that was enacted as part of the Education Reform Act of 1993. The constitutionality of this statute has not been challenged under the education and funding clauses of the Massachusetts Constitution. The language and the interpretation of the education and funding clauses of the Massachusetts Constitution differ greatly from those in *League of Women Voters of Washington*. Additionally, Massachusetts courts have recognized the Education Reform Act of 1993 as being a comprehensive process of public education reform within the Commonwealth.

II. Legal Analysis

In *League of Women Voters of Washington*, the court considered a facial challenge to the constitutionality of the state's Charter School Act. The court concluded that the treatment of charter schools as "common schools" violated Article IX, section 2 of the Washington State Constitution. Relying on a well-established rule articulated in *School Dist. No. 20 v. Bryan*, 51 Wash. 498, 99 P. 28 (1909), the court concluded that the charter schools did not constitute common schools as the term was used in the state constitution. *League of Women Voters of Washington* at 11. Noting that efforts to use or divert common school funds for other purposes had repeatedly been struck down, *id.* at 12 and cases cited, the court also held that the provisions of the Act that sought to divert both basic education funds and common school construction funds from the common schools also violated the state constitution. *Id.* at 12 & 16. The court then concluded that the provisions could not be severed from the rest of the Act and declared the entire Act unconstitutional. *Id.* at 19-20.

"A facial challenge to the constitutional validity of a statute is the weakest form of challenge and the one that is the least likely to succeed." *Blixt v. Blixt*, 437 Mass. 649, 652 (2002), *cert. denied*, 537 U.S. 1189 (2003), *citing United States v. Salerno*, 481 U.S. 739, 745 (1987). "A statute so questioned is presumed constitutional." *Blixt v. Blixt, supra*, *citing Landry v. Attorney Gen.*, 429 Mass. 336, 343 (1999), *cert. denied*, 528 U.S. 1073 (2000). The party challenging the constitutional validity of a statute "bears the burden of demonstrating 'beyond a reasonable doubt that there are no conceivable grounds' which could support its validity." *Gillespie v. Northhampton*, 460 Mass. 148, 152-153 (2011), *quoting Leibovich v. Antonellis*, 410 Mass. 568, 576 (1991). If a Massachusetts court was considering a facial challenge to the constitutionality of M.G.L.c. 71, §89, and was assessing the level of persuasiveness to ascribe to *League of Women Voters of Washington*, a court likely would analyze the history and the text of the constitutional provisions regarding education and the funding of schools and the history and text of the charter school statutes in both states.

The Education Clause of the Massachusetts Constitution has long been interpreted as being in favor of promoting education within the Commonwealth. *See, e.g., Cushing v. Inhabitants of Newburyport*, 51 Mass. 508, 511-12 (1845) (holding town could levy taxes to extend instruction into branches of knowledge not required by statutes). *Accord McDuffy v. Secretary of the Executive Office of Education*, 415 Mass. 545, 559 (1993), *quoting Cohen v. Attorney Gen.*, 357 Mass. 564, 571 (1970) ("It is a statement of general principles and not a specification of details."). *See Lynch v. Commissioner of Educ.*, 317 Mass. 73, 77-78 (1944), *citing Jenkins v. Andover*, 103 Mass. 94, 98 (1869), *quoting Cushing v. Newburyport*, 10 Met. 511 (1869). The only constitutional restriction on funding to the public schools appears in Article 18 of the Amendments to the Massachusetts Constitution, the anti-aid amendment, which prohibits public school funding being diverted to private or religious schools. *See Opinion of the Justices*, 214 Mass. 599, 601 (1913). The courts, however, have upheld as constitutional statutes where funding or services were found to be for the purpose of aiding students and not the private school. *See Attorney Gen. v. School Committee of Essex*, 387 Mass. 326, 300 (1982) and cases cited. Thus, the meaning of "public schools" within the Massachusetts Constitution appears to have been given a broader interpretation than the meaning of "common schools" under the State of Washington Constitution, and the constitutional restriction on the use of

funds for public schools in Massachusetts has been construed more narrowly than the funding restrictions under the State of Washington Constitution.

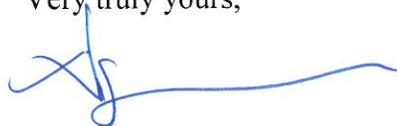
The statutory provisions relating to the creation and funding of charter schools, M.G.L. c. 71, §89, include express language that the charter schools are to be part of the public educational system. In *School Committee of Hudson v. Board of Educ.*, 448 Mass. 565 (2007), the court noted that the intent of the charter school statute was to "essentially to provide greater options and opportunities for innovative learning within public education." *Id.* at 583. Thus, the charter school statute has, in general, been noted to be part of the public education system. The Education Reform Act of 1993 made statutory changes in a number of areas relating to education including the enactment of the charter school statute, and, in recent years, the courts also have commented favorably on the entire statutory scheme that was put into place by the Education Reform Act of 1993. *Hancock v. Commissioner of Education*, 443 Mass. 428, 433-435 (2005) ("the Commonwealth's comprehensive statewide plan for education reform is beginning to work in significant ways."). See *School Committee of Lexington v. Zagaeski*, 469 Mass. 104, 112 (2014) ("the [Education] Reform Act, [] brought about broad-based changes to the funding and governance structure of the public education system in Massachusetts"); *Atwater v. Commissioner of Educ.*, 460 Mass. 844 (2001) (rejecting facial challenge to constitutionality of M.G.L. c. 71, §42, the state's teacher dismissal statute, that had been revised as part of the Education Reform Act of 1993). See also *Groton-Dunstable Regional School Committee v. Groton-Dunstable Educators Assoc.*, 87 Mass. App. Ct. 621 & n.6 (2015), *appeal denied*, 473 Mass. 1103 (2015).

III. Conclusion

If a court considering a facial challenge to the constitutionality of M.G.L. c. 71, §89 did find *League of Women Voters of Washington* to be persuasive authority and reached the conclusion that the charter school statute was unconstitutional, then the impact on Cambridge charter school enrollment and tuition reimbursement issues would be similar to what has occurred in the State of Washington; no public funds would be able to be distributed to the charter schools, and parents/guardians and students that were enrolled in charter schools would need to look for alternative schools within which to enroll.

If a court considering a facial challenge to the constitutionality of M.G.L. c. 71, §89 did not find *League of Women Voters of Washington* to be persuasive authority and upheld the current charter school statute as constitutional, then the decision would not have any effect on Cambridge charter school enrollment and tuition reimbursement issues.

Very truly yours,



Nancy E. Glowa
City Solicitor