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February 23, 2021

Via Electronic Mail (sfryc@shrewsbury.k12.ma.us)

Sandra Fryc, Chair
Shrewsbury School Committee
100 Maple Avenue
Shrewsbury, MA 01545

**Re: Applicability of M.G.L. c. 71, § 37D and other related statutes to
Shrewsbury's Elementary Redistricting Plan**

Dear Ms. Fryc,

This letter is written in response to your request for a legal opinion on the applicability and impact of certain statutes concerning racial diversity requirements in schools (namely M.G.L. c. 37D) on Shrewsbury's current plans for redistricting of its elementary schools.

Review of Relevant Statutes

M.G.L. c. 71, § 37D provides the implementation method for M.G.L. c. 71, § 37C, which declares it to be state policy to "encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines, establishing of grade levels, and the selection of new school sites."

M.G.L. c. 71, § 37D defines several of the terms in § 37C. Those definitions are excerpted below:

"Racial imbalance", the condition of a public school in which more than fifty percent of the pupils attending such school are non-white.

"Racial balance", the condition of a public school in which more than thirty percent but not more than fifty percent of the pupils attending such school are non-white.

"Racial isolation", the condition of a public school in which not more than thirty percent of the pupils attending such school are non-white.

The statute then goes on to require certain reporting from the school committee to the Department of Elementary and Secondary Education ("DESE") annually on the percent white



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and non-white students at all schools in the district. The statute also states that, if DESE determines that a racial imbalance exists in a school, it will notify the district in writing.

The statute then states “Any non-white pupil attending any public school in which racial imbalance exists shall have the right to be transferred to and to attend any other school, except an exempt school, of his parents' or guardian's choice for his grade level and under the jurisdiction of the same school committee or regional district school committee if racial isolation exists in such other school; and any white pupil attending any public school in which racial isolation exists shall have the right to be transferred to and to attend any other school, except an exempt school, of his parents' or guardian's choice for his grade level and under the jurisdiction of the same school committee or regional district school committee if racial imbalance exists in such other school.”

The language excerpted above would permit a parent to move a non-white student in a “racially imbalanced” school (i.e., a school in which more than 50% of the students are non-white) to a “racially isolated” school (i.e., a school in which less than 30% of the students are non-white) in the same district. The language excerpted above also permits a parent to move a white student in a “racially isolated” school to a “racially imbalanced” school in the same district.

The statute goes on to lay out how spots at such schools should be allocated and the requirement that, if the district cannot accommodate the parent’s request for transfer, it must file a plan with DESE to find a place for the student at the requested school. The statute lays out the procedure that a district must follow to effectuate any changes to schools to comply with the terms of this statute.

Finally, the statute does permit for a private right of action by a parent who is denied a transfer under this statute.

M.G.L. c. 15, § 1I also is relevant to this issue. This statute requires DESE to provide technical assistance to school districts to create the plans required under M.G.L. c. 71, § 37D to reduce or eliminate racial imbalance. The statute lays out the actions DESE must take if a district fails to submit a plan or submits an insufficient plan as required by M.G.L. c. 71, § 37D. The statute gives DESE the authority to withhold a district’s funding if the district does not make reasonable progress towards eliminating racial imbalance after being notified by DESE of such a problem. Finally, the statute also requires DESE to establish a fund to reimburse districts for the cost of transporting students in accordance with M.G.L. c. 71, § 37D.

M.G.L. c. 15, § 1J provides the right to the school committee to seek judicial review of a decision by DESE with regard to a plan required by M.G.L. c. 71, § 37D.

The full text of each of these statutes is attached to this letter for reference.

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Analysis of Relevant Statutes

As an initial matter, while these statutes appear a bit outdated given the language they use, they are still on the books and seemingly applicable to Shrewsbury.¹

My understanding of the current Shrewsbury elementary redistricting proposal is that it would result in three of the five elementary schools falling into the “racially imbalanced” category with the remainder being “racially balanced” and no schools being “racially isolated” based on the definitions contained in M.G.L. c. 71, § 37D. These projections are with current data and with the understanding that these figures are fluid as students move into and depart the district.

The question posed is whether the district’s current plan, which would result in three of the five elementary schools being “racially imbalanced,” is in violation of any of the relevant statutes. According to our discussions, the district’s elementary population overall is now more than 50% non-white, the redistricting plan shows that three out of the five elementary schools would have more than 50% non-white students and will be “racially imbalanced” per M.G.L. c. 71, § 37D, and the other two schools would be “racially balanced” but are on a trajectory to become “racially imbalanced” at some point in the future. None of the schools would be considered “racially isolated.”

It seems impossible that the Massachusetts legislature intended a result of these statutes for no school district to have a majority of non-white students. Rather, it seems the intent was to promote balance within schools in the same district by allowing for movement of students between “racially imbalanced” and “racially isolated” schools to achieve “racial balance.” This, however, is belied by the language of M.G.L. c. 71, § 37C, which specifically states that the intention of the law is to promote “racial balance” and to correct “racial imbalance.”

A review of case law shows that there have been less than 30 cases decided that reference the relevant statutes. There are two sets of litigation that occurred in recent years. The first is a series of cases against the Lynn public schools filed in the late 1990s and early 2000s focused on Lynn’s voluntary transfer program. These cases provide a helpful history of the relevant statutes:

The Racial Imbalance Act (“RIA”), Mass. Gen. Laws ch. 15, §§ 1I, 1J, 1K; *id.* ch. 71, §§ 37C, 37D, directs the Massachusetts Board of Education to remedy *de facto* segregation in the public schools throughout the state. *See Sch. Comm. of Boston v. Bd. of Educ.*, 352 Mass. 693, 227 N.E.2d 729, 732 (1967). The legislature enacted the RIA in response to findings that dramatic levels of racial

¹ It also appears that DESE may not be enforcing these statutes as stringently as when they were first adopted as Shrewsbury and other districts have had schools that met the definition of “racially imbalanced” and have not been notified by DESE as outlined in the statute.

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imbalance in the public schools threatened to harm students' educational opportunities. *See id.* at 733–34. The RIA has two main effects: it authorizes the Board to fund voluntary efforts to improve racial balance, Mass. Gen. Laws ch. 15, § 1I, and it allows the Board to require that school districts adopt integration plans in certain circumstances, *id.* ch. 71, § 37D.

Comfort v. Lynn Sch. Comm., 418 F.3d 1, 9 (1st Cir. 2005), abrogated by Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007)

The court found that “the plaintiffs cannot overcome the fact that only a person who was denied a transfer *on the basis of the mandatory provisions* of the RIA has standing to challenge them.” Comfort, 418 F.3d at 11. This makes it clear that there is no standing to sue unless a parent was denied a transfer under the statute. So, it follows that, if the district has no racially isolated schools, as is the case in Shrewsbury, there would be no potential for a successful legal claim by a parent/student under this statute.

The court reviewed Lynn’s transfer plan against the federal equal rights protections contained in the 14th Amendment and Article 111 of the Massachusetts Declaration of Rights provides that “[n]o student shall be assigned to or denied admittance to a public school on the basis of race, color, national origin[,], or creed.” In both instances, the court upheld Lynn’s plan, thereby dismissing the case.

It is important to note, however, that the United States Supreme Court, later in 2007, struck down the concept of “racial balancing” as a “compelling state interest” for public school assignments. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748, 127 S. Ct. 2738, 2768, 168 L. Ed. 2d 508 (2007). Rather, the Supreme Court found that Districts must look to race-neutral approaches to achieve diversity and equity in schools, rather than the formulaic and mechanical methods of racial balancing initiatives.

In a series of cases in the late 1990’s and early 2000’s, the transfer and admissions policies of the Boston Public Schools were brought under scrutiny. While the focus of this litigation was not on the RIA, it was mentioned in the context that the RIA was not applicable as Boston had a white population of less than 50%. In fact, it noted that Boston was granted funding under the RIA despite its “racially imbalanced” schools. See Boston’s Children First v. Bos. Sch. Comm., 260 F. Supp. 2d 318, 326 (D. Mass. 2003), aff’d sub nom. Anderson ex rel. Dowd v. City of Bos., 375 F.3d 71 (1st Cir. 2004).

The bulk of the remaining cases are from the 1970s and involve courts ordering school districts to comply with desegregation efforts.

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In both the Lynn and Boston cases, as well as in the U.S. Supreme Court case, the focus of the court was on the districts' holistic approach to achieving the best possible school experience for students. The courts noted that racial diversity alone should not be the driving factor in a district's planning of its schools. Similarly, M.G.L. c. 71, § 37C notes that eliminating racial imbalance and achieving racial balance should be an objective of schools, but it does not say it should be the controlling or only objective. Rather, both the statute and the case law encourage a holistic and multi-faceted approach, which is precisely what the Shrewsbury School Committee did when it adopted the "Redistricting Guiding Principles" in September 2019 at the outset of the redistricting process.

These Guiding Principles focus on seven areas, one of which is focused on finding a plan that results in the schools demographics reflecting that of the town to the greatest extent possible. The Guiding Principles also focus on educational equity, ensuring appropriate instructional space, emphasizing the importance of neighborhood schools, considering future population growth, minimizing changes to current school assignments for students, and working in concert with other district initiatives.

Conclusion

It seems that, based upon a review of the relevant statutes and the associated case law, the only way for Shrewsbury to face potential liability is if either DESE issues a written finding about the racial composition of the district's school(s), or if the District denies a required transfer under M.G.L. c. 71, § 37D, which would not be possible if the District has no "racially isolated" schools. Further, it appears that the District's holistic approach to the redistricting process is consistent with the guidance from the courts who have reviewed the application of the relevant statutes.

Given the lack of recent case law and guidance in this area, I have made an inquiry with DESE's legal office as to the impact of the relevant statutes on a district's redistricting efforts. I have received confirmation that DESE is reviewing my request and will be in touch soon, but I have not received a response as of the date of this letter.

Please do not hesitate to contact me with any questions.

Sincerely,

Sarah C. Spatafore

Enclosures

cc: Superintendent Joseph Sawyer

Part I ADMINISTRATION OF THE GOVERNMENT**Title XII** EDUCATION**Chapter 71** PUBLIC SCHOOLS**Section** PROMOTION OF RACIAL BALANCE
37C

Section 37C. It is hereby declared to be the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines, establishing of grade levels, and the selection of new school sites.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title XII	EDUCATION
Chapter 71	PUBLIC SCHOOLS
Section 37D	RACIAL IMBALANCE; DEFINITIONS; STATISTICS; TRANSFERS; PRIORITIES; PLANS FOR ELIMINATION; PUBLIC HEARINGS; REGULATIONS; JURISDICTION; COSTS; ATTORNEY'S FEES

Section 37D. As used in this section, sections thirty-seven C, I, and J, sections one I through one K of chapter fifteen, and section twelve A of chapter seventy-six, the following terms shall, unless the context requires otherwise, have the following meanings:

"Racial imbalance", the condition of a public school in which more than fifty percent of the pupils attending such school are non-white.

"Racial balance", the condition of a public school in which more than thirty percent but not more than fifty percent of the pupils attending such school are non-white.

"Racial isolation", the condition of a public school in which not more than thirty percent of the pupils attending such school are non-white.

"Exempt school", a public school to which, prior to January first, nineteen hundred and seventy-four, the passing of a competitive examination was a condition of entrance; provided, however, that the school committee or

regional district school committee having jurisdiction over such school shall, under the supervision of the board of education, establish and maintain an affirmative action program to recruit and assist non-white students to enter and to remain in attendance at such school.

The school committee of each city, town, and regional school district shall annually, at such time and in such form as the commissioner shall determine, submit to the commissioner statistics sufficient to enable a determination to be made of the percent of white and non-white pupils attending all public schools and attending each public school under the jurisdiction of each such committee. Whenever the board of education, in this section called the board, finds that racial imbalance exists in a public school, it shall in writing notify the school committee or regional district school committee having jurisdiction over such school that such finding has been made.

Any non-white pupil attending any public school in which racial imbalance exists shall have the right to be transferred to and to attend any other school, except an exempt school, of his parents' or guardian's choice for his grade level and under the jurisdiction of the same school committee or regional district school committee if racial isolation exists in such other school; and any white pupil attending any public school in which racial isolation exists shall have the right to be transferred to and to attend any other school, except an exempt school, of his parents' or guardian's choice for his grade level and under the jurisdiction of the same school committee or regional district school committee if racial imbalance exists in such other school. If a place is available for such pupil at such other school, such school committee or regional district school committee shall, forthwith upon receipt of written notice by his parents or guardian that they intend such pupil to exercise his right to be

transferred to and to attend such other school, transfer such pupil to such other school. If no place is available for such pupil at such other school, such school committee or regional district school committee shall, upon receipt of such notice, formulate and, within the time limit established by regulations of the board, file with the board a plan to provide, within the same school year for which such notice is given, a place for such pupil at such other school and shall, within such time as may be prescribed by the board, implement either such plan as approved by the board or the mandatory plan of the board to provide such place and, when such place becomes available, transfer such pupil to such other school; provided, however, that the board may temporarily or permanently excuse such school committee or regional district school committee from implementing such plan or mandatory plan if an alternative place, satisfactory to the parents or guardian of such pupil, is available at another school to which such pupil may, as provided by this section, exercise his right to be transferred and attend, or if the board finds that there is other good cause to do so. Whenever a school committee or regional district school committee determines, in accordance with regulations of the board, that the number of places available at such other school is exceeded by the number of pupils exercising their rights to be transferred to and to attend such other school, the selection of particular pupils to be transferred to such places as are available shall be in accordance with regulations of the board, which regulations shall reasonably provide for priority for non-white pupils attending schools in which more than seventy percent of the pupils are non-white, without affecting the rights of such pupils not so selected to be transferred to and to attend such other school as provided by this section.

Any such plan so filed shall set forth in detail the proposed changes in existing school attendance districts, additions to existing school buildings, use of leased or portable facilities, changes in use of school buildings, and other measures to provide a place for such pupil at such other school. Any such plan shall take into consideration on an equal basis with reduction or elimination of racial imbalance the safety of pupils in their travelling between school and home. Any such plan may provide for voluntary cooperation by other cities, towns, or regional school districts in making facilities available or otherwise rendering assistance in implementing such plan. No change in any existing school attendance district shall be made pursuant to any such plan prior to a public hearing. Notice of the time and place of such hearing and of its subject matter shall be given by mail, postage prepaid, to the parents and guardian of each pupil affected by the proposed change and either by publication in a newspaper of general circulation in the city, town, or regional school district within which such attendance district lies once in each of two successive weeks, the first such publication to be not less than fourteen days prior to the day of such hearing, or, if there is no such newspaper, by posting such notice in a conspicuous place in the city or town hall of such city, town, or member towns of such regional school district for a period of not less than fourteen days prior to the day of such hearing. At such hearing any person, whether entitled to notice thereof or not, may appear in person or be represented by an agent who need not be an attorney.

The board shall adopt regulations for the administration of the provisions of this section relating to, but not necessarily limited to, determination of places available in schools, priorities for transfer and attendance, notification to parents and guardians of pupils of such pupils' rights to

transfer and attendance, reporting and publication of places available in schools, time limits for filing of plans to provide places for pupils in schools, consolidation of such plans for filing, time limits and schedules for implementation of approved or mandatory plans to provide such places, progress reports on such implementation, and affirmative action programs.

The supreme judicial and superior courts shall have jurisdiction in equity over actions commenced by the board or by or on behalf of any pupil to enforce the provisions of this section; provided, however, that in any such action commenced by or on behalf of any pupil to enforce his right, as provided by this section, to be transferred to and to attend any school, which action is concluded in favor of such pupil, the school committee or regional district school committee having jurisdiction over such school shall be liable to such pupil or the person commencing such action on his behalf for his costs and reasonable attorney's fees.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title II	EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH
Chapter 15	DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
Section 11	ELIMINATION OF RACIAL IMBALANCE; ASSISTANCE IN FORMULATION OF PLANS; EFFECT OF NON-COMPLIANCE; DENIAL OF STATE AID; TRANSPORTATION COSTS; EQUAL EDUCATION IMPROVEMENT FUND; GUIDELINES

Section 11. The board of education, in this section called the board, shall provide technical and other assistance in the formulation of plans to reduce or eliminate racial imbalance to be filed as provided by section thirty-seven D of chapter seventy-one, may approve such plans if they meet the requirements of said section thirty-seven D, and shall provide technical and other assistance for the implementation of approved plans and mandatory plans. If a school committee or a regional district school committee has failed to file with the board a plan within the time limit established by regulation of the board as provided by said section thirty-seven D or has filed a plan which does not meet the requirements of said section thirty-seven D, the board shall consult with and, after a public hearing, make specific recommendations for such a plan, together with an explanation of how such recommendations meet the requirements of said section thirty-seven D, to such school committee or regional district

school committee, and such school committee or regional district school committee may file a revised plan in response to such recommendations; provided, however, that if the board has not approved such a plan or its revision within four months after the time limit established by such regulation of the board for its filing, the board may order that its recommendations shall be the mandatory plan to be implemented by such school committee or regional district school committee to meet the requirements of said section thirty-seven D. Any such recommendations and any such mandatory plan may include any of the following measures, and no others, to meet the requirements of said section thirty-seven D: additions to existing school buildings, use of leased or portable facilities, and changes in use of school buildings.

If, following the receipt of notification from the board that racial imbalance exists, any school committee or regional district school committee does not show progress within a reasonable time in reducing or eliminating racial imbalance in its schools as provided by said section thirty-seven D, the commissioner of education shall not certify the amount of state aid for such city or town or for such towns which are members of such regional school district, as required by section five of chapter seventy, and the board shall not approve any project for school construction for such city, town, or regional school district under chapter 70B and the commissioner of education may notify the commissioner of revenue and the comptroller to hold such funds as have been so certified under said section five but have not been disbursed. Thereafter, upon receipt by the board of plans acceptable to it and showing progress within a reasonable time in reducing or eliminating racial imbalance in its schools as provided by said section thirty-seven D, the commissioner of education may notify the commissioner of revenue and the comptroller to

pay any such withheld funds to such city or town in such amounts and at such times as he may designate, and the board may approve such projects.

The commonwealth shall, subject to appropriation and upon approval of the board, pay to a city, town, or regional district school committee one hundred percent of the cost of transportation of non-white pupils and minority pupils as defined in regulations promulgated under the federal Emergency School Aid Act, Public Law 92–318, as amended, transferred from schools in which racial imbalance exists and one hundred per cent of the cost of transportation of white pupils transferred from schools in which racial isolation exists to schools in which racial imbalance or racial balance exists for the purpose of reducing or eliminating racial imbalance as provided by said section thirty-seven D. The commonwealth shall, subject to appropriation and upon the approval of the board, also pay to a city, town or regional district school committee one hundred per cent of the cost of transportation of pupils for the purpose of reducing or eliminating an imbalance of minority students, as defined in regulations promulgated under the federal Emergency School Aid Act, Title VII of Public Law 92–318, as amended.

The board of education shall designate and administer a separate "Equal Education Improvement Fund" for each city, town or regional school district participating under the provisions of the act, to be known as the (name of city, town or regional school district) Fund. The Commonwealth shall, subject to appropriation, pay into such fund, five hundred dollars for each non-white pupil transferred from a school in which racial imbalance exists to a school in which racial isolation or racial balance exists, and five hundred dollars for each white pupil

transferred from a school in which racial isolation exists to a school in which racial imbalance or racial balance exists for the purpose of reducing or eliminating racial imbalance.

The board shall establish guidelines by which the school committee of a city, town, or regional school district participating under the provisions of this act, may prepare and submit to the board for its approval, a plan(s) for a program(s) including an estimate of expenses necessary to implement such plan, to improve the quality of education in said city, town or regional school district. Upon approval of such plan or plans, the board shall designate that the amount needed for such plan be paid to the applying community from the Equal Education Improvement Fund of said city, town or regional school district.

The board may add to such funds such monies as are appropriated therefor and pursuant to regulations promulgated thereto and as requested of the Department for the purposes of voluntary transfers of students under Chapter 15, for magnet school programs, for minority teacher and administrator recruitment and salary supplementation in the public schools, and for inservice teacher training projects.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title II	EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH
Chapter 15	DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
Section 1J	JUDICIAL REVIEW OF BOARD'S RECOMMENDATIONS OR REVISED PLANS; JURISDICTION

Section 1J. Within thirty days after (1) a school committee or regional district school committee declines to accept the recommendations made to it by the board of education, in this section called the board, (2) the board disapproves a revised plan filed with it by a school committee or regional district school committee, or (3) the board orders that its recommendations shall be the mandatory plan to be implemented by a school committee or regional district school committee, such school committee or regional district school committee may file a petition for judicial review in the superior court for the county in which it is located or in the supreme judicial court for Suffolk county. The court may affirm such recommendations, disapproval, or order of the board and require compliance with such mandatory plan by appropriate order; or, if it finds and rules that such recommendations, disapproval, or order is (a) in excess of the statutory authority or jurisdiction of the board, (b) based upon an error of law, or (c) arbitrary or capricious, an abuse of discretion,

or otherwise not in accordance with law, then it may set aside such recommendations, disapproval, or order and remand the matter to the board for further action.

The supreme judicial and the superior court shall have jurisdiction in equity upon petition of the board of education to order funds withheld as provided in section one I for such period of time as the court may determine.