

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

Docket No. _____
(Appels Court Docket No. 2022-P-1212)
Superior Court Docket No. 2181CV02146)

ON APPEAL FROM MIDDLESEX SUPERIOR COURT

**MYSTIC VALLEY REGIONAL CHARTER SCHOOL,
Gina McKINNON, and
Alex DAN on behalf of MINOR STUDENT JOHN DOE**

v.

**MASSACHUSETTS BOARD OF ELEMENTARY AND SECONDARY
EDUCATION, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND
SECONDARY EDUCATION, Patrick BUCKWALTER, Benie
CAPITOLIN, and COMMISSIONER RILEY (in his official
capacity)**

APPLICATION FOR DIRECT APPELLATE REVIEW

Dated: January 3, 2023

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I. STATEMENT OF PRIOR PROCEEDINGS

The Plaintiffs (Appellants in the Appeals Court) hereby apply to this Court for direct appellate review pursuant to Mass. R. App. P. 11. This case involves due process, free speech, and other constitutional claims against the Defendants surrounding their application of several unprecedented "performance criteria," to the Plaintiff Mystic Valley Regional Charter School ("Mystic Valley" or the "School"), as part of Defendants' recent "Site Visit" at the School.

The Superior Court granted the Defendants' motion to dismiss and, therefore, there have been very few proceedings. Plaintiffs filed an amended complaint on December 20, 2021. See Docket Entries, Exhibit A hereto. After a hearing, the Superior Court granted the Defendants' motion to dismiss all claims on standing and the merits. See Super. Ct. Order, Exhibit B hereto.

As explained below, direct appellate review is appropriate here because the Superior Court's decision involves multiple unresolved questions of standing and constitutional law.

II. STATEMENT OF FACTS

A. Mystic Valley's Charter and Mission Requires an Emphasis on Students' Commonality, Not Their Differences

Mystic Valley is a Massachusetts non-profit corporation that the Commonwealth has chartered as a commonwealth charter school since 1998. See Amended Complaint ¶31, Docket Entry No. 9. It serves approximately 1600 K-12 students that come from over 27 municipalities. See id. ¶33. The student body is diverse, speaking 56 different home languages, with nearly half of the students learning English as a second language. See id.

Charter schools in the Commonwealth are formed to pursue a particular "mission, purpose, innovation and specialized focus." G.L. c. 71, § 89(f). Mystic Valley's mission is "the incorporation of selected core virtues and fundamental ideals of our American culture, which are embodied in the Declaration of Independence and United States Constitution." See Amended Complaint ¶¶37-38, Docket Entry No. 9. The School's core virtues and ideals "focus on what students have in common, emphasize that they are all equal, and promote the philosophy that the community is all one." Id. ¶39. As the School explained to

Defendant Massachusetts Department of Elementary and Secondary Education ("DESE"), and as DESE routinely approved until recently, this means that "the school will maintain a thoroughly American identity" and "embrace the melting pot theory by highlighting our citizens' and students' commonality, not their differences, within school programs." Id. ¶41.

The School's programming has been very successful. The School ranks in the top 1% of schools across the nation, and its students regularly compete for prestigious scholarships. See id. ¶44. The School's waitlist is over 1,000 students long and attrition is very low. See id. ¶46.

B. The Performance Criteria

Massachusetts charter schools operate on a five-year cycle, after which they must secure charter renewal. See G.L. c. 71, § 89(dd). Since 2005, DESE has used internally-created "performance criteria" to gauge a charter school's progress toward renewal. In late 2018 after Mystic Valley's charter was renewed, DESE adopted new "performance criteria" that used two "key indicators" that graded a school's "cultural proficiency" and "cultural responsiveness" ("Performance Criteria"). See Amended Complaint ¶¶71-

72. The School objected to their adoption because it believed the new criteria and a requirement to have “culturally responsive pedagogy,” would mean it had to abandon its charter-required approach to teach with an emphasis on commonality, the “melting pot,” and shared culture. See id. ¶¶68-70. Defendants did not respond to the School’s objections and adopted the “cultural proficiency” and “cultural responsiveness” key indicators.

C. Evidence of Bias Against the School

In 2017, the School’s long-standing prohibition on hair extensions in its School uniform policy attracted widespread media attention when two students of color complained. See id. ¶62. Even though the School voided the prohibition and undertook a comprehensive review of its diversity policies and practices, the (inaccurate) perception remains among a small group of critics that Mystic Valley is not pursuing the welfare of its students of color. See id. ¶64.

DESE employees have actively coordinated with this group of critics. Internal DESE emails show that DESE employees were involved in an effort to share these critics’ complaints with the media. See id.

¶79. DESE internal emails reveal a self-described “cloak and dagger” approach designed to “expose” Mystic Valley. See id. ¶80. The plan included coordination with local politicians and flooding local and state media with stories from the critics in the summer of 2020. See id. ¶79.

C. Procedural Irregularities in the Site Visit

To assess whether charter renewal is appropriate under the three “Guiding Areas of Charter School Accountability,” see 603 C.M.R. § 1.11(2), DESE conducts two school visits during the five-year cycle. See Amended Complaint ¶56. One visit typically occurs halfway through the cycle and is called a “Site Visit.” See id. The purpose of the Site Visit is to “gather and document evidence about a charter school’s performance” in a “Core Criteria Site Visit Report.” Id. ¶¶57, 59. “Evidence gathered during the site visit process is ultimately used to make a renewal determination.” Id.

DESE conducted a virtual Site Visit of Mystic Valley in May 2021. See id. ¶91. The Site Visit was demonstrably and irrevocably compromised. First, Defendant Patrick Buckwalter and DESE’s Site Visit Review Team arranged for the participation of critics

who were part of the “cloak and dagger” campaign to publicize complaints about the School in local and state media. See id. ¶83. The critics were pre-selected to participate in “student focus groups” during the Site Visit, knowing that their criticisms would then be part of the “evidence” from the Site Visit. See id.

Second, DESE maintained a secret “Complaint Folder” about the School. See id. ¶84. The Folder contained mostly old complaints about the School, some more than a decade old. See id. DESE directed the Site Visit Review Team to review these stale reports to help prepare for the 2021 Site Visit. See id.

Third, DESE appointed Defendant Benie Capitolin to the Site Visit Review Team. DESE internal emails show that prior to her appointment Ms. Capitolin had already formed a preconception that “Black and Brown students” at Mystic Valley were “being actively harmed” and put in an “unsafe environment,” because Mystic Valley had taught Mark Twain’s works. See id. ¶87. She was nominated to the Review Team by a DESE employee, Olympia Stroud, who wanted “the right people on our side to filter out racism in that school.” See id. ¶86.

D. The Core Criteria Site Visit Report

Following the Site Visit, Defendant Buckwalter, the leader of the Site Visit Review Team, provided the team's preliminary findings. See id. ¶97. He told the School that its instruction "does not reflect cultural proficiency" such that Mystic Valley was "only partially conducive to learning." See id. Buckwalter acknowledged the School's long-standing mission to emphasize a shared American culture and commonality, but told the School that that approach was now inconsistent with DESE's 2018 Performance Criteria. See id. ¶98.

The later-issued Core Criteria Site Visit Report gave Mystic Valley negative findings ("Partially Meets") on three different criteria. See id. ¶¶106-10. Plaintiffs allege those reasons are pretextual because the findings contradict previous positive findings on the same indicators even though nothing materially changed at the School. See Amended Complaint ¶¶109-110.

E. The Superior Court's Decision

Plaintiffs filed suit against Defendants Massachusetts Board of Elementary and Secondary Education ("BESE"), DESE, Commissioner Riley in his

official capacity, Buckwalter and Capitolin. Their claims fall roughly into two categories. First, the Site Visit Review Team's process and Report violate the School's procedural due process and equal protection rights by intentionally using biased Review Team members, generating negative evidence by coordinating with known critics, and then issuing a pretextual report. Second, the revised Performance Criteria violate Plaintiffs' (a) free expression and association rights by prohibiting them from using the School's charter-required instruction, and (b) the School's due process rights because they are unconstitutionally vague.

The Superior Court dismissed all claims. First, it held that Plaintiffs had no standing. Ignoring Plaintiffs' allegations of the extensive changes that will have to be made to comply with the new Performance Criteria, the Superior Court concluded there was no injury because the School's charter had not been revoked and "allegations of future financial harm, attrition, and self-censoring . . . are speculative." Super. Ct. Op. at 14. Second, the court rejected the School's argument that the School was injured under Kennie v. Natural Resources Dept.,

451 Mass. 754, 760 (2008), by Defendants' generation and use of tainted evidence. It held the charter school statute's "zone of interests" precluded any due process claim or judicial challenge to DESE action prior to renewal proceedings. See Super Ct. Op. at 15-16.

The Superior Court also decided several of the merits questions. With regard to the free expression claims, the Superior Court held that charter school curriculum and instruction is "government speech" that is immune from constitutional scrutiny. See id. at 19. The court dismissed the School's "class of one" equal protection claim but applied the wrong legal test applicable to the denial of a discretionary government benefit, Mancuso v. Mass. Interscholastic Athletic Ass'n, 453 Mass. 116, 129 (2009). See Super. Ct. Op. at 19-21. On the School's procedural due process claims, the Superior Court ignored Plaintiffs' argument based on Kennie that the School was injured by the use of tainted evidence, and instead held that the School had to show the Commonwealth deprived the School of its charter. See id. at 22.

III. STATEMENT OF ISSUES OF LAW

This appeal raises the following legal issues, all of which were presented to the Superior Court.

A. STANDING

- (1) Did the Superior Court err by failing to apply the relevant "substantial risk" of future harm standard?
- (2) Did the Superior Court correctly interpret Sch. Committee of Hudson v. Bd. of Educ., 448 Mass. 565, 579 (2007) and the "zone of interest" test to preclude Plaintiffs' standing?
- (3) Is a private non-profit corporation chartered as a commonwealth charter school a political subdivision of the Commonwealth such that it has no constitutional rights against the Commonwealth?

B. DUE PROCESS AND EQUAL PROTECTION CLAIMS

- (4) Did the School allege a procedural due process violation under Kennie v. Natural Resources Dept., 451 Mass. 754, 760 (2008)?
- (5) Did the Superior Court err by dismissing Plaintiffs' vagueness claim, without any evidence about how Defendants understood

(and disagreed about the meaning of) the performance criteria?

- (6) Should the Superior Court have used the “class of one” equal protection standard of Village of Willowbrook v. Olech, 528 U.S. 562 (2000), and did it err in its application of Mancuso v. Mass. Interscholastic Athletic Ass’n, 453 Mass. 116, 129 (2009)?

C. FREE EXPRESSION AND ASSOCIATION CLAIMS

- (7) Did the Superior Court correctly dismiss Plaintiffs’ free expression and association claims because charter school curriculum and instruction are “government speech”?

IV. ARGUMENT

A. Standing

1. The Superior Court Misapplied the Law Concerning Standing and Future Risk of Harm

The Superior Court’s analysis on standing is a single sentence, concluding that the School’s charter has not been revoked and that allegations of future harm and self-censoring are “speculative.” The Court erred by not applying the relevant standing standard, “substantial risk of harm.”

Even in the absence of existing injury, standing exists whenever there is a “substantial risk that harm will occur” to the plaintiff. See SBA List v. Driehaus, 573 U.S. 149, 159 (2014). This Court has not expressly applied the “substantial risk” test, but generally applies Article III standing precedents. See also Pugsley v. Police Dept., 472 Mass. 367, 371 (2015); see also Commonwealth v. Lucas, 472 Mass. 387, 392 (2015) (relying on SBA List).

The Superior Court failed to apply any of the elements of the “substantial risk” test.¹ The court also ignored Plaintiffs’ factual allegations showing risk of harm from the Performance Criteria, including that (1) the School was told its long-standing approach and curriculum no longer complied with DESE’s Performance Criteria, see Amended Complaint ¶¶97-98, (2) the School uses curriculum with codified, structured, and scripted approaches like its “Reading Mastery” and “Saxon Math” programs, see id. ¶¶130-32

¹ Standing exists when the Plaintiff can show (1) “an intention to engage in a course of conduct arguably affected with a constitutional interest,” (2) the intended future conduct is “arguably proscribed,” and (3) there is evidence of substantial risk of future enforcement. See SBA List, 573 U.S. at 164-67.

and (3) changes to those approaches will require retraining teachers, and will result in contract breaches with many long-time teachers. See id. Those allegations plausibly allege a “substantial risk of future harm” and, therefore, are sufficient to demonstrate standing at the pleading stage.

2. *The Superior Court Misinterpreted Hudson Sch. Committee and Erroneously Held the Charter School Statute’s “Zone of Interests” Could Preclude Constitutional Challenges*

Besides the changes to its instruction, curriculum, training, and staffing, Mystic Valley has standing because it has already suffered concrete injury by the negative findings in the Core Criteria Site Visit Report. By regulation, the evidence from the Report *must* be considered during the School’s renewal process. *See* 603 C.M.R. §§ 1.08(2), 1.11(2). Thus, the biased and procedurally deficient Site Visit caused the School concrete injury when it happened. See Am. Premier, Inc. v. AMTRAK, 839 F. 3d 458, 461 (6th Cir. 2016) (“[A] plaintiff’s injury accrues at the time that process was denied because the allegedly infirm process is an injury in itself.”); Kennie v. Nat’l Resources Dept., 451 Mass. at 760 (finding potential due process violation when the “use of

tainted evidence might be seen to interfere with the plaintiff's right to have their application heard in a meaningful manner").²

The Superior Court decided that even if it assumed Mystic Valley was injured by Defendants' allegedly malicious creation of negative evidence during the Site Visit, Plaintiffs lacked standing because such harm was not within the charter school statute's "zone of interests." Id. at 15. The Superior Court misapplied the zone of interests test in two ways.

First, the Superior Court overread Sch. Committee of Hudson v. Bd. of Educ., 448 Mass. 565, 579 (2007) to mean "the charter school statute does not allow for an appeal or review of any action that occurs during the five-year charter period." Super. Ct. Op. at 15 (emphasis added). Hudson only held that local school committees have no standing to challenge charter application decisions. The decision did not address

² In addition, Mystic Valley suffered reputational injuries from the Report. The Superior Court never even addressed the line of cases cited by Plaintiffs holding that such reputational injuries create standing. See, e.g., Buchanan v. Alexander, 284 F. Supp. 3d 792, 826-27 (M.D. La. 2018), *vacated in part on other grounds*, 919 F.3d 847 (5th Cir. 2019).

standing of a charter school. The “zone of interest” cases relied upon by the Superior Court preclude the public, competitors, or other strangers to a statute, from seeking relief. The “zone of interest” test, however, does not prohibit a regulated party like a charter school from seeking relief against a regulator for allegedly illegal and unconstitutional conduct. See Enos v. Sec’y of Envtl. Affairs, 432 Mass. 132, 140 (2000).

Second, the Superior Court focused on the wrong “zone of interest.” “A party has standing when it can allege an injury within the area of concern of the statute, regulatory scheme, **or constitutional guarantee** under which the injurious action has occurred.” Doe No. 1 v. Sec’y of Educ., 479 Mass. 375, 486 (2018) (emphasis added). Thus, when a plaintiff brings constitutional claims the court must examine whether the alleged injury is within the areas of concern of the relevant constitutional provisions, not a challenged statute. See id. (examining the areas of concern protected by the education and equal protection clauses of the Massachusetts Constitution).

3. *A Charter School Is Not a Political
Subdivision of the Commonwealth.*

The Defendants press an alternative argument that commonwealth charter schools have no standing to assert any constitutional claims because they are political subdivisions, or "arms of the state." The issue appears to be one of first impression.

The argument should be rejected. The traditional indicators of state control point toward the School's autonomy. For instance, education has never been the exclusive domain of the state, even if the government funds it. See Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982). Furthermore, government funding is not exclusive in this case: charter schools are permitted to receive gifts and other funding separate from the State. See G.L. c. 71, §89(k)(4), (7). Charter schools hold property and contract in their own names. See id. §89(k)(3), (5). They are private corporations with private incorporators. See id. § 89(k)(8). Moreover, the Commonwealth has given up centralized control over the relevant issues - curriculum and instruction, see G.L. c. 71, § 1 (providing school committees with freedom to choose subject matter, besides broad general subjects like reading, writing,

English, U.S. history and arithmetic); id. §§48, 50 (giving schools freedom to decide on textbooks). The Commonwealth has provided even more curricular freedom to charter schools. See G.L. c. 71, § 89(m) (giving charter schools discretion to structure curriculum “around particular areas of focus”); 603 C.M.R. § 1.102(2)(d) (requiring Commissioner approval only for educational program or curriculum changes that are “inconsistent with those specified in the school’s charter”).

There are enough statutory indicators of independence to warrant discovery. More factual development is also consistent with this Court’s decision in Walter E. Fernald Corp. v. Governor, 471 Mass. 520, 533-34 (2015). In that case, this Court ruled that a school for the disabled was not a political subdivision, but only after engaging in a detailed factual inquiry concerning the school’s historical records, corporate bylaws, and annual reports. Here, Defendants want to skip the required factual inquiry and have all commonwealth charter schools be declared political subdivisions of the Commonwealth as a matter of law.

B. The Superior Court Erroneously Dismissed the Claims Under Mass. R. Civ. P. 12(b) (6)

1. The Superior Court Did Not Focus on the School's Right to Be Heard in a Meaningful Manner

The Superior Court dismissed the procedural due process claim because the negative findings in the Core Criteria Site Visit Report were "only one element of the renewal process." Super. Ct. Op. at 22. Because charter renewal is still possible, the Superior Court believed Plaintiffs could not plausibly allege deprivation of any constitutionally protected interest. See id.

The Superior Court ignored this Court's decision in Kennie v. Natural Resources Dept., 451 Mass. 754 (2008). In that case, the Court held that the generation of tainted evidence by a government official interfered with the plaintiff's "protected right to seek a permit" and "to have their application heard in a 'meaningful manner.'" Id. at 761 n.14, 762. Plaintiffs in this case similarly allege, based on internal DESE emails, that Defendants generated tainted evidence in violation of their own Code of Conduct, out of animus. See Amended Complaint ¶¶17, 89-90. Kennie confirms that the deprivation of a fair

renewal process through the use of tainted evidence is itself an injury. See 451 Mass. at 761 n.14

2. *The Superior Court Ignored Objective Indicia that the Performance Criteria Are Unconstitutionally Vague*

Plaintiffs allege the Performance Criteria are unconstitutionally vague, violating the School's due process rights. See Amended Complaint ¶156. The Superior Court rejected the claim as a matter of law, deciding that criteria were sufficiently defined and explained by website links. See Super. Ct. Order at 23. The court erred, however, by ignoring that Defendants themselves have disagreed about the meaning of the criteria. While the Commissioner and BESE have said, after the fact, that there is no conflict between the Performance Criteria and the School's charter, see Amended Complaint ¶¶112, 116, Defendant Buckwalter flatly told the School that its long-standing emphasis on a shared American culture and commonality was now inconsistent with the Performance Criteria. See id. ¶98. The inconsistency among the Defendants about what is permitted under the criteria leads to the inference, which must be drawn in Plaintiffs' favor, that a person of "common intelligence" would not understand what the criteria

mean. See Chief of Police v. Holden, 470 Mass. 845, 854 (2015).

3. *The Superior Court Used the Wrong Equal Protection Standard for a "Class of One" Claim.*

The Superior Court acknowledged that the School is bringing a "class of one" claim, i.e. that it has been "irrationally singled out." Engquist v. Or. Dept. of Agric., 553 U.S. 591, 601 (2009). However, instead of applying the relevant test, whether the School was "singled out" without a rational basis, see id. at 602, the Superior Court dismissed the claim because Defendants did not "engage[] in an egregious abuse of power," see Super Ct. Op. at 21.

The Superior Court erroneously relied on Mancuso v. Mass. Interscholastic Athletic Ass'n, 453 Mass. 116, 129 (2009), which describes the equal protection standard applicable to discretionary decisions to withhold government benefits. However, that does not apply to a class-of-one claim based on malicious creation of tainted evidence.

4. *The Government Speech Doctrine Does Not Apply.*

The Superior Court decided that Plaintiffs' free speech and association claims should be dismissed on

the sole basis that Mystic Valley's instruction and curriculum are "government speech." See Super. Ct. Op. at 19. However, the court never applied the three-part test to determine whether Mystic Valley's curriculum and instruction are in fact government speech. See Shurtleff v. City of Boston, 986 F.3d 78, 87-88 (1st Cir. 2021). Because the Commonwealth has long delegated instruction and curriculum to local schools, and created charter schools to allow even more independence from the state, charter school curriculum and instruction are less like government speech and more similar to a limited public forum or nonpublic forum, see Walker v. Tex. Div., 576 U.S. 200, 218-19 (2015), neither of which permit content-based restrictions or "compelled private speech," see id., as is present in this case.

V. DIRECT APPELLATE REVIEW IS APPROPRIATE

Direct Appellate review is appropriate when, among other things, the appeal presents "questions of first impression or novel questions of law." Mass. R. App. P. 11(a). Here, the Court should grant this Application because the case presents numerous issues of first impression, including:

(1) Whether to use the “substantial risk of future injury” test used by the federal courts in analyzing Article III standing.

(2) Whether either Sch. Committee of Hudson v. Bd. of Educ., 448 Mass. 565, 579 (2007), G.L. c. 71, § 89, or the “zone of interest” test, precludes a charter school from pursuing any claims outside of the charter renewal administrative process?

(3) Whether a commonwealth charter school is a political subdivision of the Commonwealth such that it may not sue for a violation of constitutional rights?

(4) Whether Kennie v. Natural Resources Dept., 451 Mass. 754, 760 (2008), permits a procedural due process claim based on the creation of tainted evidence, motivated by animus?

(5) Whether the equal protection standard in Mancuso v. Mass. Interscholastic Athletic Ass’n, 453 Mass. 116, 129 (2009), applies to “class of one” equal protection claims?

(6) Whether commonwealth charter school curriculum/instruction is “government speech” that carries no First Amendment or state constitutional protection?

(7) Whether the "government speech" doctrine even applies to state constitutional claims, or student or teacher free expression and association claims?

CERTIFICATE OF COMPLIANCE WITH MASS. R. APP. 20(A)
INCLUDING PAGE AND WORD COUNT COMPLIANCE

This application for direct appellate review complies with the form requirements of Mass. R. App. 20(a). It was written in 12-point monospaced font (Courier New), double-spaced. The argument section is 10 pages in compliance with Mass. R. App. 11(b)(5), and in addition the word-count is less than 2,000 (including footnotes) as computed by the word count function on Microsoft Word.

Respectfully submitted,

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Through their attorneys,

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Dated: January 3, 2023

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CERTIFICATE OF SERVICE

I, Charles M. Waters, do hereby certify under the pains and penalties of perjury, that a copy of this document, Application For Direct Appellate Review, was served this day upon the attorney of record for the Appellees via electronic mail.

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EXHIBIT A

2181CV02146 Mystic Valley Regional Charter School, on behalf of itself and its students and faculty et al vs. Massachusetts Board of Elementary and Secondary Education et al

- Case Type:
Equitable Remedies
- Case Status:
Open
- File Date
10/01/2021
- DCM Track:
A - Average
- Initiating Action:
Declaratory Judgment G.L. c. 231A
- Status Date:
10/01/2021
- Case Judge:
- Next Event:

All Information Party Event Tickler Docket Disposition

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<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
06/07/2022 02:00 PM	Civil C Rm 740	Courtroom 740	Rule 12 Hearing		Held - Under advisement


Ticklers

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Service	10/01/2021	12/30/2021	90	10/03/2022
Answer	10/01/2021	01/31/2022	122	10/03/2022
Rule 12/19/20 Served By	10/01/2021	01/29/2022	120	10/03/2022


<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Rule 12/19/20 Filed By	10/01/2021	02/28/2022	150	10/03/2022
Rule 12/19/20 Heard By	10/01/2021	03/30/2022	180	10/03/2022
Rule 15 Served By	10/01/2021	11/25/2022	420	10/03/2022
Rule 15 Filed By	10/01/2021	12/27/2022	452	10/03/2022
Rule 15 Heard By	10/01/2021	12/27/2022	452	10/03/2022
Discovery	10/01/2021	09/21/2023	720	10/03/2022
Rule 56 Served By	10/01/2021	10/23/2023	752	10/03/2022
Rule 56 Filed By	10/01/2021	11/20/2023	780	10/03/2022
Final Pre-Trial Conference	10/01/2021	03/19/2024	900	10/03/2022
Judgment	10/01/2021	09/30/2024	1095	10/03/2022
Under Advisement	06/07/2022	07/07/2022	30	10/03/2022

Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
10/01/2021	Attorney appearance On this date Charles Waters, Esq. added for Plaintiff Mystic Valley Regional Charter School, on behalf of itself and its students and faculty		
10/01/2021	Attorney appearance On this date Karen Ann Whitley, Esq. added for Plaintiff Mystic Valley Regional Charter School, on behalf of itself and its students and faculty		
10/01/2021	Attorney appearance On this date Jonathan R Voegelé, Esq. added for Plaintiff Mystic Valley Regional Charter School, on behalf of itself and its students and faculty		
10/01/2021	Attorney appearance On this date Howard Cooper, Esq. added for Plaintiff Mystic Valley Regional Charter School, on behalf of itself and its students and faculty		
10/01/2021	Case assigned to: DCM Track A - Average was added on 10/01/2021		 Image
10/01/2021	Original civil complaint filed.	1	 Image
10/01/2021	Civil action cover sheet filed.	2	 Image
10/01/2021	Demand for jury trial entered.		
10/01/2021	Mystic Valley Regional Charter School, on behalf of itself and its students and faculty's MOTION for appointment of Special Process Server.	3	 Image
10/01/2021	Endorsement on Motion for Appointment of Special Process Server (#3.0): ALLOWED		 Image
10/06/2021	Attorney appearance On this date Eric A Haskell, Esq. added for Defendant Massachusetts Department of Elementary and Secondary Education		 Image
10/06/2021	Attorney appearance On this date Eric A Haskell, Esq. added for Defendant Massachusetts Board of Elementary and Secondary Education		
10/06/2021	Attorney appearance On this date Eric A Haskell, Esq. added for Defendant Commissioner of Elementary and Secondary Education Jeffrey C. Riley (in his official capacity only)		 Image
10/12/2021	Service Returned for Defendant Massachusetts Board of Elementary and Secondary Education: Service through person in charge / agent; 10/01/2021, in hand to Nicole Niles, 75 Pleasant Street, Malden, MA 02148	4	 Image
10/12/2021	Service Returned for Defendant Massachusetts Department of Elementary and Secondary Education: Service through person in charge / agent; 10/01/2021, in hand to Nicole Niles, 75 Pleasant Street, Malden, MA 02148	5	 Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
10/12/2021	Service Returned for Defendant Commissioner of Elementary and Secondary Education Jeffrey C. Riley (in his official capacity only): Service through person in charge / agent; 10/01/2021, in hand to Nicole Niles, 75 Pleasant Street, Malden, MA 02148	6	 Image
10/14/2021	Defendants Massachusetts Board of Elementary and Secondary Education, Massachusetts Department of Elementary and Secondary Education, Commissioner of Elementary and Secondary Education Jeffrey C. Riley (in his official capacity only)'s Assented to Motion to extend time for respond too complaint.	7	 Image
10/19/2021	Endorsement on Motion of defendants to extend time to respond to complaint (#7.0): ALLOWED after review (*dated 10/18/2021) Judge: Hogan, Hon. Maureen		 Image
11/10/2021	Attorney appearance On this date Cassandra Bolanos, Esq. added as Private Counsel for Defendant Massachusetts Board of Elementary and Secondary Education		
11/10/2021	Attorney appearance On this date Cassandra Bolanos, Esq. added as Private Counsel for Defendant Massachusetts Department of Elementary and Secondary Education		
11/10/2021	Attorney appearance On this date Cassandra Bolanos, Esq. added as Private Counsel for Defendant Commissioner of Elementary and Secondary Education Jeffrey C. Riley (in his official capacity only)		
11/10/2021	Defendant's Notice of intent to file motion Dismiss Applies To: Bolanos, Esq., Cassandra (Attorney) on behalf of Commissioner of Elementary and Secondary Education Jeffrey C. Riley (in his official capacity only), Massachusetts Board of Elementary and Secondary Education, Massachusetts Department of Elementary and Secondary Education (Defendant)	8	 Image
12/20/2021	Attorney appearance On this date Charles Waters, Esq. added as Private Counsel for Plaintiff Gina McKinnon, as Parent and Next Friend of Minor Student John Doe		
12/20/2021	Attorney appearance On this date Karen Ann Whitley, Esq. added as Private Counsel for Plaintiff Gina McKinnon, as Parent and Next Friend of Minor Student John Doe		
12/20/2021	Attorney appearance On this date Jonathan R Voegel, Esq. added as Private Counsel for Plaintiff Gina McKinnon, as Parent and Next Friend of Minor Student John Doe		
12/20/2021	Attorney appearance On this date Howard Cooper, Esq. added as Private Counsel for Plaintiff Gina McKinnon, as Parent and Next Friend of Minor Student John Doe		
12/20/2021	Attorney appearance On this date Charles Waters, Esq. added as Private Counsel for Plaintiff Alex Dan, as Parent and Next Friend of Minor Student John Doe		
12/20/2021	Attorney appearance On this date Karen Ann Whitley, Esq. added as Private Counsel for Plaintiff Alex Dan, as Parent and Next Friend of Minor Student John Doe		
12/20/2021	Attorney appearance On this date Jonathan R Voegel, Esq. added as Private Counsel for Plaintiff Alex Dan, as Parent and Next Friend of Minor Student John Doe		
12/20/2021	Attorney appearance On this date Howard Cooper, Esq. added as Private Counsel for Plaintiff Alex Dan, as Parent and Next Friend of Minor Student John Doe		
12/20/2021	Amended: First amended complaint filed by Mystic Valley Regional Charter School, on behalf of itself and its students and faculty, Gina McKinnon, as Parent and Next Friend of Minor Student John Doe, Alex Dan, as Parent and Next Friend of Minor Student John Doe	9	 Image
01/05/2022	Defendants Massachusetts Board of Elementary and Secondary Education, Massachusetts Department of Elementary and Secondary Education, Commissioner of Elementary and Secondary Education Jeffrey C. Riley (in his official capacity only), Patrick Buckwalter, Benie Capitolin (in Their Individual Capacities)'s Motion to Extend time to respond to Amended Complaint	10	 Image
01/05/2022	Defendants Massachusetts Board of Elementary and Secondary Education, Massachusetts Department of Elementary and Secondary Education, Commissioner of Elementary and Secondary Education Jeffrey C. Riley (in his official capacity only), Patrick Buckwalter, Benie Capitolin (in Their Individual Capacities)'s Notice of		 Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	appearance of Julie E. Green as counsel for all of the Defendants in this matter.		
01/05/2022	Attorney appearance On this date Julie Elisabeth Green, Esq. added as Private Counsel for Defendant Massachusetts Board of Elementary and Secondary Education.		
01/05/2022	Attorney appearance On this date Julie Elisabeth Green, Esq. added as Private Counsel for Defendant Massachusetts Department of Elementary and Secondary Education.		
01/05/2022	Attorney appearance On this date Julie Elisabeth Green, Esq. added as Private Counsel for Defendant Commissioner of Elementary and Secondary Education Jeffrey C. Riley (in his official capacity only).		
01/05/2022	Attorney appearance On this date Julie Elisabeth Green, Esq. added as Private Counsel for Defendant Patrick Buckwalter, Benie Capitolin (in Their Individual Capacities).		
01/10/2022	Endorsement on Motion of defendants to extend time to respond to amended complaint (#10.0): ALLOWED by assent (*dated 01/06/2022)		 Image
01/31/2022	Service Returned for Defendant Patrick Buckwalter, Benie Capitolin (in Their Individual Capacities): Service accepted by counsel; 01/28/2022, Counsel Julie E. Green at 1 Ashburton Place, Boston, MA 02108	11	 Image
01/31/2022	Defendants Massachusetts Board of Elementary and Secondary Education, Massachusetts Department of Elementary and Secondary Education, Commissioner of Elementary and Secondary Education Jeffrey C. Riley (in his official capacity only), Patrick Buckwalter, Benie Capitolin (in Their Individual Capacities)'s Notice of motion to dismiss.	12	 Image
01/31/2022	Defendants Massachusetts Board of Elementary and Secondary Education, Massachusetts Department of Elementary and Secondary Education, Commissioner of Elementary and Secondary Education Jeffrey C. Riley (in his official capacity only), Patrick Buckwalter, Benie Capitolin (in Their Individual Capacities)'s Request for leave to file 30-page memo of law	13	 Image
02/08/2022	Endorsement on Request of defendants for leave to file 30 page memo of law (#13.0): ALLOWED Judge: Budreau, Hon. James		 Image
03/21/2022	Plaintiffs Mystic Valley Regional Charter School, on behalf of itself and its students and faculty, Gina McKinnon, as Parent and Next Friend of Minor Student John Doe, Alex Dan, as Parent and Next Friend of Minor Student John Doe's Assented to Motion for leave to exceed page limit	14	 Image
03/31/2022	Defendants Massachusetts Board of Elementary and Secondary Education, Massachusetts Department of Elementary and Secondary Education, Commissioner of Elementary and Secondary Education Jeffrey C. Riley (in his official capacity only), Patrick Buckwalter, Benie Capitolin (in Their Individual Capacities)'s Motion for Leave to File Overlength Reply Brief	15	 Image
04/01/2022	Endorsement on Motion for leave to exceed page limit (#14.0): ALLOWED After review, motion allowed. Dated: March 30, 2022 and notices mailed 04/01/22 Judge: Budreau, Hon. James		 Image
04/05/2022	Endorsement on Motion for Leave to file Overlength Reply Brief (#15.0): ALLOWED After review, Motion allowed. Dated: April 1, 2022 and notices mailed 4/5/22 Judge: Budreau, Hon. James		 Image
04/15/2022	Defendants Massachusetts Board of Elementary and Secondary Education, Massachusetts Department of Elementary and Secondary Education, Patrick Buckwalter, Benie Capitolin (in Their Individual Capacities)'s Motion to dismiss the amended complaint under rules 12 (b)(1) and 12 (b)(6)	16	 Image
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04/15/2022	Opposition to motion to dismiss the amended complaint under rules 12 (b)(1) and 12 (b)(6) filed by Mystic Valley Regional Charter School, on behalf of itself and its students and faculty, Gina McKinnon, as Parent and Next Friend of Minor Student John Doe, Alex Dan, as Parent and Next Friend of Minor Student John Doe	16.2	 Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
04/15/2022	Reply/Sur-reply in support of their motion to dismiss the amended complaint	16.3	 Image
05/13/2022	The following form was generated: Notice to Appear Sent On: 05/13/2022 10:02:01		
06/07/2022	Matter taken under advisement: Rule 12 Hearing scheduled on: 06/07/2022 02:00 PM Has been: Held - Under advisement Comments: Event conducted by ZOOM conference. Hon. John P Pappas, Presiding Appeared: Plaintiff Charles Waters, Esq., Defendant Eric A Haskell, Esq., Staff: Arthur T DeGuglielmo, Assistant Clerk Magistrate		
10/03/2022	MEMORANDUM & ORDER: OF DECISION ON DEFENDANTS' MOTION TO DISMISS: (which see 24 pages scanned & mailed out) ORDER: For the foregoing reasons, the defendants' motion to dismiss is ALLOWED. Dated 10/3/22 Judge: Pappas, Hon. John P	17	 Image
10/03/2022	JUDGMENT on Defendants, Massachusetts Board of Elementary and Secondary Education, Massachusetts Department of Elementary and Secondary Education, Commissioner of Elementary and Secondary Education Jeffrey C. Riley (in his official capacity only), Patrick Buckwalter, Benie Capitolin (in Their Individual Capacities) 12(b) motion to dismiss against Plaintiff(s) Mystic Valley Regional Charter School, on behalf of itself and its students and faculty, Gina McKinnon, as Parent and Next Friend of Minor Student John Doe, Alex Dan, as Parent and Next Friend of Minor Student John Doe. It is ORDERED and ADJUDGED: That the plaintiffs complaint be and hereby is DISMISSED against ALL defendants.	18	 Image
10/14/2022	NOTICE OF APPEAL: Plaintiffs Mystic Valley Regional Charter School, Gina McKinnon, and Alex Dan, as Parent and Net Friend of Minor Student John Doe hereby appeal this Court's Judgment on Motion to Dismiss, dated October 3, 2022 and docketed on October 3, 2022 (Docket Number 18). Dated: October 14, 2022 Applies To: Cooper, Esq., Howard (Attorney) on behalf of Alex Dan, as Parent and Next Friend of Minor Student John Doe (Plaintiff); Waters, Esq., Charles (Attorney) on behalf of Alex Dan, as Parent and Next Friend of Minor Student John Doe (Plaintiff)	19	 Image
10/27/2022	Plaintiffs Mystic Valley Regional Charter School, on behalf of itself and its students and faculty, Gina McKinnon, as Parent and Next Friend of Minor Student John Doe, Alex Dan, as Parent and Next Friend of Minor Student John Doe's Notice of Transcript Order	20	 Image
12/01/2022	CD of Transcript of 06/07/2022 02:00 PM Rule 12 Hearing received from Donna Holmes Dominguez. 1	21	
12/01/2022	Notice of assembly of record sent to Counsel	22	 Image
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Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Judgment after Finding on Motion	10/03/2022	

EXHIBIT B

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2021-02146

MYSTIC VALLEY REGIONAL CHARTER SCHOOL & others¹

vs.

MASSACHUSETTS BOARD OF ELEMENTARY AND
SECONDARY EDUCATION & others²

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANTS' MOTION TO DISMISS

Plaintiffs Mystic Valley Regional Charter School (“Mystic Valley”), teacher Gina McKinnon (“McKinnon”), and Alex Dan (“Dan”) as parent of minor student John Doe (collectively, “plaintiffs”) commenced this action against the Massachusetts Board of Elementary and Secondary Education (“BESE”), the Massachusetts Department of Elementary and Secondary Education (“DESE”), DESE employees Patrick Buckwalter (“Buckwalter”) and Benie Capitolin (“Capitolin”), and Commissioner of Elementary and Secondary Education Jeffrey C. Riley (“Commissioner”) (collectively, “defendants”), alleging constitutional violations in the implementation and application of certain criteria to Mystic Valley during a mid-term review of its operations. The case is before the court on the defendants’ motion to dismiss. For the following reasons, the defendants’ motion is **ALLOWED**.

¹ Gina McKinnon; Alex Dan, as parent and next friend of Minor Student John Doe

² Massachusetts Department of Elementary and Secondary Education; Patrick Buckwalter, in his individual capacity; Benie Capitolin in her individual capacity; Jeffrey C. Riley, in his official capacity as Commissioner of Elementary and Secondary Education

BACKGROUND

The plaintiffs' Amended Complaint ("AC") consists of forty-nine pages and 169 numbered paragraphs. The court briefly summarizes the facts therein, which the court takes as true for purposes of a motion to dismiss, and reserves additional facts for discussion. See Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 223 (2011) (holding that, in reviewing sufficiency of complaint, court takes as true "'the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor'" (citations and internal quotation marks omitted)).

Mystic Valley, located in Malden, Massachusetts, obtained its charter in 1998 and, since then, the Board of Elementary and Secondary Education has consistently renewed Mystic Valley's charter. Mystic Valley's current charter period expires on June 30, 2023.

Mystic Valley's mission is that students are best served and prejudice and divisiveness are best defeated by focusing on one shared American culture, and specifically on the idea that America is a melting pot and all individuals are equal. AC, par. 7. Working with a small group of critics, DESE has targeted Mystic Valley to force it to abandon its mission and educational approach. AC, par. 13. DESE recognized that it could not directly cause Mystic Valley to change its mission, so it attempted to do so indirectly by revising the Performance Criteria to apply when conducting its Site Visits, which are relevant to the charter renewal process. AC, pars. 14, 15; see Exhibit A (Performance Criteria).³

³ The exhibits the court references in this decision are attached to the defendants' memorandum in support of their motion to dismiss. "Where, as here, the [parties] had notice of these documents and relied on them in framing the complaint, the attachment of such documents to a motion to dismiss does not convert the motion to one for summary judgment . . ." Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 n.4 (2004). The defendants have also moved under Mass. R. Civ. P. 12(b)(1), and a court "may consider documents and other materials outside the pleadings when ruling on a rule 12(b)(1) motion." Audoire v. Clients' Security Bd., 450 Mass. 388, 390 n.4 (2008).

The Performance Criteria consist of nine criteria⁴ in three separate categories: Faithfulness to Charter consists of (1) Mission and Key Design Elements, (2) Access and Equity, and (3) Compliance; Academic Program Success consists of (5) Student Performance, (6) Program Delivery, (7) School Climate and Family Engagement, and (8) Capacity; and Organizational Viability consists of (9) Governance. Exhibit A, at 5; see Exhibit A, at 6-11 (setting out “key indicators” of each criterion). Criteria 6, 7, and 8, are further broken down into numbered key indicators. Exhibit A, at 5, 8-10. Mystic Valley specifically takes issue with two new terms, “cultural proficiency” in Criterion 6’s Key Indicator 6.2, and “culturally responsive” in Criterion 7’s Key Indicators 7.1 and 7.2, which Mystic Valley alleges mandate a focus on differences rather than commonality. AC, pars. 15, 72; see Exhibit A, at 3 (defining “culturally proficient” and “culturally responsive”); Exhibit A, at 8-9 (key indicators of Criteria 6 and 7). Mystic Valley contends that these new Performance Criteria are intentionally incompatible with Mystic Valley’s state-approved charter, mission, and educational approach. AC, par. 77.

DESE first evaluated Mystic Valley under the new Performance Criteria during its “Site Visit” (conducted remotely) in May 2021. AC, par. 16; see AC, pars. 91-99 (details of DESE’s May 2021 Site Visit). After this visit, defendant Patrick Buckwalter held a virtual meeting with Mystic Valley’s leadership team and informed them that the Site Visit team’s preliminary findings included the failure of Mystic Valley’s instruction to reflect cultural proficiency. AC, par. 97. Buckwalter acknowledged Mystic Valley’s long-standing commonality approach and made clear that this approach was inconsistent with the Performance Criteria. AC, par. 98.

⁴ It is unclear into which categories the fourth criterion, “Dissemination,” and the tenth criterion, “Finance,” fall. Compare Exhibit A, at 5 (chart listing Performance Criteria), with Exhibit A, at 7, 11 (key indicators of “Criterion 4: Dissemination” and “Criterion 10: Finance”). Regardless, it does not appear that the Site Review included an assessment of those criteria.

Through its public records request, Mystic Valley learned that members of the Site Visit team, including defendants Patrick Buckwalter and Benie Capitolin, were biased against Mystic Valley. AC, par. 17; see AC, pars. 78-82, 85-90 (critics of Mystic Valley revealed through public records request).

On July 1, 2021, Mystic Valley submitted a formal request to DESE for a waiver from application of the “offending” Performance Criteria until DESE agreed that the Performance Criteria that conflict with Mystic Valley’s charter would not be part of the Site Visit report or the charter review in 2023. AC, par. 101. DESE failed to address this waiver, AC, par. 102, until after Mystic Valley filed this action, at which time DESE held a hearing before BESE on Mystic Valley’s waiver request. AC, pars. 111-118. BESE denied Mystic Valley’s waiver request, concluding that there was no conflict between Mystic Valley’s charter and mission and the Performance Criteria. AC, par. 116.

DESE issued its “Year 23 Core Criteria Site Visit Report” (“Draft Report”)⁵ to Mystic Valley on August 25, 2021. AC, par. 103; see AC, pars. 103-110 (Draft Report details); Exhibit B (Draft Report). The Draft Report rated Mystic Valley on a number of the Performance Criteria as “Meets” or “Partially Meets” the criteria. See Exhibit B, at 3 (“Executive Summary” of ratings). Specifically, the Draft Report gave a “Meets” rating to Criteria 1 and 2, and a “Partially Meets” rating to Criterion 6’s Key Indicator 6.4, Criterion 7’s Key Indicator 7.1, and Criterion 9; as for Criterion 5, Student Performance, the Draft Report rated Mystic Valley as “[n]ot requiring assistance or intervention[.]” Exhibit B, at 3, 16.

⁵ DESE has since finalized the Draft Report. For the sake of consistency, the court continues to refer to the document as the Draft Report.

With respect to Key Indicator 7.1, which Mystic Valley partially met, the Draft Report found that Mystic Valley's

“program includes some elements designed to foster a safe and supportive environment and help students develop social and emotional skills. The school environment is somewhat inclusive and reflective of the community and students' cultures and identities. The extent to which the school's behavioral management system is supportive and responsive to all students is unclear based on concerns raised by students.”

Exhibit B, at 24 (formatting omitted). The Draft Report specifically noted:

“Students' cultures and identities are somewhat reflected in curriculum documents and the learning environment. As noted in Key Indicator 6.2: Instruction, stakeholders described some examples of instruction that reflect cultural proficiency. Administrators and teachers reported that the Core Knowledge curriculum and 1B curriculum used by the school include texts written by diverse authors and that students have opportunities to explore issues from multiple perspectives and make personal connections. Administrators and student and family support staff reported that images displayed in the school reflect different identities and cultures. Administrators and family members reported that the school organizes an annual event called Around the World that celebrates customs and foods of different countries.

“. . . Some students reported that they have been treated differently because of their race but that things have gotten better over time. Students also reported that teachers have been open to having conversations about racial and sexual identities. Students further reported they thought it would be helpful to have more teachers of color. . . .

“The school staff does not reflect the racial and ethnic composition of students and families the school serves. The school's student population is approximately 18 percent African American, 25 percent Asian, 10 percent Hispanic, 43 percent White, and 5 percent Multi-Race, Non-Hispanic. According to Profiles, 6.0 full-time equivalent (FTE) staff at the school are African American, 4.0 are Asian, 4.0 are Hispanic, 161.7 are White, and 2.0 are Multi-Race, Non-Hispanic.”

Exhibit B, at 25 (formatting omitted). With respect to Mystic Valley's behavioral management system, the Draft Report found, in pertinent part:

“Administrators reported that they track discipline data closely and provided evidence that they review data disaggregated by race and for students with

disabilities. Administrators reported that they seek to minimize suspensions but have not made any specific changes to the discipline system recently based on the school's data because disparities among student groups reflect disparities that exist statewide. Administrators provided tables showing rates of in-school and out-of-school suspension for the school, for each of the sending districts in the school's region, and the state.

"Future site visit teams should examine the extent to which the school's program includes elements designed to foster a safe and supportive environment and help students develop social and emotional skills, the extent to which the school environment is inclusive and reflective of the community and students' cultures and identities, and the extent to which the school's behavioral management system is supportive and responsive to all students."

Exhibit B, at 26 (formatting omitted).

The Draft Report did not rate Key Indicator 6.2, concerning cultural proficiency, "due to the limited scope of the visit[.]" Exhibit B, at 20 n.21, but the Site Visit team did "gather[] evidence related to a subset of the elements included in Key Indicator 6.2: Instruction." Exhibit B, at 20 n.22 (formatting omitted). For this indicator, the Draft Report found that "Stakeholders [at Mystic Valley] reported that instruction reflects high expectations for all students. Stakeholders described some examples of instruction that reflects cultural proficiency. Stakeholders reported that instruction fosters student engagement and that learning environments are generally conducive to learning." Exhibit B, at 20 (formatting omitted). The Draft Report included the following findings concerning cultural proficiency:

"When asked if instruction is expected to reflect cultural proficiency, administrators and teachers reported that the Core Knowledge curriculum and 1B curriculum used by the school include texts written by diverse authors and that students have opportunities to explore issues from multiple perspectives and make personal connections. This perspective is consistent with the definition of cultural proficiency included in the Charter School Performance Criteria. At the same time, administrators and teachers reported that the focus of the program is on developing students' cultural literacy. This is a term developed by E.D. Hirsch, Jr., who is the founder and chairman of the Core Knowledge Foundation, and refers to the idea that there is a core body of knowledge all students should be

taught. School administrators also reported that they embrace the ‘melting pot’ theory and seek to focus on commonality, not differences.

“Teachers and students listed some examples of instruction that reflects cultural proficiency. Teachers reported that students have opportunities in class to share their own stories and build connections to what is being taught. Teachers also reported that they worked with the school director and civil rights coordinator to adapt the curriculum used to teach [The Adventures of Tom Sawyer] in grade 5 to address issues of race, and that they have also made changes to the curriculum used to teach [The Adventures of Huckleberry Finn] in the high school. Students reported that teachers explain racial slurs in textbooks and instruct students not to use them because they are hurtful. Students also reported that they have had discussions about different cultures, including those reflecting their own heritage, in history and Spanish classes.”

Exhibit B, at 21 (footnote omitted).

DISCUSSION

I. Charter Schools

The defendants challenge the plaintiffs’ claims on the basis of standing and on their merits. As the context in which the plaintiffs’ claims arise informs the resolution of those issues, the court sets out the statutory and regulatory provisions concerning charter schools. See, e.g., School Comm. of Hudson v. Board of Educ., 448 Mass. 565, 567-573 (2007).

A charter school is a tuition-free “public school, operated under a charter granted by the [Board of Elementary and Secondary Education], which operates independently of a school committee and is managed by a board of trustees.” G.L. c. 71, § 89(c), (m); see G.L. c. 71, § 89(e), (h), (j) (detailing application process to establish charter school). “A charter school shall operate in accordance with its charter and the provisions of law regulating other public schools” as well as with G.L. cc. 71A, 71B, and “comply with all applicable state and federal health and safety laws and regulations.” G.L. c. 71, § 89(s), (bb); see G.L. c. 71, § 89(aa) (“[T]he internal form of governance of a charter school shall be determined by the school’s charter.”); see also

G.L. c. 71, § 89(s) (excepting charter schools from complying with G.L. c. 71, § 41, regarding professional teacher status and § 42, regarding leaves of absence, and explaining responsibilities for special needs students); G.L. c. 71, § 89(u), (y) (setting out application of G.L. c. 268A regarding obligations of public officials and employees, G.L. c. 258 regarding tort liability, and G.L. c. 150E regarding collective bargaining). A charter is considered a license. 603 Code Mass. Regs. § 1.02 (defining “charter” as “license issued by [BESE] . . . allowing the grantee to operate a charter school for a period of five years”).

“A charter school established under a charter granted by [BESE] shall be a body politic and corporate with all powers necessary or desirable for carrying out its charter program, including, but not limited to, the power to . . . sue and be sued, but only to the same extent and upon the same conditions that a municipality can be sued” G.L. c. 71, § 89(k)(2); see G.L. c. 71, § 89(k)(1), (3)-(8) (listing some of charter school’s powers).

“The board of trustees of a charter school holds the charter of the school and governs the school[.]. . . . [including] oversee[ing] the school’s budget.” 603 Code Mass. Regs. § 1.06(1). The board of trustees “shall be deemed to be public agents authorized by the commonwealth to supervise and control the charter school.” G.L. c. 71, § 89(c); see 603 Code Mass. Regs. § 1.02 (defining board of trustees as “[p]ublic agents authorized by state to supervise and oversee a charter school”). “The board of trustees, in consultation with the teachers, shall determine the school’s curriculum and develop the school’s annual budget.” G.L. c. 71, § 89(w).

A charter school receives “tuition payments [i.e., funding] from each school district whose students attend the charter school.” 603 Code Mass. Regs. § 1.07(2); see G.L. c. 71, § 89(ff)-(hh) (explaining funding procedure and formula); see also G.L. c. 71, § 89(o) (requiring charter school to notify school districts of enrolled students from those districts annually by April

1st). “The students who reside in the school district in which the charter school is located shall be provided transportation to the charter school by the resident district’s school committee on similar terms and conditions as transportation is provided to students attending local district schools if the transportation is requested by the charter school.” G.L. c. 71, § 89(cc); 603 Code Mass. Regs. § 1.07(3) (same).

Charter schools are “open to all students, on a space available basis, and shall not discriminate on the basis of race, color, national origin, creed, sex, gender identity, ethnicity, sexual orientation, mental or physical disability, age, ancestry, athletic performance, special need, or proficiency in the English language or a foreign language or academic achievement.” G.L. c. 71, § 89(m); 603 Code Mass. Regs. § 1.05(2) (same); see G.L. c. 71, § 89(kk) (requiring Commissioner to “collect data on the racial, ethnic, and socio-economic make-up of the student enrollment of each charter school”). Charter schools, however, “may limit enrollment to specific grade levels and may structure curriculum around particular areas of focus such as mathematics, science or the arts[,]” *id.*, and “[p]reference for enrollment in a commonwealth charter school shall be given to students who reside in the city or town in which the charter school is located.” G.L. c. 71, § 89(n). “Students in charter schools shall be required to meet the same performance standards, testing and portfolio requirements set by [BESE] for students in other public schools.” G.L. c. 71, § 89(v). A charter school shall not hire a teacher “who is not certified pursuant to [G.L. c. 71, §] 38G unless the teacher has successfully passed the state teacher test as required in said section 38G.” G.L. c. 71, § 89(ii).

“Each charter school shall submit an annual report, no later than August 1, to [BESE], the local school committee, each parent or guardian of its enrolled students and each parent or guardian contemplating enrollment in that charter school.” G.L. c. 71, § 89(jj); 603 Code Mass.

Regs. § 1.08(1) (same); see id. (setting out contents of annual report). DESE “may send evaluation teams to visit each charter school on an annual or on an as-needed basis to corroborate and augment the information provided in the annual report. [DESE] may conduct other site visits as necessary. Site visit teams may also gather any other evidence relevant to the school’s performance. The written reports from these site visits shall become part of the charter school’s record, along with any response that the school submits.”⁶ 603 Code Mass. Regs. § 1.08(2).

“A charter granted by [BESE] shall be for 5 years.” G.L. c. 71, § 89(dd); see 603 Code Mass. Regs. § 1.04(6)(b) (noting that five-year period begins on July 1st). “The charter school shall submit its application for renewal of a charter . . . no earlier than March 1st of the third school year of the relevant charter and no later than August 1st after the end of the fourth school year of the relevant charter.” 603 Code Mass. Regs. § 1.11(1). “[BESE] shall develop procedures and guidelines for revocation and renewal of a school’s charter[,]” G.L. c. 71, § 89(dd), and “[DESE] shall issue guidelines describing the evaluation process to be followed in reviewing applications for charter renewal, including protocols for renewal inspections and performance criteria.” 603 Code Mass. Regs. § 1.11(2). “All charter schools will be evaluated on the same performance criteria as provided in the guidelines, provided, however, that the criteria will take into account each school’s charter and accountability plan.” Id.

“The decision by [BESE] to renew a charter shall be based upon the presentation of affirmative evidence regarding the faithfulness of the school to the terms of its charter, including the extent to which the school has followed its recruitment and retention plan and has disseminated best practices in accordance with [G.L. c. 71, § 89(dd); the success of the school’s

⁶ It does not appear from the plaintiffs’ Amended Complaint that Mystic Valley submitted a “response” to the Draft Report. See 603 Code Mass. Regs. § 1.08(2).

academic program; and the viability of the school as an organization. [DESE] will gather evidence regarding these issues from the renewal application and from other information, including but not limited to, a school's annual reports, financial audits, test results, site visit reports, and the renewal inspection report. . . . Evidence of academic success for all students is essential for charter renewal.” Id.

After this process, BESE may renew a charter, or BESE or the Commissioner “may impose conditions on a school’s charter for violations of law or failure to make progress with student achievement, failure to adhere to and enhance its recruitment and retention plan, failure to comply with the terms of its charter, or failure to remain viable.” 603 Code Mass. Regs. § 1.12(1). Alternatively, BESE “may place a charter school on probation if in its judgment the imposition of a condition alone would be insufficient to remediate the problem. [BESE] may impose conditions on the school’s charter that require the school to address specific areas of concern.” 603 Code Mass. Regs. § 1.12(2).

BESE may also suspend or revoke a charter, but it must do so for cause, which includes, inter alia, lack of evidence of academic success or failure to comply substantially with the terms of the charter, with G.L. c. 71, § 89, or with any other laws or regulations. 603 Code Mass. Regs. § 1.12(3)(a)-(h) (setting out non-exhaustive list of causes for charter suspension or revocation). “Before [BESE] revokes a charter, it shall notify the charter school in writing that [BESE] intends to revoke the charter. . . . 60 days before the revocation takes effect.” 603 Code Mass. Regs. § 1.12(4). “Upon receiving a notice of intent to revoke a charter, notice of non-renewal, or notice of suspension where the health, safety, or education of the school’s students is at immediate risk, the school shall have the rights provided in [G.L. c. 30A, § 13,” governing

the non-renewal of licenses, and 801 Code Mass. Regs. 1.00, providing for judicial review of agency decisions under G.L. c. 30A, § 14. 603 Code Mass. Regs. § 1.12(5).

As noted, Mystic Valley's charter is up for renewal in 2023.

II. Standing

The defendants, first, challenge the standing of Mystic Valley,⁷ Gina McKinnon, and Alex Dan to bring this action under G.L. c. 231A, § 1 (Count 1) and 42 U.S.C. § 1983 (Counts II-V).

“The issue of standing is one of subject matter jurisdiction[.]” Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court, 448 Mass. 15, 21 (2006), and “[a] defendant may properly challenge a plaintiff’s standing to raise a claim by bringing a motion to dismiss under Mass. R. Civ. P. 12(b)(1)” Ginther v. Commissioner of Ins., 427 Mass. 319, 322 (1998); see Reporter’s Notes to Mass. R. Civ. P. 12 (1973) (“[L]ack of subject matter jurisdiction . . . is generally not curable, and certainly not waivable. . . . [thus] the issue should remain open throughout” and “may be raised at any time up to final judgment on appeal, in any way, by any party, or by the court sua sponte.”). Accord Pugsley v. Police Dep’t of Boston, 472 Mass. 367,

⁷ The defendants argue that Mystic Valley is not a person able to bring suit under 42 U.S.C. § 1983. A charter school is “a body politic and corporate” that can “sue and be sued, but only to the same extent and upon the same conditions that a municipality can be sued” G.L. c. 71, § 89(k). “[A] municipality may be a ‘person’ within the meaning of § 1983 for the purposes of *liability*.” Spence v. Boston Edison Co., 390 Mass. 604, 609 (1983) (emphasis added). A municipality is not “a ‘person’ for the purpose of challenging State action itself.” Id.; see Dartmouth v. Greater New Bedford Reg’l Vocational Tech. High Sch. Dist., 461 Mass. 366, 380 (2012) (“The decisional law rests on the proposition that constitutional protections belong to ‘persons,’ including private corporations, who are generally considered independent of the Commonwealth.”). As the plaintiffs point out, however, G.L. c. 71, § 89(k), equates a charter school to a municipality only as to the extent the municipality can be sued. For purposes of this decision, the court concludes that Mystic Valley is a “person” able to bring suit under 42 U.S.C. § 1983. Contra Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist., 908 F. Supp. 2d 597, 605 (M.D. Penn. 2012) (concluding that plaintiff charter school “is properly considered a ‘person’ able to bring suit under § 1983” but because its relationship with school district “is analogous to that of a municipal corporation-creator where the powers granted to the municipal corporation are defined and limited by the creator[.]” charter school, “like a municipality or municipal corporation, may not bring this constitutional challenge against its creator”); cf. 24 Pa. Stat. § 17-1714-A(a)(2) (Pennsylvania charter school statute providing that charter school is body corporate with power to “[s]ue and be sued, but only to the same extent and upon the same condition that political subdivisions and local agencies can be sued”).

371 (2015). “[I]t is solely the plaintiff’s burden to prove his standing.” Pugsley, 472 Mass. at 373.

“Injuries that are speculative, remote, and indirect are insufficient to confer standing.” Ginther, 427 Mass. at 323; Pugsley, 472 Mass. at 373 (holding that plaintiff “must allege sufficient facts to show that he has suffered a nonspeculative, direct injury”); see Sullivan v. Carrick, 888 F.2d 1, 4 (1st Cir. 1989) (“Where a chilling effect is speculative, indirect or too remote, finding an abridgment of First Amendment rights is unfounded.”). Additionally, that injury must be “within the area of concern of the statute, regulatory scheme, or constitutional guarantee under which the injurious action has occurred.” Doe v. Secretary of Educ., 479 Mass. 375, 386 (2018); Arbella Mut. Ins. Co. v. Commissioner of Ins., 456 Mass. 66, 82 (2010) (“[T]o establish standing to challenge administrative agency actions, a plaintiff must allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred.” (alteration in original) (citation omitted)); Ginther, 427 Mass. at 323 (“[F]or the plaintiff to have standing, the injury alleged must fall ‘within the area of concern of the statute or regulatory scheme under which the injurious action has occurred.’” (citations omitted)). In other words, a plaintiff’s interests “‘must come within the zone of interests arguably protected by’” the statutory scheme at issue. Arbella Mut. Ins. Co., 456 Mass. at 82 (citation omitted).

Considerations relevant to the standing analysis are “‘the language of the statute in issue; the Legislature’s intent and purpose in enacting the statute; the nature of the administrative scheme; decisions on standing; any adverse effects that might occur, if standing is recognized; and the availability of other, more definite, remedies to the plaintiffs.’” School Comm. of Hudson, 448 Mass. at 580 (citation omitted).

The defendants are correct that Mystic Valley’s charter has not been revoked and that allegations of future financial harm, attrition, and self-censoring as a result of the Site Visit and Draft Report are speculative. See Sullivan, 888 F.2d at 4; Pugsley, 472 Mass. at 373; Ginther, 427 Mass. at 323; see also note 9, infra. Similarly speculative and remote are McKinnon’s claim that she cannot teach her classes “the way she believes is best” and is instead compelled “to teach DESE’s viewpoint that individual differences between citizens have to be elevated and emphasized over common culture and values[,]” AC, par. 126, and Dan’s claim that his child John Doe “is being denied and threatened with the denial of access to the commonality-focused instruction for which his parents enrolled him at Mystic Valley.” AC, par. 127; see also note 9, infra.⁸

Pursuant to the applicable statutes and regulations, BESE must base its decision about Mystic Valley’s charter renewal on evidence DESE has gathered regarding Mystic Valley’s faithfulness to the terms of its charter, the success of its academic program, and its viability as an organization. See G.L. c. 71, § 89(dd); 603 Code Mass. Regs. § 1.11(2). DESE will gather this evidence from Mystic Valley’s renewal application, annual reports, financial audits, test results, site visit reports, and the renewal inspection report. See id. As Mystic Valley points out, then, DESE’s May 2021 Site Visit and the Draft Report will be among the evidence that BESE may consider when determining whether to renew Mystic Valley’s charter. Mystic Valley contends

⁸ The plaintiffs’ reliance on Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014), is misplaced. There, the issue before the United States Supreme Court was whether the plaintiffs had “alleged a sufficiently imminent injury for purposes of Article III” of the United States Constitution, id. at 152, which “limits the jurisdiction of federal courts to ‘Cases’ and ‘Controversies.’” Id. at 157. “To establish Article III standing, a plaintiff must show (1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘likel[i]hood’ that the injury ‘will be redressed by a favorable decision.’” Id. at 157-158 (alteration in original) (citation omitted). The Court focused on the first element, as to which “[a]n allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or there is a “substantial risk” that the harm will occur.” Id. at 158. Even if this standard did apply here, the plaintiffs have not alleged facts plausibly suggesting that injury is certainly impending or there is a substantial risk that harm will occur to them.

that this negative “evidence” constitutes an injury that will make its charter renewal more difficult. Even if the court agreed that this purportedly negative evidence constitutes an “injury” for purposes of standing,⁹ this “harm” to Mystic Valley is not within the charter school statute’s zone of interests.

The charter school statute does not allow for an appeal or review of any action that occurs during the five-year charter period. See School Comm. of Hudson, 448 Mass. at 580 (considering “‘nature of the administrative scheme’” and “‘availability of other, more definite, remedies to the plaintiffs’” when determining standing). For example, “[BESE] may waive provisions of 603 [Code Mass. Regs.] 1.00 for good cause. If a charter applicant or charter school board of trustees makes a written request for a waiver, [BESE] may waive the applicability of one or more provisions of 603 [Code Mass. Regs.] 1.00. These waivers shall be granted only under circumstances the Board deems exceptional and such waivers shall be granted only to the extent allowed by law.” 603 Code Mass. Regs. § 1.03(2). There is no review

⁹ The Draft Report’s conclusions and findings with respect to the cultural proficiency and cultural responsiveness criteria are not wholly negative.

First, the Draft Report concluded that Mystic Valley “partially met” Key Indicator 7.1, cultural responsiveness, finding that Mystic Valley’s environment “is somewhat inclusive and reflective of the community and students’ cultures and identities[;]” the curriculum included “texts written by diverse authors and . . . students have opportunities to explore issues from multiple perspectives and make personal connections[;]” images displayed in the school reflect different identities and cultures[;]” and the school “organizes an annual event called Around the World that celebrates customs and foods of different countries.” The Draft Report also noted that students had concerns about the “extent to which the school’s behavioral management system is supportive and responsive to all students” and that while “[s]ome students reported that they have been treated differently because of their race[;]” they reported that “things have gotten better over time” and “teachers have been open to having conversations about racial and sexual identities.” The Draft Report noted that Mystic Valley’s “staff does not reflect the racial and ethnic composition of students and families the school serves” and that students “reported they thought it would be helpful to have more teachers of color.”

Second, the Draft Report did not rate Key Indicator 6.2, cultural proficiency, but noted evidence that related to “Instruction,” including the inclusion in the curriculum of “texts written by diverse authors” that provided students with opportunities “to explore issues from multiple perspectives and make personal connections[;]” the teaching of The Adventures of Tom Sawyer and The Adventures of Huckleberry Finn in a way “to address issues of race” including explanations of the racial slurs therein; and student “discussions about different cultures, including those reflecting their own heritage, in history and Spanish classes.”

process available for denial of waivers.¹⁰ Rather, a charter school may only seek judicial review under G.L. c. 30A, § 14, of BESE's revocation of its charter, issuance of a notice of non-renewal, or issuance of a notice of suspension. 603 Code Mass. Regs. § 1.12(5). This limitation on the availability of judicial review suggests that any alleged harm to charter schools within the five-year charter period is not within the zone of interests that the charter school statute protects. See Arbella Mut. Ins. Co., 456 Mass. at 82; cf. School Comm. of Hudson, 448 Mass. at 578 (rejecting plaintiff's argument that, as "department regulation provides for judicial review under G.L. c. 30A of a decision to *revoke* a charter . . . , judicial review under G.L. c. 30A must similarly be provided in the case of a decision to *grant* a charter" (emphasis in original)).

The plaintiffs therefore do not have standing to allege these claims against the defendants. The defendants' motion to dismiss the Amended Complaint is accordingly

ALLOWED.

III. Merits

"As the plaintiff lacks proper standing, [the court] need not decide the merits of [the plaintiff's] case." Pugsley, 472 Mass. at 373. For the sake of completeness, the court does so, briefly.^{11, 12}

¹⁰ Therefore, BESE's denial of Mystic Valley's request for a waiver from the application of certain Performance Criteria until DESE determined that those Performance Criteria conflicted with Mystic Valley's charter also does not constitute an injury that provides Mystic Valley with standing.

¹¹ In their opposition, the plaintiffs withdrew Count VI, alleging breach of contract.

¹² Unlike the claims for declaratory and injunctive relief in Counts I-IV against the Commissioner in his official capacity, see O'Malley v. Sheriff of Worcester Cnty., 415 Mass. 132, 141 n.13 (1993); Doe, Sex Offender Registry Bd. No. 474362 v. Sex Offender Registry Bd., 94 Mass. App. Ct. 52, 62 n.11 (2018), the plaintiffs' request for monetary damages in Count V triggers the issue of qualified immunity as to Buckwalter and Capitolin in their individual capacities, which the defendants have raised. "Determining whether a defendant is entitled to qualified immunity involves two questions: (1) 'whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right,'" and "(2) 'whether the right at issue was "clearly established" at the time of defendant's alleged misconduct[.]'" Miranda-Rivera v. Toledo-Dávila, 813 F.3d 64, 72 (1st Cir. 2016) (ellipses in original) (citations omitted); Nelson v. Salem State Coll., 446 Mass. 525, 531 (2006). If the answer to both questions is in the affirmative, the defendant is not entitled to qualified immunity. See Stamps v. Framingham, 813

A. Standard of Review

A party moving to dismiss pursuant to Mass. R. Civ. P. 12(b)(6) contends that the complaint fails “to state a claim upon which relief can be granted” ““While a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions” Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008) (ellipses and alteration in original), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). ““Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact).”” Id. (ellipses and alteration in original), quoting Bell Atl. Corp., 550 U.S. at 555.

At the pleading stage, then, the plaintiff must assert “factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect the threshold requirement . . . that the plain statement possess enough heft to show that the pleader is entitled to relief.” Id. (internal quotations and alterations omitted), quoting Bell Atl. Corp., 550 U.S. at 557. Plausibility does not “impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will raise evidence of the” misconduct alleged. Bell Atl. Corp., 550 U.S. at 556. Therefore, “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

B. Count II – First Amendment Violations

F.3d 27, 34 (1st Cir. 2016). Given this court’s conclusion, above, that the plaintiffs do not have standing to assert these claims, and below, that all of the plaintiffs’ claims fail on their merits, the court need not resolve the question of qualified immunity.

In Count II, the plaintiffs seek an injunction prohibiting the defendants from further using or applying the Performance Criteria to Mystic Valley as they impermissibly restrict the plaintiffs' speech. The parties agree that the speech at issue is the curriculum, and they dispute whether the curriculum is government speech – the defendants allege that it is, and therefore not regulated under the First Amendment; the plaintiffs counter that it is not because Mystic Valley is a private corporation that is not part of the government.

“[W]hen the state is the speaker it can decide the content of its message” Griswold v. Driscoll, 625 F. Supp. 2d 49, 54 (2009). “Public officials have the right to recommend, or even require, the curriculum that will be taught in public school classrooms. Doing so is a form of government speech, which is not generally subject to First Amendment scrutiny.” Id. Accordingly, “the curriculum of public schools is a fully protected form of state speech.” Id., citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995); see Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (characterizing activities “as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences”); Westfield High Sch. L.I.F.E. Club v. Westfield, 249 F. Supp. 2d 98, 114 n.13 (D. Mass. 2003) (delineating speech in school settings “into three tiers, built up from the most restrictable to the least: The bottom tier consists of *government speech* (i.e., a principal speaking at a school assembly) over which the government may exercise unfettered control over content; the middle tier consists of *school-sponsored speech* (i.e., a teacher editing a curriculum-based newspaper that is a part of a journalism class) over which the school may exercise control over content because the speech might reasonably be perceived as bearing the imprimatur of the school and because it involves pedagogical interests; the top tier

consists of *private, school-tolerated speech* (i.e., student speaking to another during lunch break) which may be controlled to the extent it substantially disrupts or materially interferes with the school's disciplinary concerns" (emphasis in original) (citation omitted)).

With respect to charter schools, "[t]he board of trustees, in consultation with the teachers, shall determine the school's curriculum" G.L. c. 71, § 89(w). The board of trustees, in turn, are "public agents authorized by the commonwealth to supervise and control the charter school." G.L. c. 71, § 89(c); 603 Code Mass. Regs. § 1.02. It follows that, as public agents, acting under the Commonwealth's authority to determine the charter school's curriculum, Mystic Valley's curriculum is government speech. See Hazelwood Sch. Dist., 484 U.S. at 271; Griswold, 625 F. Supp. 2d at 54.

The plaintiffs' claim alleging that the defendants are violating their First Amendment rights therefore fails.

C. Counts III and V – Equal Protection Violations

The plaintiffs allege that the Performance Criteria, on their face, unlawfully target and disparately impact Mystic Valley, and that the defendants have not applied the Performance Criteria in a fair and unbiased manner. In Count III, the plaintiffs seek an injunction prohibiting BESE, DESE, and the Commissioner from further using the Performance Criteria or applying them to Mystic Valley, and in Count V, the plaintiffs seek damages from Buckwalter and Capitolin. The parties agree that Counts III and V are "class of one" equal protection claims.

"The equal protection clause of the Fourteenth Amendment mandates that 'all persons similarly situated should be treated alike.'" Mancuso v. Massachusetts Interscholastic Athletic Ass'n, 453 Mass. 116, 128 (2009), quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). The purpose of the equal protection clause "is to secure every person within the

State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” Id. at 124 n.19, quoting Willowbrook v. Olech, 528 U.S. 562, 564 (2000). In a “class of one” claim, a plaintiff alleges that it “‘has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.’” Id., quoting Willowbrook, 528 U.S. at 564. “There must be at least an ‘egregious abuse of power.’” Id. at 129 (citation omitted).

DESE is required, by regulation, to “issue guidelines describing the evaluation process to be followed in reviewing applications for charter renewal, including protocols for renewal inspections and performance criteria.” 603 Code Mass. Regs. § 1.11(2). “All charter schools will be evaluated on the same performance criteria” Id. The Performance Criteria therefore do not apply solely to Mystic Valley.¹³ Further, BESE has concluded that the Performance Criteria do not conflict with Mystic Valley’s charter, and the Draft Report’s conclusions do not indicate that the application of the Performance Criteria – cultural proficiency and cultural responsiveness in particular – to Mystic Valley disparately impacted Mystic Valley in any way.

¹³ The court notes that the notions of cultural proficiency and cultural responsiveness are not limited to charter schools. The Professional Standards for public school teachers, for example, require that they “[p]romote[] the learning and growth of all students through instructional practices that establish high expectations, create a safe and effective classroom environment, and demonstrate cultural proficiency.” 603 Code Mass. Regs. § 7.08(2); see, e.g., 603 Code Mass. Regs. § 35.03(2)(c) (setting out standards for school committees to use to evaluate educators in their public schools, including whether educator is culturally proficient, meaning s/he “[a]ctively creates and maintains an environment in which students’ diverse backgrounds, identities, strengths, and challenges are respected”). The Commissioner is also required “to institute a process to develop [for public schools] academic standards for the core subjects of mathematics, science and technology, history and social science, English, foreign languages and the arts” that “shall be designed to inculcate respect for the cultural, ethnic and racial diversity of the commonwealth and for the contributions made by diverse cultural, ethnic and racial groups to the life of the commonwealth[,]” G.L. c. 69, § 1D, and “to institute a process for drawing up curriculum frameworks for the core subjects” that “shall be designed to avoid perpetuating gender, cultural, ethnic or racial stereotypes.” G.L. c. 69, § 1E.

See note 9, supra; see also Mancuso, 453 Mass. at 128-129 (noting that plaintiff must show some negative “treatment”).

Regardless, the plaintiffs have not alleged facts plausibly suggesting that the defendants applied the Performance Criteria differently to any other similarly situated charter school, or that the defendants engaged in an egregious abuse of power. See 603 Code Mass. Regs. § 1.11(2); Mancuso, 453 Mass. at 128; see also SBT Holdings, LLC v. Westminster, 547 F.3d 28, 34 (1st Cir. 2008) (“A claim for a ‘class of one’ equal protection violation ‘is cognizable when – and only when – a plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.’” (citations and internal quotation marks omitted)); see, e.g., Beauchamp v. Massachusetts Parole Bd., 84 Mass. App. Ct. 1116, 2013 WL 5744249 at *1 (2013) (Rule 1:28 decision) (affirming allowance of defendant’s motion to dismiss where “complaint fails to identify and relate specific instances where persons similarly situated in all relevant aspects were treated differently”).

The plaintiffs’ equal protection claims therefore fail as well.

D. Counts IV and V – Procedural Due Process Violations

“Procedural due process tests whether governmental action depriving a person of life, liberty, or property has been implemented in a fair manner.” Vasquez v. Commonwealth, 481 Mass. 747, 757 (2019). The plaintiffs allege that they have a property interest in Mystic Valley’s charter, that they have a liberty interest in promulgating Mystic Valley’s commonality-focused instruction and curriculum, and that they have been deprived of an unbiased review of both. For purposes of this decision only, the court presumes that the plaintiffs have alleged facts plausibly suggesting the existence of a property interest and a liberty interest. But see Roslindale Motor Sales, Inc. v. Police Comm’r of Boston, 405 Mass. 79, 82-83 (1989) (“Due process requirements

are implicated when licensing decisions affect a property interest. . . . To have a property interest in a license, an applicant must ‘have a legitimate claim of entitlement to it.’ The more discretion granted a governmental body in licensing, the less likely it is that citizens have a property interest in obtaining a license.” (citations omitted)); Butler v. Turco, 93 Mass. App. Ct. 80, 83 (2018) (“A liberty interest may arise from the Constitution itself, or it may arise from an expectation or interest created by State laws or regulations.”).

“Absent some infringement of a protected liberty [or property] interest, there is no deprivation that would trigger procedural due process concerns.” Roe v. Attorney Gen., 434 Mass. 418, 431 (2001). While “[t]he potential deprivation of liberty [or property interests] implicates the protections of procedural due process[.]” Paquette v. Commonwealth, 440 Mass. 121, 131 (2003), the plaintiffs have not alleged facts plausibly suggesting that they will be potentially deprived of their charter or their ability to continue to implement their established commonality-focused approach. As discussed above, the Draft Report, which was not wholly negative, is only one element of the renewal process that also takes into consideration the renewal application, annual reports, financial audits, test results, and the renewal inspection report. See 603 Code Mass. Regs. § 1.11(2). Additionally, “[e]vidence of academic success for all students is essential for charter renewal.” Id.

As the plaintiffs have not alleged facts plausibly suggesting the deprivation or potential deprivation of their property and liberty interests, their procedural due process claims fail.

E. Count I – Declaratory Judgment under G.L. c. 231A, § 1-2

In Count I, the plaintiffs seek declarations as to the Performance Criteria and the Site Visit team. First, with respect to the Performance Criteria, the plaintiffs allege that they are

invalid on their face and as applied to Mystic Valley because they are unconstitutionally vague.¹⁴ The Performance Criteria not only define the terms “culturally proficient” and “culturally responsive” but they also name the “foundational resources” for the definitions. See Exhibit A, at 2-3. “Culturally proficient policies and practices enable staff members and students to interact effectively in a culturally diverse environment in which students’ backgrounds, identities, strengths, and challenges are respected.” Exhibit A, at 3. “Cultural responsiveness is an approach to viewing culture and identity as assets, including students’ race, ethnicity, or linguistic assets, among other characteristics. Culturally responsive policies and practices acknowledge and actively draw upon diverse backgrounds, identities, strengths, and challenges of administrators, students, staff, and community as a way to deepen connections between the school and its community.” *Id.* The Draft Report itself also provides links to the Department of Education website that provide further explanation of these terms and assistance in applying them. See Exhibit B, at 56, 61. The plaintiffs have therefore failed to allege facts plausibly suggesting they are entitled to a declaration that the Performance Criteria are unconstitutionally vague. Cf. Scione v. Commonwealth, 481 Mass. 225, 230 (2019) (“A statute is unconstitutionally vague when ‘it lacks . . . certainty and definiteness . . . so that a [person] of ordinary intelligence [is unable] to ascertain whether any act or omission of his [or hers], as the case may be, will come within the sweep of the statute.’” (ellipses and alterations in original) (citation omitted)); Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 118 (1955) (“The degree of certainty with which standards for the exercise of discretion are set up must necessarily depend on the subject matter and the circumstances.”).

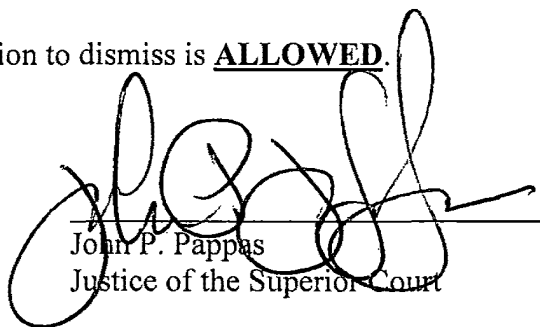
¹⁴ The plaintiffs also seek declarations that the Performance Criteria are inconsistent with Massachusetts statutes and regulations and violate the plaintiffs’ First Amendment and equal protection rights. These requests fail for the reasons already set out, above.

Second, with respect to the Site Visit team, the plaintiffs allege that the use of biased team members violated Mystic Valley's procedural due process rights. The plaintiffs have alleged facts plausibly suggesting that Buckwalter and Capitolin were biased against Mystic Valley. See AC, pars. 82, 85-87. If Buckwalter and Capitolin were the sole decision makers – and if the Draft Report resulting from the Site Visit constituted an appealable decision, which it does not – “this issue would have been a close one. . . . Better practice suggests, *but due process does not require*, that” DESE employees with a demonstrated bias against Mystic Valley “should recuse [themselves] from any” future site visits. See Varga v. Board of Registration of Chiropractors, 411 Mass. 302, 307-308 (1991) (emphasis added).

Accordingly, the plaintiffs are not entitled to the declaratory relief sought, even if all of the factual allegations in the Amended Complaint were true. See Buffalo-Water 1, LLC v. Fidelity Real Estate Co., LLC, 481 Mass. 13, 20 (2018) (holding that declaration that “plaintiff is not entitled to the declaratory relief sought based on the allegations in the complaint. . . . is implicit in a judge’s order to dismiss a declaratory judgment claim under rule 12(b)(6)”).

ORDER

For the foregoing reasons, the defendants’ motion to dismiss is ALLOWED.



John P. Pappas
Justice of the Superior Court

DATE: October 3, 2022