

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FUSION LEARNING, INC.)	
Plaintiff,)	
)	Civil Action No. 1:21-cv-11059-PBS
v.)	
)	
ANDOVER SCHOOL COMMITTEE,)	
TOWN OF ANDOVER D/B/A ANDOVER)	
SCHOOL DEPARTMENT D/B/A ANDOVER)	
PUBLIC SCHOOLS, CLAUDIA BACH,)	
SUPERINTENDANT, SANDRA TRACH, ASST.)	
SUPERINTENDANT, and SHELDON BERMAN,)	
FORMER SUPERINTENDANT,)	
Defendants.)	
)	

SECOND AMENDED COMPLAINT AND JURY DEMAND (Leave to File Second Amended Complaint and Jury Demand Granted on January 13, 2023)

Introduction

1. Plaintiff Fusion Learning, Inc. (“Fusion Academy”) brings this action to redress violations of its rights under the Constitution and laws of the United States and the Commonwealth of Massachusetts.
2. This action is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation under color of state law of rights, privileges and immunities secured by the First and Fourteenth Amendments to the Constitution of the United States, and other laws.

Jurisdiction

3. Jurisdiction of this Court is invoked pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343(3) and, respecting the claims for declaratory relief, pursuant to 28 U.S.C. § 1367.

Parties

4. Fusion Academy is a corporation, incorporated under the laws of Delaware, with its corporate headquarters and principal place of business in Grand Rapids, Michigan.
5. The defendants are the Andover School Committee (“ASC”) and the Town of Andover d/b/a Andover School Department d/b/a Andover Public Schools (hereinafter “Town”).
6. As required by M.G.L. c. 30A, § 20(h), part of the Massachusetts Open Meeting Law, ASC chair Shannon Scully and all other members of the ASC upon being elected to office, certified that they had received from the Attorney General’s Office a copy of the Massachusetts Open Meeting Law, regulations promulgated thereunder, and a copy of the educational materials prepared by the Attorney General. According to §20, such “certification shall be evidence that the member of the public body has read and understands the requirements of the open meeting law and the consequences of violating it.”
7. Many of the requirements of the Open Meeting Law embody principles of rights guaranteed by the First and Fourteenth Amendments of the Constitution of the United States.

Facts

Defendants’ Background

8. The public educational system of the Town of Andover, Massachusetts is operated by a department of the Town under state statutes and regulations of the Massachusetts Department of Elementary and Secondary Education (“DESE”). The area or district served by the Andover Public Schools is coterminous with the Town of Andover.
9. The ASC is the elected governing board of Andover’s public educational system. Although it functions as an elected committee of town government, the ASC has autonomous

authority, separate from other town agencies, to carry out the educational policies of the state.

10. The Superintendent of Schools is appointed by vote of the ASC and reports directly to the ASC.
11. The ASC appoints, upon recommendation by the Superintendent, Assistant Superintendents. Assistant Superintendents report directly to the Superintendent, not the ASC. At all relevant times, the Superintendent was Sheldon Berman or Claudia Bach, who succeeded Berman as acting Superintendent.

Fusion Academy Background

12. Fusion Academy owns and operates schools. Its schools are an alternative private option for parents of children in grades 6-12 who often struggle in traditional school settings. As opposed to a typical Andover Public School classroom education, the educational experience at Fusion Academy is customized around each student and provides one student to one teacher instruction. Classes are individually paced for each student, and the material is presented in a way that takes into account each student's interests, strengths, and learning style.
13. Schools operated by Fusion Academy are accredited by, or have their accreditation pending from, all major national and regional educational accreditation agencies, including the New England Association of Schools and Colleges.
14. Fusion Academy operates over 60 campuses located in 17 states and the District of Columbia, including three in Massachusetts: Newton, Burlington and Hingham.
15. Fusion Academy's three Massachusetts campuses have been approved as private schools, pursuant to M.G.L.c. 76, § 1, also known as the Massachusetts Compulsory Education Law.

Public Education in Massachusetts

16. By statute and by regulations, primarily from DESE, the state prescribes in considerable detail how public schools are to be run.
17. Student learning time, including the length of a school day and year, structured learning requirements, such as core curriculum and course completion criteria, are uniform across all Massachusetts public schools.
18. To the best of Fusion Academy’s knowledge, the instruction in studies required by law in the public schools of Burlington, Hingham and Newton equals in thoroughness and efficiency, and in the progress made therein, the instruction in the public schools of Andover.

Non-Public Education in Massachusetts

19. The statutory mechanism for approval to operate a private school in Massachusetts is M.G.L.c. 76, § 1, which vests authority in the school committee in whose district the private school is located. A school committee’s approval under M.G.L.c. 76, § 1 means that Massachusetts children attending the private school may do so without violation of the compulsory attendance law.
20. In pertinent part, M.G.L.c. 76, § 1 provides that, “[f]or the purposes of this section, school committees shall approve a private school when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town; but shall not withhold such approval on account of religious teaching”

21. DESE is the state agency that provides leadership, oversight, funding, support, and accountability for public school districts, including Andover.
22. The Commissioner of DESE has issued a memorandum entitled *Advisory on Approval of Massachusetts Private Schools Pursuant to Mass. Gen. Laws c. 76, § 1*, dated October 7, 2007 (hereinafter “DESE Advisory”).
23. According to the DESE Advisory, “[s]chool committee approval is neither an *evaluation* of program quality nor an *endorsement* of any particular school. The decision to enroll a child in, or to withdraw a child from, a particular private school is one that parents must make.” (Emphasis added.)
24. According to the DESE Advisory, DESE has no jurisdiction or authority over private schools and does not regulate them.
25. Because school committees are afforded discretion in developing their own review policies under M.G.L.c 76, § 1, DESE recommends that “Standards for Approval of Private Schools” be established by school committees and set forth in a written policy. “In order to assist private schools in its district, the school committee should have a written statement of policy and procedures by which it considers and acts upon private school applications for approval” to ensure that the school committee has “a private school review process that is open and reasonable.”
26. The DESE Advisory further states that a school committee’s written policy should address:
 - the standard for private school approval under G.L. c. 76, § 1 (“equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town.”);
 - the procedures for school committee approval (application process, timetable, requested documentation, site visits, procedures for periodic review of approval status, etc.);
 - other agency approvals that may be required (health, safety, building and fire inspections, etc.);

- the records and materials the school is required to maintain; and
- the criteria for measuring the "thoroughness and efficiency" of private school instruction in such areas as the program of studies and curriculum, student performance assessment procedures, the length of school day and school year, staff distribution and qualifications, textbooks and materials, maintenance of student records, and compliance with applicable federal and state laws.

27. The DESE Advisory also addressed a frequently asked question by school administrators and school committees:

Q: Are any of the state mandates applicable to public schools made applicable to private schools by the phrase, "when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town?"

A: Various state laws set forth the subjects that public schools teach. See, for example, G.L. c. 71, §§ 1, 2 and 3; G.L. c. 69, § 1D. Generally, the "thoroughness and efficiency" language in G.L. c. 76, § 1, should not be interpreted as extending particular public school mandates regarding instruction and curriculum to private schools.

28. According to the DESE Advisory, M.G.L.c. 76, § 1, "requires that a school committee apply its policies and procedures *consistently* to all private schools located within its jurisdiction."

(Emphasis supplied.)

29. In its Advisory, DESE includes "a sample of factors that a school committee may wish to consider in evaluating the 'thoroughness and efficiency' of the instruction offered by a private school." According to DESE, these "sample criteria are not mandatory, and the school committee may adopt or amend them in any *reasonable* way." (Emphasis added.)

30. State regulation of private schools is limited such that children may obtain instruction deemed valuable by their parents and not in conflict with any legitimate state interest. As state regulation takes into account, parents have a fundamental right to send their children to private schools.

31. Massachusetts does not require of private schools:

- a. registration, licensing and/or accreditation;
- b. teacher certification;
- c. length of school year;
- d. instruction or curriculum, including what courses shall or may be taught, how they should be taught and who may teach them; and
- e. student learning time, including structured learning time, in-person learning time, direct instruction, synchronous or asynchronous learning, on-line digital instruction, or remote learning.

Children with a Disability

32. Eligible students with learning disabilities in Massachusetts who attend private school are entitled to a special education designed to meet their needs. These services are provided or arranged for, and paid by, the public school district in which the student resides, not the private school.
33. The Individuals with Disabilities Act, 20 U.S.C. §§ 1400-1485 (2010), (“IDEA”), requires public schools to provide a free appropriate public education (“FAPE”) in the least restrictive environment to students with disabilities. In order to achieve this, the unique educational needs of students with disabilities are to be identified in an individualized education program (“IEP”). This federal obligation extends to students attending private schools in certain circumstances.
34. Parents who refuse to consent to the provision of services in an IEP offered by the public school because they disagree or are unhappy with the public-school IEP, services or placement, may opt to place their child in a private school setting at their expense and seek full or partial tuition reimbursement from the public school under IDEA. Reimbursement

depends on whether the parents can show that the public school failed to provide an appropriate education. Typically, parents of students with disabilities take legal action in order to access private school options using IDEA funds to support tuition expenses.

35. Under Massachusetts law, school districts are required to provide services to parentally placed private school children with disabilities beyond those required by IDEA and its implementing regulations. As a matter of state law, “all school age children with disabilities are entitled to a FAPE from their school district of residence, regardless of whether they are enrolled in a public or private school.” M.G.L.c. 71B, § 3.
36. As described in another DESE advisory (SPED 2018-1), public school districts have an obligation to locate and evaluate students with disabilities who have been enrolled by their parents in private schools located within the district, regardless of district of residency, and to calculate and spend a proportionate share of IDEA grant funds providing equitable services for these students.

Education and the First Amendment

37. In Massachusetts, as in the rest of our country:
 - a. Parents have a constitutional right to send their children to private schools . Runyon v. McCrary, 427 U.S. 160, 178 (1976). Private schools have a First Amendment right to academic freedom. Asociacion de Educacion v. Garcia-Padilla, 490 F.3d, 1, 11 (1st Cir. 2007).
 - b. The liberty of parents or guardians to direct the upbringing and education of their children is a right guaranteed by the Constitution and it may not be abridged by state or local action which has no reasonable relation to some

purpose within the competency of the state. Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-535 (1925).

- c. The liberty interests protected by the First and Fourteenth Amendments extend to activities involving child education.
- d. The discretion of the states and local school boards must be exercised in a manner that comports with the transcendental imperatives of these amendments.
- e. Our nation is deeply committed to safeguarding educational freedom, which is of transcendent value under the First Amendment. Keyishian v. B'd of Regents, 385 U.S. 589, 603 (1967). The term educational freedom encompasses the freedom of educational institutions to pursue their ends without interference extending beyond the state's limited interest in ensuring *an* education for its children. Asociacion de Educacion v. Garcia-Padilla, 408 F. Supp. 2d 62, 69 (D.P.R. 2005).
- f. Educational freedoms include the right of a private school to determine for itself how subjects shall be taught. Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957), Frankfurter, J. concurring. They guarantee to a private school under the First Amendment the right to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. Asociacion de Educacion v. Garcia-Padilla, 408 F. Supp. 2d 62, 69 (D.Mass. 2005).
- g. Educational freedom is based upon the exclusion of governmental intervention in the intellectual life of educational institutions. Sweezy, supra. It includes not merely liberty from restraints on thought, expression and association in the academy, but also the idea that schools should have the freedom to make decisions about *how* and *what* to teach. B'd of Regents v. Southworth, 529 U.S. 217, 237 (2000).

38. The approval process prescribed in M.G.L. c. 76 § 1 requires that the applicant have an opportunity to explain its proposal and present witnesses. If the proposal is rejected, the applicant must be given the chance to revise its proposal to remedy identified inadequacies.
39. Alleged inadequacies that are not fact-based cannot justify rejection of the application.
40. M.G.L. c. 76, § 1 ensures that “all children shall be educated, not that they shall be educated in any particular way.” Comm. V. Roberts, 159 Mass. 372, 374 (1893).
41. Under M.G.L.c. 76, § 1, a school committee does not have the power to require that children “be educated in a certain way at a certain place.” Care and Protection of Charles, 399 Mass. 324 (1987) (citing Appeal of Peirce, 122 N.H. 762, 768 (1982)).
42. Approval of home school applications and private school applications are to be treated under the same standard, set forth in M.G.L. c. 76, § 1.

ASC Policy Respecting Nonpublic Schools

43. The published policy of the ASC respecting the approval process for a nonpublic school consists of a one sentence paraphrase of M.G.L. c. 76, § 1: “In accordance with state law, the School Committee will approve a private school when it is satisfied that the instructional program of the school equals that of the town’s public schools in thoroughness, efficiency, and progress made.”
44. The policy offers no timetable for the application process to unfold so that any plan for opening the private school’s doors is subject to the whim of the ASC.
45. The policy, contrary to the DESE Advisory, does not set forth any standards, policies or procedures for approval of a private school application, including, but not limited, to the criteria for measuring the "thoroughness, efficiency and progress made" of private school instruction.

46. For example, the policy does not inform an applicant whether:
- a. any of the sample factors set forth in the DESE Advisory would be considered or otherwise utilized by the ASC in its review;
 - b. the approval process would be iterative, as DESE urges, or non-iterative;
 - c. the required documentation, e.g. data on teacher retention rates and teacher experience;
 - d. evidence of other agency approvals, such as health, building, fire, is required at the time of application;
 - e. non-teaching staff, such as nurses, psychologists, social workers must be employed prior to approval;
 - f. the applicant would have an opportunity to present supporting witnesses at a hearing;
 - g. the applicant would have an opportunity prior to a vote to correct gross mistakes of fact in any analysis of the application provided to the ASC;
 - h. non-academic positions such as nursing would need to be in place prior to submission of the application for approval or only prior to actual operation of the school;
 - i. use of a “draft” job description for a non-academic position would be a negative;
 - j. evidence of NCAA approval of courses would be necessary;
 - k. the particular uses to which music and art rooms would be put needed to be described, it being evident that each would be used for some type of learning related to the room name;
 - l. computer programs for lesson planning by teachers, for student learning, for parent communication and for administrative functions such as recordkeeping, scheduling

- and transcript exchanges, would need to be provided prior to any hearing on the application;
- m. the applicant should have on staff, rather than rely on outside professionals, a robust range of individuals to attend to students with disabilities;
 - n. the applicant's teachers must have a bachelor's degree, a master's degree, a state license or other, similar qualifications;
 - o. the absence of a faculty/staff directory at the time of submission of the application would be regarded as a negative, notwithstanding the fact that the application might languish for a year;
 - p. an applicant's purported failure to comply with DESE's "Student Learning Time" regulations, including those for structured learning time and in-person instruction, would result in non-approval even though DESE expressly has stated these regulations do not apply to private schools;
 - q. an applicant must comply with the defendant Town's traditional school model as a condition of approval;
 - r. small class size would be an important consideration, as suggested by the defendant ASC's public statement that: "smaller class sizes enable teachers to provide more personal attention to students;" "class size matters, particularly when teachers are able to alter or adjust their instruction to better address individual needs;" and "[m]uch of our professional development ... has focused on that kind of differentiated and targeted attention to individual students;"
 - s. the applicant must provide special education services and/or teachers;

- t. offering enrollment to families of students who may have learning disabilities or an IEP plan, would be a factor against approval, as the defendant ASC chair Scully stated on March 25, 2021;
 - u. the ASC interprets the “thoroughness and efficiency” language in M.G.L. c. 76, § 1 as extending public school mandates regarding instruction and curriculum to private schools, notwithstanding DESE’s advisory to the contrary;
 - v. the ASC, contrary to the DESE Advisory, interprets approval of a private school’s application to be an endorsement of the school.
47. The ASC policy respecting non-public schools is impermissibly vague under the Fourteenth Amendment.
48. This effective absence of an ASC policy permitted Scully, Bach, Trach, Berman, the Town and the ASC to create their own unpublished policies, procedures and standards of review for Fusion Academy’s application, to Fusion Academy’s detriment.
49. It also permitted the defendants to slow-walk the application process as a means of destroying Fusion Academy’s interest in operating a private school in Andover.
50. Four private schools currently operate, and at all times relevant to this complaint have operated, within the town. Notwithstanding the recommendation of DESE, the ASC does not have any policy or procedure for periodic review of their approval status and has not performed any such review.
51. In recommending denial of and/or in denying Fusion Academy’s applications pursuant to M.G.L.c. 76, § 1, all defendants applied to Fusion Academy, policies, procedures, standards, criteria, requirements, assessments, evaluations and public school mandates that they have not applied to or required of those private schools, depriving Fusion Academy of rights and

liberty interests secured by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and in violation of M.G.L.c. 76, § 1, which requires that a school committee apply its private school review policies and procedures *consistently* to all private schools located within its jurisdiction.

52. The ASC has approved home school applications pursuant to the existing ASC nonpublic school policy.
53. Although the defendants acknowledge that private school applications and home school applications are to be approved based on the same standards, Fusion Academy believes that the defendants have not applied to home school applications the same standards as were applied to its private school applications, depriving Fusion Academy of rights and liberty interests secured by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and in violation of M.G.L.c. 76, § 1.
54. At all relevant times, defendants acted under a badge of state authority, M.G.L.c. 76, § 1.
55. The deprivations of Fusion Academy's rights were caused by defendants' exercise of authority pursuant to M.G.L.c. . 76, § 1, and the defendants' policy issued pursuant thereto.

Fusion Academy's First Application

56. On May 29, 2018, Fusion Academy submitted its first application to operate a private school. As of that date, it was already operating approximately 46 schools in various states.
57. Fusion Academy submitted the virtually identical application to the Newton School Committee and School Department.
58. The ASC policy contained no timetable for consideration of the application and the ASC offered none at that time or at any other time.

59. The ASC designated the Town, Trach and Berman to review Fusion Academy's first application and make a recommendation on approval to the ASC.
60. Over the ensuing several weeks, the defendants made it a pre-condition to completion of the application review process and approval that Fusion Academy secure a certificate of occupancy for physical facilities within which to operate its proposed school.
61. Therefore, in September 2018, Fusion secured a school site in Andover pursuant to a written lease of ten (10) years and six (6) months with a cumulative lease obligation over those years of \$2,584,082.48. Promptly after signing the lease, it had performed a complete build-out of the campus at a cost of more than \$1,400,000.
62. On or about September 4, 2018, the Newton School Committee unanimously approved Fusion Academy's application, having found that its proposed school satisfied the statutory requirements respecting thoroughness and efficiency. Fusion Academy's first application to the ASC languished for another six months before getting any attention from the ASC.
63. For its meeting on March 7, 2019, the ASC identified Fusion Academy as an agenda item and Trach presented the ASC with a written report ("Trach Report I"). Scully, as chair, elected not to post Trach Report I with the ASC agenda. Nor did she provide a copy to Fusion. No recommendation was made by Trach or Berman at this meeting and no vote was taken on the application.
64. On March 8, 2019, Berman sent to the school superintendents of Newton and Burlington a copy of Trach Report I and informed them he would be recommending against approval.
65. Finally, on the morning of March 21, 2019, less than 12 hours before Fusion was scheduled to present on its application at the ASC meeting, the defendants provided a copy of Trach Report I to Fusion Academy. Even on this date, almost two weeks after Berman's email to

the superintendents of Newton and Burlington, Fusion Academy had not been informed that Berman and the defendant Town would be recommending against approval.

66. At the March 21 ASC meeting, Trach Report I was discussed but no action was taken on Fusion Academy's application.
67. Immediately following this event, Fusion Academy requested a list of any open issues or outstanding items. The defendants never responded to this request.
68. On March 29, 2019, contrary to the open meeting law, communications occurred amongst Berman and at least a quorum of the ASC, including Tracey Spruce, Susan McCready and Joel Blumstein. The communications discussed two media articles of doubtful quality that painted Fusion Academy in a negative light.
69. On April 1, 2019, Berman transmitted via email to all five members of the ASC his memo dated April 1, 2019, stating that "Sandy [Trach] will be recommending against approving Fusion's application.... I support that recommendation."
70. Defendant Scully, as chair, did not provide Fusion Academy with a copy of Berman's memo or otherwise notify it of this recommendation.
71. At some point between March 21, 2019, the date when Fusion Academy received a copy of Trach Report I, and April 2, 2019, Trach and/or Berman made changes to Trach Report I. This amended version of Trach Report I was never provided to Fusion or otherwise made public.
72. On or about April 2, 2019, a quorum of the ASC, including Scully, Spruce and Blumstein, discussed and deliberated amongst themselves privately, contrary to the Open Meeting Law, Fusion's application.

73. On or about April 2, 2019, Scully, Spruce and Blumstein edited and changed Trach Report I to better support publicly their sham vote to be taken at the upcoming April 4, 2019 meeting (hereinafter “Trach Report II”).
74. On April 3, 2019, once again in violation of the Open Meeting Law, Blumstein and Spruce communicated that they would complete their edits to Trach Report II after the ASC April 3, 2019 meeting that morning. Fusion Academy was not identified as an agenda item for the April 3, 2019 meeting.
75. On April 3, 2019 at approximately 8:30 AM, Berman emailed the Newton and Burlington school superintendents a copy of Trach Report II and included the aforementioned two negative media articles.
76. On April 3, 2019 at approximately 6:15 PM, Berman again emailed the Newton and Burlington school superintendents, informing them that the defendants had decided to revise Trach Report II further and make the negative recommendation not at the meeting on April 4, 2019 but, rather the one after that. He requested they not share Trach Report II with anyone. None of this information was ever communicated to Fusion Academy.
77. On April 3, 2019 at approximately 7 PM, defendants notified Fusion Academy that the ASC vote on its application would be rescheduled to a future meeting.
78. On or about April 8, 2019, Scully and Blumstein continued to review and edit Trach Report II.
79. On the evening of April 8, 2019, Trach emailed Fusion Academy that the ASC would vote on its application at the April 11, 2019 meeting.
80. On information and belief, on or about April 8-9, 2019, Trach Report II was made available to all ASC members via a shared Dropbox.

81. On April 10, 2019 at approximately 5:30 PM, considerably less than the 48 hours of advance notice mandated by the Open Meeting Law, Fusion Academy was provided with a copy of Trach Report II.
82. On April 10, 2019, approximately 36 hours in advance of the scheduled April 11, 2019 ASC meeting, Scully and Berman's office edited what appears to be a previously existing draft press release. The document described in some detail what transpired at the April 11, 2019 ASC meeting, an event still in the future, including the reasons why the ASC had voted to reject Fusion Academy's application.
83. On April 11, 2019, at approximately 10 AM, Fusion Academy emailed to Scully requesting that Fusion Academy be removed from the evening's agenda because it had received Trach Report II less than 24 hours earlier. It also noted the absence of a response, made just after the March 21, 2019 ASC meeting, for a list of any open issues or outstanding items.
84. On April 11, 2019, at approximately 4 PM, Scully emailed Fusion, declining to remove Fusion from the agenda, stating: "*The Committee has not yet had a chance to discuss Ms. Trach's memo or recommendation issued yesterday, and tonight's meeting presents us the first opportunity.*" (Emphasis supplied.)
85. Scully knew this statement was untruthful when she made it.
86. Facilitated by Scully's actions as described above, at least a quorum of the ASC had unlawfully deliberated and prejudged Fusion Academy's first application before the April 11, 2019 meeting. As a result of the conduct of Scully and the other defendants, Fusion Academy was not provided a fair and impartial review and hearing on its application.
87. Scully's conduct as described above was knowing and intentional.
88. Scully understood or should have understood that her conduct violated the rights of Fusion

Academy.

89. Scully knowingly violated the Open Meeting Law. Notwithstanding this knowing violation, she subsequently testified that the ASC took its Open Meeting duties very seriously; that she, herself, would not have had a conversation with other ASC members outside of an open meeting about how to vote on Fusion Academy's application and, going into this particular open meeting, would not have had knowledge of how other ASC members intended to vote; that deliberations at open meetings inform the opinions of ASC members and, for this reason, hearing from one's colleagues at open meetings is important.
90. Scully did not act reasonably or in good faith in respect of Fusion Academy and its application.
91. Scully knowingly and intentionally violated Fusion Academy's due process rights.
92. Scully acted with impermissible motivation and with disregard of Fusion Academy's clearly established constitutional rights, including due process, equal protection and academic freedom.
93. The defendant Town, Trach and Berman all purportedly relied on the DESE Advisory in reviewing the application and in making their recommendations to the defendant ASC to deny Fusion Academy's first application.
94. At the April 11, 2019 hearing on Fusion's application, Berman told the ASC that he agreed with Trach's recommendation because, "we have to make a clear distinction that this is as thorough and efficient as our education. In essence, when a school district says yes, they are in essence endorsing a program and at this point I do not feel I can have the confidence based on this assessment that the district can endorse the program as a private school that

would essentially be equivalent and giving the same diploma as AHS so I would concur with Sandys rec.”

95. Berman made this statement, knowing that approval of an application is not an endorsement of the private school.
96. The 2019 Recommendation was based, *inter alia*, on the fact that the Fusion Academy teaching model relies upon fewer teacher-led instructional hours than in Andover public schools and a ratio of one student to one teacher during those hours in comparison to a ratio of 25 to 30 students and one teacher at the Andover public schools.
97. The 2019 Recommendation declared these two methods “in no way comparable,” implicitly denouncing the Fusion Academy model.
98. The defendants, in rejecting the application, treated an hour of 1-to-1 learning to be identical in thoroughness and efficiency to an hour of 25-to-1 learning even though they have publicly articulated the view that “smaller class sizes enable teachers to provide more personal attention to students;” “class size matters, particularly when teachers are able to alter or adjust their instruction to better address individual needs;” and “[m]uch of our professional development ... has focused on that kind of differentiated and targeted attention to individual students.”
99. The 2019 Recommendation declared that Fusion Academy’s application “may impact a student’s application and preparation for higher education,” a criterion not found in the ASC policy, in the DESE Advisory or any other source known to Fusion Academy.
100. The 2019 Recommendation stated that Fusion Academy “acknowledges that it will not have a nurse on site,” a requirement not to be found in any ASC policy and not within the items listed in M.G.L. c. 76, § 1 for consideration by a school committee.

101. It went on to observe that, in the absence of an on-site nurse, Fusion Academy would “have no option but to decline to admit or terminate” certain students, which would, so it opined, constitute discrimination on the basis of disability. It also drew a false conclusion that the absence of an on-site nurse would require Fusion Academy to decline admission to students with certain medical needs.
102. Nothing in M.G.L.c. 76, § 1 suggests that a school committee is the appropriate municipal body to police anti-discrimination policies, which many federal, state and municipal organizations have legislative mandates to oversee.
103. The 2019 Recommendation noted, accurately in this instance, that Fusion Academy expected to admit students who had not thrived in traditional school environments and that Fusion will not seek recognition from the state as a licensed private special education school. It then observed that the application failed to set out how it would support the “social, emotional, and behavioral needs (e.g., psychological services, counseling, social work, nursing etc.)” of such students, a criterion not spelled out in the ASC policy on nonpublic school approval.
104. As the 2019 Recommendation then misleadingly concluded, “despite targeting students with social/emotional challenges for admission, Fusion will be unable to meet the social, emotional, and behavioral needs of said students due to inadequate staffing....” Fusion Academy was not “targeting” such students although it intended to accept special needs students who otherwise met its criteria.
105. Aside from mischaracterizing the student population targeted by Fusion Academy, this passage omitted the central fact that public school districts have an obligation to locate and evaluate students with disabilities enrolled by their parents in private schools located within

the district, and to calculate and spend a proportionate share of federal special education (Individuals with Disabilities Education Act or IDEA) grant funds providing equitable services for these students. DESE Revised July 2018 Administrative Advisory SPED 2018-1.

106. Students with disabilities who are entitled to an individualized educational program (IEP) and who attend private school at private expense are entitled to special education funding with federal, state and local monies designed to meet their needs. If the student is a resident of Andover, the services would have to be provided or arranged for by the defendant Town, not Fusion Academy.
107. The defendants Town, Trach and Berman did not include this information about the Town's obligation in the 2019 Recommendation. Nor did they include it in the presentation to the ASC during the hearing on the application.
108. On information and belief, this aspect of the 2019 Recommendation was meant as a signal to the ASC that Fusion Academy, if approved as a private school, would siphon away from the public school system federal and state funds dedicated to special needs students.
109. The basis for Fusion Academy's belief is not only the language of the 2019 Recommendation but also the statement of the defendant Berman, on June 19, 2019 and again in August 2020, that one of the reasons Fusion Academy was not and would not be approved as a private school is because some of the Town's special needs education funding from the state and federal governments could be reallocated to Fusion.
110. On June 19, 2019, Fusion Academy representatives met with Berman and informed him of Fusion Academy's interest in submitting a revised application. Berman responded that there would be "a large hurdle to get over" and that the defendants were concerned about special

ed enrollment dollars from the district being allocated away from the Town and to Fusion Academy. Berman explained that he was not worried about Phillips Academy asking for any money—"they have a huge endowment."

111. There is no statutory or DESE authority allowing for consideration of federal and state special education funding and/or cost sharing requirements as a factor in private school approval under M.G.L.c. 76, § 1.
112. The 2019 Recommendation criticized the absence of any licensing requirement for teachers at Fusion Academy even while noting that "there is no state policy for teacher licensure for private schools." It neglected to add that the ASC policy likewise has no such requirement.
113. In a similar vein, it noted the public schools' teacher orientation programs, teacher experience levels and teacher retention rate, criteria for approval not mentioned in any policy, standard, law, regulation or advisory. It then urged disapproval of the application because of "Fusion's failure to provide data regarding teacher turnover rates, subject matter expertise, or its policy regarding teacher preparation time." Left unsaid was that such data was not called for by the ASC policy on approval.
114. The conduct of the hearing deprived Fusion Academy of its right to be heard.
115. The denial of the first application deprived Fusion Academy of its rights, including but not limited to its right to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.
116. The denial of the first application deprived Fusion Academy, *inter alia*, of its constitutional right to due process and equal protection.

117. Validation of this allegation came almost two years later when Berman, speaking at an Andover Rotary Club meeting, told attendees that the defendants had never afforded Fusion Academy's applications serious consideration.

Fusion Academy's Second Application

118. At the time of the ASC's denial on April 11, 2019, and during subsequent conversations, members of the ASC told Fusion Academy that if it addressed defendant Trach's criticisms of its first application, principally located in the 2019 Recommendation, there would not be any reason to disapprove a second application.

119. Fusion Academy, therefore, spent a year reworking its application in a way that addressed the alleged weaknesses articulated in respect of the first application.

120. On or about May 14, 2020, Fusion Academy resubmitted its application.

121. Even though it was not obligated to do so, Fusion Academy's second application complied with DESE's "Student Learning Time" regulations and, in particular, "full-time in-person learning" and "structured learning time" requirements.

122. As with its first application, Fusion Academy had no timetable by which to measure the progress of the review process.

123. The defendant ASC designated Trach and Berman to review Fusion Academy's second application and make a recommendation on approval to the ASC.

124. On or about September 12, 2020, the ASC released its fiscal 2021 Andover Public Schools Approved Budget document, which was signed by Scully ("FY21 Budget").

125. In its FY21 Budget, the ASC stated that, starting in 2019, costs for special education out-of-district placements increased substantially and that the ASC expected such costs to continue through at least FY21. "Heading into FY21, a number of specific budget drivers will limit

any discretionary spending on new investments. The major budget driver is special education.” Due to “unanticipated increases in special education costs,” “many areas of need could not be addressed at this time.”

126. On March 25, 2021, the ASC, based on the recommendations of the defendant Town, acting through Bach and Trach (“2021 Recommendation”), again denied Fusion’s application.

The Review Process of the Second Application

127. In the ten months between the date of submission and March 16, 2021, despite repeated inquiries by Fusion Academy representatives as to the timeline for review, and despite numerous offers to provide any missing information, documentation or assistance and/or to discuss any areas of concern, the defendants provided no substantive feedback.
128. On March 16, 2021, the ASC publicly posted the agenda for its March 18, 2021 meeting. Fusion Academy’s application was listed as a discussion item. Fusion Academy had had no prior notice of this event.
129. The ASC addressed Fusion’s second application at its March 18, 2021 meeting. At no time prior to this meeting had any of the defendants informed Fusion of any concerns with or deficiencies in its second application.
130. The ASC has a policy that “ feedback on posted agenda items is encouraged at business meetings *in order to inform decisions*. Typically, the public is asked to wait until the meeting comes to each particular agenda item to hear feedback on it as part of the discussion.” (Emphasis added.)
131. In an email sent on March 18, 2021, Scully, the ASC chair, specifically directed that Fusion Academy representatives not be invited to the virtual ASC meeting and that instead, “[t]hey can make use of the public comment if they would like.”

132. At the March 18, 2021 ASC meeting, the public comment segment occurred at the beginning of the meeting and **prior** to the hearing on any specific agenda item.
133. At the March 18, 2021 meeting, when Fusion Academy's application came up as an agenda item, Scully refused to permit Fusion Academy representatives to participate in the ASC's discussion about the application. Fusion Academy representatives were not permitted to respond to the comments of the ASC members and the testimony of Trach.
134. At the March 18, 2021 ASC meeting, Trach stated that student learning time raised questions as to whether Fusion Academy rises to the equivalency of the public schools. She incorrectly described structured learning time, student learning time and many other aspects of Fusion Academy's second application.
135. Trach also commented on how she had not been given access to Fusion Academy's digital learning platforms without telling the ASC that she had never requested access nor responded to Fusion Academy's inquiries of what else it could provide to her.
136. At the March 18, 2021 ASC meeting, Trach also misled the ASC in response to one of their questions respecting special education and IEP responsibility. She indicated that these were areas for which Fusion was responsible when, as she knew or should have known, the defendant Town is legally and financially obligated to provide for and oversee such services for students in private schools located in the district.
137. The conduct of the hearing deprived Fusion Academy of its right to be heard.
138. On March 23, 2021, at approximately 3 PM, the defendant ASC posted its agenda for its March 25, 2021 meeting. Fusion Academy's application was listed as a vote item for hearing. Scully did not authorize the posting of any written report with the agenda on March 23, 2021.

139. On March 24, 2021, at about mid-day, the public agenda had been changed on the ASC's website to include a memorandum from Trach to Bach, dated March 23 ("2021 Recommendation"). The memorandum, 15 pages long, recommended that the ASC deny Fusion Academy's application.
140. Fusion Academy, having about 30 hours to react to the numerous inaccuracies in the 2021 Recommendation, submitted a responsive letter to the ASC approximately one hour before the scheduled meeting on March 25, 2021.

Denial of the Second Application

141. At the March 25, 2021 meeting, Scully again refused to permit Fusion Academy representatives to address ASC questions and comments during the hearing when its application came up as an agenda item. Fusion Academy representatives were not permitted to respond to the comments of Trach and Bach.
142. As at the March 18 meeting, and as a result of Scully having expressly directed that they not be invited into the March 25, 2021 virtual meeting, they were restricted to addressing the 2021 Recommendation during the public comment session prior to the start of the hearing on its application.
143. Although Fusion Academy had specifically asked that its responsive letter be read during the hearing and be posted to the ASC website for public review, Scully refused to do either. She also refused to read during the meeting the letters and emails of support for Fusion Academy submitted by Andover residents.
144. As with its first application, Scully's bias and hostility towards Fusion Academy and her intentional misconduct infected the second application review process.
145. The conduct of the hearing deprived Fusion Academy of its right to be heard.

146. At this meeting, the ASC denied the application, 4-1. The stated reason was the recommendation of Trach, contained in the 2021 Recommendation.
147. As with the 2019 Recommendation, this version treated an hour of 25-to-1 learning as identical in thoroughness and efficiency to an hour of 1-to-1 learning, even though the defendants themselves had publicly articulated the view that “smaller class sizes enable teachers to provide more personal attention to students;” “class size matters, particularly when teachers are able to alter or adjust their instruction to better address individual needs;” and “[m]uch of our professional development ... has focused on that kind of differentiated and targeted attention to individual students.”
148. The 2021 Recommendation erroneously stated that the application does not comply with public school student learning time regulations because Fusion Academy’s “self-study digital learning module does not meet the student learning requirement for in-person instruction.”
149. The 2021 Recommendation erroneously stated that a single Fusion course would have only 23 hours of in-person instruction with a teacher. Trach refused to disclose that the digital instruction sessions at Fusion Academy occurred on campus and were teacher supervised rather than being remote, self-study, digital sessions.
150. At the March 25, 2021 hearing on Fusion Academy’s application, Trach erroneously told the ASC that Fusion Academy’s digital instruction sessions do not satisfy student learning time regulations because they are not considered “full-time in-person learning” pursuant to DESE Commissioner’s Directive dated March 9, 2021. In fact, Fusion Academy’s digital instruction sessions do fit within the DESE definition of “full-time in-person learning.” Her erroneous premise gave her license to conclude that because Fusion Academy does not

comply with Massachusetts student learning time regulations in this respect, “this is precisely where Fusion Academy’s application falls short” and should be denied.

151. Setting aside the inapplicability of public-school mandates, Trach’s statements could not have been made in good faith by anyone who had read relevant DESE regulations.
152. The defendant Town, Bach, and Trach misled the ASC respecting Fusion Academy’s purported non-compliance with DESE’s student learning time regulations with the intent to have the ASC deny Fusion Academy’s resubmitted application.
153. Since the ASC must have known, regardless of Trach’s misrepresentations, that public school requirements such as student learning time are inapplicable to private schools, its use of this criterion deprived Fusion Academy of its rights.
154. The four ASC members who voted to deny the resubmitted application stated that a major consideration was Fusion’s purported non-compliance with the student learning time regulations as articulated by Trach and endorsed by Bach.
155. The one ASC member who voted in favor of Fusion Academy, Paul Murphy, is the only professional educator on the committee, having taught mathematics at Phillips Academy, a private school in Andover, since 1988 and having served in several administrative capacities, including cluster dean, and dean of students and residential life. He developed Phillips Academy’s first fully online geometry courses in 2017.
156. At the hearing on March 25, 2021, Mr. Murphy stated that the ASC application review process has major flaws in it—the committee cannot determine equivalency between a traditional bricks and mortar school and a 1-to-1 school model.
157. Mr. Murphy made the following comments respecting the 2021 Recommendation:

- a. how does a private school come into any town and offer a different means of instruction: 1-on-1 is so different from traditional classroom instruction—it is apples to oranges;
 - b. “making the same progress” can’t be measured [because Fusion Academy is not up and running] but likely has occurred in other towns [where Fusion Academy operates];
 - c. what Ms. Trach is referring to as asynchronous takes place inside Fusion Academy and is not remote;
 - d. remote learning works for some kids;
 - e. asynchronous learning clearly helps some kids and has made major steps forward;
 - f. everything depends on the child and the family;
 - g. evidence is that different kids learn in different ways; and
 - h. asynchronous instruction is a great tool for talented teachers. It is teacher-supervised at Fusion Academy and I would consider that Fusion would do it well.
158. The 2021 Recommendation was critical of the second application because notwithstanding the absence of any ASC policy regarding plans in “draft” form or requirements surrounding nurses generally and notwithstanding the absence of any request for a “final” version, Fusion Academy’s plan for nursing coverage was embodied in a draft contract rather than a fully executed one.
159. The 2021 Recommendation reported that “there was no evidence to comprehensively evaluate” Fusion Academy’s statement that its instructional units meet state requirements for public school. Since state law, state regulation and ASC policy on private school approval do not require an application to provide evidence “to comprehensively evaluate”

the statement, it is not surprising that Trach could make this statement. Why she did not, over a 10-month period, ask for additional “evidence” is confounding.

160. The 2021 Recommendation complained that the defendants were not given access to certain digital platforms in use at Fusion Academy. Since the ASC policy on approval of private school applications did not list such access as a matter of interest and since no defendant requested access, the report, while true, confirms that Fusion Academy was denied fundamental rights. No defendant prior to the March 18, 2021 ASC meeting ever raised any questions or concerns respecting digital platforms.
161. The 2021 Recommendation listed as another reason for denial that the length of a course at Fusion Academy may vary in response to a student’s pacing needs. The defendants themselves, for their own schools, have told their constituents that “[m]uch of our professional development ... has focused on ... differentiated and targeted attention to individual students.” Why such differentiation is good for the schools overseen by the defendants but bad for Fusion Academy is confounding.
162. The 2021 Recommendation returned to the theme of special needs students who are eligible for an IEP. It repeats the same charge as in the 2019 Recommendation, namely that Fusion Academy “is not equipped” to deal with such students and so will need to turn to outside providers. It failed to explain, again, that it is the legal and financial obligation of the defendant Town to provide for and oversee special education services for parents who choose to enroll their children in Fusion Academy and that federal and state funds are available in such a situation.
163. The defendants at all relevant times were aware that approval of Fusion Academy’s application likely would result in restrictions on how the defendants could spend federal and

state special education funds available to the public schools, and that the town budget might, under some circumstances, have to contribute more funds to satisfy the Town's legal obligation in support of special needs students whose parents chose to enroll them in Fusion Academy.

164. At the March 25, 2021 hearing, Scully stated that it was "a giant red flag" for her that Fusion Academy was targeting special education families. Besides being factually incorrect, it is further support for Fusion Academy's belief that its application was not and, without judicial intervention, will not, be approved because some of the Town's special needs education funding from the state and federal governments could be reallocated to Fusion Academy.
165. The conduct of the hearing deprived Fusion Academy of its right to be heard.
166. The denial of the second application deprived Fusion Academy of rights, including, but not limited to, its right to determine for itself on academic freedom grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.
167. The defendants' construction and application of M.G.L.c. 76, § 1, unreasonably infringes upon the rights of Fusion Academy guaranteed by the First and Fourteenth Amendments.
168. The actions by defendants exceed mere regulation of non-public schools where children obtain instruction deemed valuable by their parents and which is not in conflict with any legitimate state interest.
169. The defendants' construction and application of M.G.L.c. 76, § 1, is arbitrary, capricious and without reasonable relation to any end within the competency of the state.

170. The conduct, actions, inactions and omissions of the defendants violated clearly established rights guaranteed by the Constitution of the United States, which they knew or which a reasonable person in the defendants' positions should have known.
171. Defendants have unlawfully destroyed/deprived/interfered with Fusion Academy's liberty, business and property.
172. Scully's conduct as described above violated the Massachusetts Open Meeting Law.
173. Facilitated by Scully's actions, as described above, at least a quorum of the ASC had unlawfully deliberated and prejudged Fusion Academy's two applications prior to the open meeting at which the vote took place.
174. Scully did not act reasonably or in good faith in respect of Fusion Academy's applications.
175. Scully knowingly and intentionally violated Fusion Academy's due process rights respecting its applications.
176. Scully acted with impermissible motivation and with disregard of Fusion Academy's clearly established constitutional rights to due process.
177. Scully understood or should have understood that her conduct violated Fusion Academy's rights.
178. As a result of the conduct of Scully and the defendants, Fusion was not provided a fair and impartial hearing on its applications.

COUNT I

179. The allegations of paragraphs 1 through 178 are repeated and incorporated herein.
180. The policies, actions, failures to act and omissions of the defendants while acting under color of state law have deprived Fusion Academy of its rights, privileges and immunities

secured by the First and Fourteenth Amendments to the United States Constitution in violation of 42 U.S.C. §1983.

181. As a result, Fusion Academy has suffered damages.

COUNT II

182. The allegations of paragraphs 1 through 181 are repeated and incorporated herein.

183. Title II of the Americans with Disabilities Act of 1990 (“ADA”) 42 U.S.C. § 12101, *et seq.*, and the implementing regulations, prohibit public entities from discriminating based on disability. As stated in 28 C.F.R. pt. 35, App. A at 449, Title II applies to anything a public entity does.” Title II applies to the ASC and Town.

184. Among other things, the ADA prohibits local governmental entities from discriminating against an entity because of its known association with persons with disabilities.

185. Although Fusion Academy does not target students with disabilities for enrollment, its schools are open to students with disabilities whose parents choose to enroll them there. Once approved, Fusion Academy’s Andover campus would be open to students with disabilities.

186. As alleged above, Berman, one of the individuals to whom the ASC committed the responsibility to review Fusion Academy’s applications and to recommend whether to approve, stated, on more than one occasion, that Fusion’s application would not be approved because some of the funding provided pursuant to IDEA for students with a disability could be reallocated away from the Town to Fusion Academy.

187. The defendants violated the ADA.

188. As a result, Fusion Academy has suffered damages.

COUNT III

189. The allegations of paragraphs 1 through 188 are repeated and incorporated herein.

190. Fusion Academy has a right and intends to submit another application to the ASC pursuant to M.G.L. c. 76, § 1.

191. Pursuant to 28 U.S.C. § 2201, Fusion Academy is entitled to a declaration that its first application satisfied the requirements of M.G.L. c. 76, § 1.

192. Pursuant to 28 U.S.C. § 2201, Fusion Academy is entitled to a declaration that its second application satisfied the requirements of M.G.L. c. 76, § 1.

PRAYERS FOR RELIEF

WHEREFORE, Fusion Academy respectfully requests that this Court:

- a. Award compensatory damages in an amount to be determined at trial;
- b. Award interest, costs and attorneys' fees;
- c. Declare that Fusion Academy's first application to the Andover School Committee satisfied the requirements of M.G.L. c. 76, § 1 for the operation of a private school;
- d. Declare that Fusion Academy's second application to the Andover School Committee satisfied the requirements of M.G.L. c. 76, § 1 for the operation of a private school;
- e. Award such other relief as is just or equitable.

DEMAND FOR TRIAL BY JURY

Plaintiff Fusion Learning, Inc hereby demands a trial by jury on all issues so triable.

Fusion Learning, Inc.
By its attorneys,

/s/ Joseph J. Wadland

/s/ James L. Ackerman

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Dated: January 18, 2023

CERTIFICATE OF SERVICE

I hereby certify that the foregoing, filed through the Electronic Case Filing System, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and that a paper copy will be served upon those indicated as non-registered participants on January 18, 2023.

/s/ Joseph J. Wadland

Joseph J. Wadland, Esq.