UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FUSION LEARNING, INC. Plaintiff, v. ANDOVER SCHOOL COMMITTEE, et al. Defendants.	)	C.A. No. 1:21-cv-11059-MJJ

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT (Leave to File Memorandum Not to Exceed 60 Pages Granted on April 19, 2024)

INTRODUCTION

Plaintiff, Fusion Learning, Inc. ("Fusion"), is moving for a summary judgment as to the liability of the Andover School Committee ("ASC") and the Town of Andover ("Town") on three grounds: violation of Fusion's right to equal protection of the law; violation of Fusion's procedural due process rights; and violation of Fusion's first amendment right to academic freedom. For the assistance of the Court, Fusion has included with its LR 56.1 Concise Statement of Material Facts (hereinafter "SOF") two exhibits: an alphabetical list of most individuals mentioned including the positions held by each, SOF ¶1 (Ex. 1), and a glossary of acronyms, SOF ¶2 (Ex. 2).

Defendants admit that, at all relevant times, they were acting under color of state law, M.G.L.c. 76, § 1. SOF ¶3. Having improperly burdened fundamental rights protected by the Constitution, they are liable under 42 U.S.C § 1983 to Fusion for their violations. *Monell v. Dept. of Soc. Servs. of City of New York,* 436 U.S. 658, 694-695 (1978).

In this Memorandum in Support ("Memo"), Fusion will first provide an overview of the factual framework within which its three-year saga at Andover played out. It then addresses each of the three claims as to which it is entitled to a summary judgment respecting liability. For each claim, it provides additional, undisputed, factual details that support its motion. A summary judgment on any one of the three claims will entitle Fusion to damages.

OVERVIEW OF FACTS

I. Background About Fusion

Fusion operates private schools for children in grades 6 through 12. Today, it has slightly over 80 schools, located in 19 states and the District of Columbia. SOF ¶6. Fusion has never been denied the right to open a school, except at Andover. With one exception, Fusion has never closed a school.[1] SOF ¶389. This fact alone has significance. While economic utility may not answer all questions about a school's thoroughness, efficiency and progress, it is a relevant consideration unless one believes that parents disregard school effectiveness when choosing their child's school.

During its three-year effort to open a school at Andover, Fusion had between 48 and 55 such schools. At the start of the saga, the closest ones to Massachusetts were in Connecticut. Early in the saga's course, Fusion successfully opened two Massachusetts schools, one at Newton, approved on September 4, 2018 and opened on the same day, and one at Burlington, approved on October 23, 2018 and opened on January 16, 2019. A third school at Hingham was approved on June 15, 2020 and opened on September 16, 2020.[2] Fusion itself is a for-profit entity. SOF ¶386.

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[1] The one exception was a location in Manhattan where the site's lease expired. Fusion had and still has another location in Manhattan. SOF ¶389.

2 Fusion had initially considered the town of Wellesley as a possibility but, for reasons unrelated to this lawsuit, it never filed an application there. SOF ¶373.

All Fusion schools operate in essentially the same manner, subject to state required variations in curriculum. All have shared resources, organized around both a home base team of education professionals and regional support teams of other education professionals. Each school's administrative and teaching staffs go through the same training programs and work off one general framework of instruction. Each school uses centrally chosen technology platforms and teaching materials. SOF ¶388. Every Fusion school that has been open long enough to complete the accreditation process has been accredited by its regional accrediting agency.[3] SOF ¶336.

The central focus of Fusion's education model is the ratio of one teacher to one student in a class. Each school is relatively small (approximately 70 to 90 students). Its vision is "to create the most personalized schools in the world, where every student has a path to success." SOF ¶366. As shown in the Carter Research, LLC ("Carter") report entitled *The Benefits of 1:1 Learning ("1:1 Learning")*, "[t]he global research evidence on 1:1 learning and small-group approaches to learning is robust and unassailable…. When delivered at its most efficient, 1:1 learning has yielded gains of, on average, 9 months in every 12." SOF ¶342. Put in layman's language, the student has learned in a period of 12 months not only what is expected in the 12 calendar months but also what is expected in an additional nine months. The Carter paper entitled *Fusion Academy Program Evaluation of the Educational Model ("Program Evaluation")* at 2-3 reported the finding that "Fusion Academy students are achieving substantial gains in their academic progress over a 12-month period: an average months' gain for Fusion

[3] Each Andover district employee and school committee member who was asked in this litigation whether, in their view, accreditation was important, affirmed that it was a valuable symbol of educational prowess. SOF ¶334. *See, also, Meagher v. Andover School Committee,* 94 F.Supp.3d 21 (D.Mass. 2015), for information on the workings of the New England Association of Schools and Colleges ("NEASC") and the seriousness with which the defendants have taken the accreditation process of its public schools. According to ASC chair Scully, "accreditation is meaningful." SOF ¶334.

students of approximately 8 months in a twelve-month period." SOF ¶345. Converting the Carter words into laymen's language again, the student has learned in the 12 month period what is expected in the 12 months plus what is expected in an additional eight months.

Robust data permitted Carter to compare tenth grade students at Fusion's Massachusetts schools to tenth grade students at Andover High School ("AHS").[4] It found that a higher percentage of the Fusion students met or exceeded grade-level expectations as compared to tenth graders at AHS. Other data developed by Carter confirmed that Fusion students make academic progress comparable to the largest effects found in the 1:1 literature. SOF ¶ ¶344- 346.

The *Program Evaluation* report pointed to another differentiator between Fusion schools and the traditional public school where class size is often 25:1.[5] It cited to a recent study of high school student engagement, which found that students were typically engaged 60% of the time. In that setting, a student who is sitting in her chair in the classroom for 990 hours per year is actually learning for only 600 of those hours. SOF ¶361.

As the *Program Evaluation* noted, time is used differently at Fusion schools. In the Fusion model, "distractions are kept to a minimum." No student needs to sit by idly while a slower learner tries to understand the day's lesson plan. No student needs to sit idly because he is unable to grasp the lesson plan that all of his classmates are mastering at that moment.[6] SOF ¶362.

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[4] As laid out in the *Program Evaluation* report, the findings are based on large amounts of data gathered from Fusion, from publicly available information on Andover Public Schools ("APS") and Massachusetts public schools generally and from a publicly available data base maintained by Northwest Evaluation Association, a non-profit source of highly reliable data on US student achievements. In addition, Carter conducted on-site visits and interviews at the three Massachusetts Fusion schools over a four-day period. SOF ¶347. Since the defendants chose not to challenge any of the findings in the Carter reports, those findings are undisputed.

[5] This Memo looks more closely at AHS at pp. 22-26 below. According to defendants, class size at AHS during the period encompassing Fusion's applications was maxed out, with about half of the classes at a 25:1 ratio. SOF ¶203 (f) and (v).

[6] See pp. 17-18 below for the ASC's agreement in its FY 2021 Budget that smaller classes are better than larger classes.

The *1:1 Learning* study has many findings of note.. For instance, "1:1 learning stands out as a powerful educational strategy that significantly enhances student attainment by addressing individual learning needs with precision. The core strength lies in the personalized approach to understanding and diagnosing each student's unique requirements….The diagnostic phase of 1:1 learning involves an in-depth analysis of a student's current academic standing and their specific challenges. 1:1 teachers armed with this information, are better equipped to craft targeted learning approaches that cater to individual needs in comparison to the typical public-school teacher… Furthermore, 1:1 learning excels in the immediate correction of misconceptions…. [T]he teacher can provide instant clarification, preventing entrenchment or errors and fostering a deeper understanding of the subject matter. Teacher effectiveness research consistently highlights the impact of timely and accurate feedback on student learning. This immediacy not only rectifies misconceptions promptly but also cultivates a dynamic and responsive learning environment where students feel supported and encouraged to overcome academic challenges." Research on teacher effectiveness emphasizes the importance of adaptability, and 1:1 learning exemplifies this quality. 1:1 teachers have the flexibility to adjust their teaching methods based on the evolving needs of each student. This adaptability ensures that the learning process remains fluid, promoting sustained academic growth." SOF ¶363.

II. Regulation of Education Under Massachusetts Law

At an earlier point in this action, Judge Saris provided an excellent overview of state regulation of schools, including private ones. *See Memorandum and Order on Motion to Dismiss, Doc. No. 30* (*"Doc No. 30")*, at pp. 6-8. As she noted, the key phrasing of M.G.L.c. 76, § 1, insofar as relevant to this action, requires a private school to obtain approval from the school committee of the district within which the private school intends to operate. The school

committee is required to approve "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…." Fusion incorporates here by reference the points set out by Judge Saris at pages 6-8.[7]

Fusion's first amendment to its complaint introduced homeschooling into the litigation.[8] The key to understanding state regulation in that area is the decision of the Supreme Judicial Court in *Care and Protection of Charles,* 399 Mass. 324 (1987). The SJC held that a school committee or its designee is to approve or disapprove homeschooling applications based on the same standard as private schools, as set out in M.G.L.c. 76, § 1. Just as a child attending an unapproved private school would be truant, so too would a child being home schooled without the approval.[9]

State law, thus, vests exclusively in local school committees the authority to protect the state's interest in compulsory education. The committees have the responsibility to fashion policies, procedures and standards to carry out the delegated power to approve. During the relevant time, the ASC dealt with this responsibility through a one sentence "policy," which is set forth in the footnote below.[10] As Judge Saris observed, the "Andover School Committee's

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[7] Later amendments to Fusion's complaint have mooted certain other portions of Judge Saris's memorandum and order.

[8] *See Fusion's papers seeking leave to amend, Doc. No.36, No.37 and No.41.* The motion was allowed, and the amended allegations became a part of the case. Doc. No. 43.

[9] The parents of a truant child are subject to criminal liability under M.G.L.c. 76 § 2. The state may also initiate a civil proceeding against the parents under M.G.L.c. 119, § 24 to compel school attendance or to remove the child.

[10] ASC Policy LBC-Relations with Nonpublic Schools: "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." SOF ¶45.

published policy respecting its approval process for private schools merely parrots the statutory standard…." *Doc. No. 30 at 7*.[11]

To round out this picture of state education law, it is useful to turn again to *Care & Protection of Charles,* supra. In addition to identifying one part of a comparator class for equal protection purposes, namely homeschooling applicants, it also articulated well the government interest at issue in this action, namely: "that all children shall be educated, not that they shall be educated in any particular way." 399 Mass. at 336, quoting *Commonwealth v. Roberts,* 159 Mass 372, 374 (1893).

III. A Chronology of Fusion's Application History

This section provides a brief description of Fusion's application experience, which spanned three years. The two sections that follow this chronology provide additional details about the application process that are necessary to an understanding of Fusion's claims. Still further details, specific to each of the three constitutional claims, are set out in later Argument sections of this Memo. What appears in this chronology is intended to provide a general timeline for the reader's orientation.

In early 2018, Fusion had decided to open a handful of schools in suburban Boston. By letter dated March 29, 2018, it alerted Andover school superintendent Sheldon Berman that it intended to apply for approval to operate a private school in Andover. At roughly the same time, it provided similar information to the district administrations at Newton, Burlington and Wellesley. SOF ¶369.

[11] Policy LBC does not, in fact, exactly parrot the statute. LBC speaks of "the instructional program." It says nothing about "progress," which focuses on whether students are learning anything from the instructional program, or "efficiency," which may refer to the quantum of effort needed from teachers and/or the quantum of effort required of students to make progress.

Under cover letter dated July 23, 2018, Fusion submitted to Berman an application that covered over 1,500 pages of text. The bulk of the material was devoted to a description of the curriculum and lesson plans. Since all of Fusion's schools operate in essentially the same manner, the application sent to Berman was not a wholly new creation. Indeed, the submissions to Newton on May 11, 2018 and to Burlington on June 11, 2018 were virtually carbon copies of the Andover application. SOF ¶370.

The ASC delegated to Berman the responsibility for the review process, including a timeline and the criteria to evaluate the application and for making a recommendation to the ASC. Berman did not acknowledge to Fusion his receipt of the application and appears to have done nothing with it until the newly hired assistant superintendent for teaching and learning, Sandra Trach, arrived on the job. Berman, thereupon, delegated to her the responsibility that the ASC had delegated to him. SOF ¶¶51-61.

Evidence of her labor surfaced in late September when she sent to Fusion a list of 27 questions, which Fusion answered three days later. SOF ¶371. Shortly thereafter, she informed Fusion that she intended to use the sample criteria listed by the Massachusetts Department of Elementary and Secondary Education ("DESE")[12] in a document published in 2007 and entitled Advisory on Approval of Massachusetts Private Schools Pursuant to Mass. Gen. Laws c. 76, § 1 ("DESE Advisory"). SOF ¶¶53, 60. A copy of the DESE Advisory is attached at Ex. 4.

At roughly the same time, Trach told Fusion that its application would not be considered for approval without a certificate of occupancy. As a result, Fusion started a complete build-out, at a cost of about $1,400,000, of space that it had previously identified. SOF ¶¶90-92, 372. The DESE Advisory

[12] DESE is the state agency charged with oversight of elementary and secondary public schools. Massachusetts, unlike many states, has not enacted any statutes or promulgated any regulations that govern private schools, other than certain special education schools. DESE has no authority over privates schools and has no jurisdiction over local school committee decisions made pursuant to M.G.L.c. 76, § 1.

does not require a certificate of occupancy as a prerequisite to approval to operate a private school. The town of Burlington approved Fusion's application to open its school there, subject to, *inter alia,* later submission of a certificate of occupancy.

Aside from these interactions, there was little other activity visible to Fusion respecting its application for many months. Meanwhile, Newton approved Fusion's school there on September 4, 2018 and Burlington gave its conditional approval on October 23, 2018. SOF ¶386.

Finally, in early March of 2019, Trach informed Fusion that she would report to the ASC about its application on March 7. When a Fusion representative asked whether Fusion should have people at the meeting, Trach said that it was unnecessary. SOF ¶375. At this meeting, Trach told the ASC, among other things, that Fusion had been "incredibly cooperative" with her "and anytime I've asked for something that might be missing, they do produce it."[13] SOF ¶163.

Trach's March 7 presentation, which included both a written report, dated March 5, 2019, and an oral discussion, did not include a recommendation or, indeed, a clear signal about what her recommendation would be. However, the next day, on March 8, Berman emailed the superintendents at Newton and Burlington and informed them that he would be recommending against approval.[14] Fusion learned of the negative recommendation only late in the day of April 10, roughly 26 hours before the meeting at which the ASC voted to deny its application. SOF ¶¶125-127, 156.

Several days after the March 7 meeting, Fusion was invited to make a presentation to the ASC, an event that occurred on March 21. In the morning, before this meeting started, Fusion

[13] Even after the saga had concluded and litigation had started, she admitted that Fusion got back to her within a day of her asking a question and she cannot remember if there was ever a time that Fusion failed to get her information that she asked for. SOF ¶376.

[14] Since Trach's job was, in her words, "to follow the direction of the superintendent," SOF ¶202, the outcome of the review process was not in doubt as of March 8. If, notwithstanding Berman's hope that Fusion would just go away, which he expressed in April 2018, uncertainty existed prior to March 8, it did not exist thereafter.

was given a copy of Trach's March 5 written report that had formed a part of her March 7 presentation. In hindsight, given Berman's March 8 declaration to his Newton and Burlington colleagues, it is difficult to see what purpose Trach's invitation had, other than to deceive Fusion about the approval process. SOF ¶¶125-128.

In any case, at the March 21 meeting, Fusion representative made a presentation. Certain ASC members expressed an interest in learning more. As a follow-up to those expressions, Fusion asked Trach what additional information would be useful to the ASC in coming to a decision. Trach replied that she had "no further questions to share." SOF ¶¶131-132. Notwithstanding Trach's response, on March 29, the principal Fusion representative at Andover wrote to Berman that she had assembled a packet of information responsive to the ASC inquiries during the March 21 meeting and was prepared to send the packet as Berman directed. Berman did not respond. Despite Berman's silence, the Fusion representative transmitted the packet to Berman, with a copy to Trach, on April 1. SOF ¶378.

The packet included a list of colleges where recent graduates from one Fusion school in New York had matriculated as well as statistically strong data showing, *inter alia*, that 90% of Fusion students in the 2016-2017 school year felt emotionally supported; 91% felt listened to and treated with respect by their teachers; 95% were getting the academic support they needed to be successful; 94% were confident in their ability to learn the material; and 94% were likely to ask questions or offer thoughts in class. The corresponding percentages for their previously attended school was roughly half the Fusion percentage. SOF ¶379.

Neither Trach nor Berman nor any other representative of the defendants responded to Fusion about the packet of information. SOF ¶380. In retrospect, given Berman's March 8 email

to the superintendents at Newton and Burlington, Fusion is no longer surprised at the absence of interest in the data.

At 5:32 pm on April 10, Trach sent to Fusion her written recommendation that the ASC deny approval at its 7:00 pm meeting on April 11, 2019. That the recommendation was negative had been made known to the ASC at least as early as April 1, 2019. In addition to Trach and Berman, contributors to the final written recommendation, as it was sent to Fusion, included ASC members Blumstein, Spruce and Scully, as well as Catherine Lyons, outside attorney to both defendants. SOF ¶¶136-138, 141-144, 147-149 and 155-156.

In the morning of April 11, Fusion's Mike Van Dinter emailed ASC chair Scully to request that the ASC delay its consideration of the application due to the short notice and Trach's "no further questions to share" response to the March 25 inquiry about open issues. Scully refused because, according to her email back to Fusion at 3:51 pm, the ASC "has not yet had a chance to discuss Trach's memo or her recommendation issued yesterday, and tonight's meeting presents us the first opportunity." SOF ¶¶157, 160.

Scully's response should be viewed in the light of the ASC's amended answer to ¶73 of the operative complaint, which admits that "[o]n 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."[15] SOF ¶142.

The vote at the April 11 meeting went as one would expect a sham vote to go. The only unexpected event was Berman's declaration that a vote to approve would constitute an endorsement of Fusion. SOF ¶381. There was no basis for the statement, which is directly opposite to the DESE Advisory. That document counsels that a school committee's "approval is

[15] The meeting was postponed from April 4 to April 11 for reasons unknown to Fusion.

neither an evaluation of program quality nor an endorsement of any particular school. The decision to enroll a child in … a private school is one that parents must make." SOF ¶62.

The defendants admit that the principal reason for the ASC's negative vote was Trach's negative recommendation. SOF ¶¶304-306. Her written recommendation, in turn, was principally based on comparing what went on at APS, mainly its high school, with the Fusion program limned in its application. SOF ¶58. It did not occur to her to look at how any of the many operating Fusion schools actually implemented the program, how thorough the instruction was at those schools, how efficient 1:1 teaching was at Fusion schools or whether Fusion students at, say, Newton and Burlington were making progress. SOF ¶¶164, 181, 301.

After the negative vote, Fusion spent some months considering whether to apply again. It decided to do so with a reworked application that would address the negative points articulated by Trach and the ASC. A principal reason for this decision was encouragement from at least one ASC member that a positive vote was likely if Fusion could modify its program to meet the primary criticisms expressed at the Aprill 11 meeting. SOF ¶382.

Fusion hired an outside consultant to help in revising the new application to align it with the DESE Advisory and to address the criticisms leveled at the first application. SOF ¶383. Meanwhile, it started to offer tutoring classes at the Andover space that it had built out as a prerequisite to approval of its first application.[16] Fusion's hope was that its success as a tutoring center would show to the defendants Fusion's commitment to Andover and the value of its participation in the life of the community. SOF ¶384.

While working with the consultant, Fusion sent an application to the town of Hingham on February 14, 2020. The Hingham application was the same as the first Andover application,

[16] Tutoring does not require a license or other approvals.

except that it was reformatted to align better with the DESE Advisory. Hingham's school committee approved the application on June 15, 2020. SOF ¶385.

On May 14, 2020, over a year after the first denial and after about nine months working with its consultant, Fusion submitted its second Andover application. SOF ¶212. Although based on the same principles as those undergirding all of its schools, this one contained several modifications intended to meet the defendants' criticisms of its first application.[17] There was scant communications between Fusion and the defendants until March of 2021. Although Fusion tried on a regular basis to check on the status of its application and to see if the defendants had questions or concerns that Fusion could address, little or no substantive interchanges about the application took place. SOF ¶230.

On March 16, 2021, the ASC posted on its website that Fusion's application would be on the agenda for the March 18 ASC meeting as new business for "information only." At that virtual meeting Trach led a discussion with the ASC. The discussion participants did not include Fusion representatives, who had requested the opportunity to participate. Scully, the ASC chair, specifically directed that Fusion representatives not be invited into that discussion and that instead, "[t]hey can make use of the public comment if they would like," held at the very start of the meeting. The discussion had a decidedly negative tone from Fusion's perspective. SOF ¶¶233-240.

One week later, the application came up for a vote at the ASC meeting. Trach's negative recommendation, dated March 23, 2021, was posted on the ASC website on March 24, 2021, roughly 30 hours before the scheduled hearing. As with the meeting a week earlier, Fusion was

[17] In terms of number of pages, it was shorter than the first application but was still spread over more than 500 pages of text. It included a "Locator" document that listed defendants' criticisms of the first application, a brief statement of how the second application addressed the criticism and the pages of the new application where the changes were discussed. SOF ¶213.

not allowed to participate in the discussion carried on among Trach and the ASC members. The vote was four to disapprove and one to approve.[18] SOF ¶¶245-250. As with the first application, the defendants admit that the principal reason for the vote was Trach's negative recommendation. SOF ¶¶304-306. Her written recommendation, in turn, had been principally based on comparing what went on at AHS to Fusion's revised program, as described in the second application. SOF ¶58. As with the review process for the first application, it did not occur to Trach to look at how instruction was actually carried out at Fusion's many operating schools, which, by March 2021, included two within a short drive of Andover and one further away at Hingham. SOF ¶¶164, 181 and 301.

At the March 25 meeting, chair Scully had articulated a concern that both of Trach's recommendations had touched upon but had not highlighted. In Scully's words, "a giant red flag for me is this seemingly competing message that Fusion does not want to be a special education school, which is fine, and that Fusion doesn't have the capacity to handle special education services to the level of APS, which again is fine. But I contrast that with the fact that I think it's pretty clear they're targeting special education families and special education students." SOF ¶252. As Fusion details below at pp. 24-25, a significant concern of the defendants during the relevant time frame was the amounts they were paying private schools pursuant to requirements of the Individuals with Disabilities Education Act ("IDEA") to provide an education for special needs students from Andover, amounts that the defendants were trying to reduce.

The application history ends there. However, Fusion needs to add two more points because they inform the entirety of the three-year process and, in hindsight, capture the flavor of Fusion's experience at Andover from start to finish. The first point deals with the defendants'

[18] The one affirmative vote was cast by the only ASC member whose job was education. Paul Murphy is a long-time teacher and administrator at Phillips Academy. SOF ¶96.

process. The defendants structured it as "non-iterative," SOF ¶94, even though, as the ASC admits, DESE urges school committees to have an iterative private school review process. As chair Scully put it to several school administrators in April 2019, "it is not our responsibility to guide development of private school programs or provide a checklist of tasks for applicants." She returned to the same thesis in January 2021 when she expressed to Trach and acting superintendent Bach her "concern that Fusion seems to think evaluation of their application will be an iterative process, where Andover resources help them identify deficiencies and suggest improvements to their program, rather than having the program evaluated based on the submission." SOF ¶¶159, 224. True to their word, after Trach's 27 questions on September 23, 2018, no one on behalf of the defendants responded meaningfully to the many inquiries from Fusion whether any additional information would be useful. SOF ¶¶131-132. When, on April 1, 2019, Fusion did submit significant amounts of additional information in response to inquiries at the ASC hearing on March 21, 2019, the undisputed evidence is that Trach's partially formed recommendation document was not changed one iota to take account of that information.[19] SOF ¶84.

The second point that colored the entire process was Berman, Andover's superintendent from start until his retirement on December 31, 2020. He was the person to whom the ASC delegated the task of review and recommendation. On April 25, 2018, less than one month after Fusion's initial letter indicating an intention to submit an application, and almost three months before receipt of the actual application, Berman remarked in an email to his counterpart at Wellesley: "Hopefully, they [Fusion} will just go away." SOF ¶101. Berman's bookend to this wish occurred on March 19, 2021, one day after the ASC meeting at which its negative vote on

[19] It was changed but only "to better support their sham vote." SOF ¶142.

the second application was telegraphed and six days before the actual vote. While addressing an Andover Rotary Club meeting, he told the audience that, regardless of changes to Fusion's application, there was no way that it would get approved.[20] SOF ¶242.

Should the defendants want to make the point that Berman was no longer superintendent in March of 2021, the words of his interim successor, Claudia Bach, show that a changed occupant in the superintendent's chair did not change the hostility that Fusion faced. As Bach told Trach in a January 23, 2021 email: "It seems to me we are losing the argument [Fusion's] program does not meet our standards… it's been hard to prove it's inferior, because every statement we make, they come back with a counter argument. They are slick that way." SOF ¶226.

Fusion learned of this hostility only through discovery. During the three-year saga, its concerns had been muted by gestures such as the invitation to present to the ASC on March 21, 2019. Only in retrospect has Fusion been able to see such gestures as shams, like the ASC vote on April 11, 2019.

IV. Trach's Process and Her Two Products

In order to put Fusion's constitutional claims into their proper light, it is necessary here to set out additional detail about both the process that Trach followed prior to her recommendations and the conclusions she arrived at, as reflected in her written recommendations.

The place to start this part of the story is with a snippet from her deposition. She was shown an email chain, dated March 16, 2020. Fusion's local Andover representative, who at that point was in charge of Fusion's tutoring center, had started the chain by wishing Berman a happy birthday and offering to help with Andover students in light of pandemic-related school closures.

[20] At his deposition, Berman did not recall this remark. Tellingly, he did not deny making it. SOF ¶243.

Berman did not respond to Fusion's representative but he did forward the email to Trach, "fyi." Trach responded to Berman by assuring him that "[w]e would not seek or recommend Fusion for learning activities." Berman then answered Trach's email by telling her: "I was just sending it to you so you were aware. I had no intention of recommending them for anything." SOF ¶202.

With this email exchange in front of her, Trach was asked: "And you would take to heart what he [Berman] believed about Fusion, correct?" She answered: "It's my job to follow the direction of the superintendent." SOF ¶202. Given her job, her observations about Fusion in her written recommendations, examined below, will not come as a surprise.

A. Trach's Process

Before looking at the specifics of the written recommendations, a word about her process is in order. For both applications, she described her charge as reviewing the application and providing a recommendation to the ASC. She also asked questions of the Fusion administrators. SOF ¶¶310, 324. She acknowledged that Fusion always got back to her promptly. SOF ¶163. She looked at the criteria in the DESE Advisory and at ASC Policy LBC to help to assess thoroughness and efficiency. She also consulted with outside counsel, Catherine Lyons. In addition, she claims to have enlisted the help of her program coordinators and curriculum coordinators.[21] SOF ¶¶315-318.

What she did not do was any research on differences in learning between classes with 1:1 ratio of student to teacher and 1:25 ratio. She did not ask whether any such research was available. SOF ¶¶320, 324, 340-341, 355-361. However, she agreed with the statement in the ASC FY 2021 Budget document to the effect that smaller class sizes are preferable to larger

[21] As discussed in more detail, infra p. 40, Trach provided her coordinators with an incorrect legal standard of review respecting both applications, SOF ¶¶72-74 (1st application), SOF ¶¶80-81 (2nd application), and as to the first application, she reached her recommendation prior to receiving feedback from her coordinators. SOF ¶¶70-78.

sizes.[22] SOF ¶322.

The idea of checking with other Fusion schools did not occur to her because her charge was to review the application provided to her. SOF ¶310. Whether students at Fusion's relatively new schools in Newton and Burlington were able to learn course content in the time allotted was not within the scope of her task. Nor did she ask about how learning was accomplished at Fusion's many schools in other states, most of which had been open for years. SOF ¶¶325-326. This remarkably limited vision of the review process is all the more striking in light of the fact that Fusion, early in the saga, offered to arrange a trip for her to see one of the schools in Connecticut or New York, which had been open for years. SOF ¶387.

She did not take note that DESE's publicly available School Accountability System, which compares each high school's performance to others in the state measured across six criteria including student achievement and growth and completion of rigorous courses, rated Hingham HS and Newton South HS significantly higher than Andover HS.[23]. SOF ¶¶331-332. Had she done so, the data might have helped her to answer the question at the heart of the statute about thoroughness, efficiency and progress. However, her charge did not go that far because those data were not in the application and her process was non-iterative. SOF ¶310.

She continued to ignore Fusion data provided on April 1, 2019 in response to inquiries at the March 21, 2019 meeting at which Fusion representatives had made a presentation. SOF ¶139. The data, which were statistically significant, were strongly supportive of Fusion's program.

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[22] Published on September 12, 2020, the document read in part: "smaller class sizes enable teachers to provide more personal attention to students, analyze data on individual student progress, and differentiate instruction to address individual needs. The research shows that class size matters, particularly when teachers are able to alter or adjust their instruction to better address individual needs. Much of our professional development, progress monitoring systems, and purchase of intervention materials has focused on providing that kind of differentiated and targeted attention to individual students." SOF ¶219.

[23] Although not a trained educator like Trach, Judge Saris was aware that "Newton is an outstanding school system, as is Hingham" Tr. of 12/6/21 hearing on motion to dismiss at 32.

SOF ¶¶ 379.

Trach had fulfilled her charge respecting the first application over roughly a six-month period (October 2018 until April 2019). For the second one, the span of time was mid-May 2020 until late March 2021.

B. Trach's Recommendations

The following summarizes what Trach laid out, first in a 5-page recommendation, dated April 10, 2019, and then in a 17-page recommendation, dated March 23, 2021. How her process and her recommendations stack up against equal protection comparators, minimal levels of due process and a government's obligation to justify suppression of academic freedom are addressed in the Argument portion of this Memo below.

According to Trach's recommendation on Fusion's first application:

- Fusion provided inadequate hours of direct instruction per school day/school week
- even in a 1:1 setting, she could not conclude that a student could meet the breadth and depth of the curricular requirements within Fusion's "extremely limited direct instructional time"
- approximately 50% of Fusion's instructional time was "essentially a study hall" and, therefore, not equivalent to "direct instruction" at AHS
- Fusion's requirement of fewer core courses for graduation compared to AHS "may impact a student's application" for higher education
- Fusion required fewer credits for certain courses (*e.g.,* physical education) than AHS
- at Fusion, there were no opportunities known to Trach for peer dialogue in "world languages"
- Fusion failed to provide certain materials, such as an anti-discrimination policy and student records regulations, "despite multiple requests"
- Fusion failed to provide data regarding teacher turnover rates and subject matter expertise, apparently again "despite multiple request"
- "the district was not provided with any information indicating that Fusion has the capacity to provide students with on-site Science [sic] lab experiences"
- there was no indication that Fusion had the "capacity to provide students with direct services to address their social, emotional, and behavioral needs (e.g. psychological services, counseling, social work, nursing, etc.)" and so students' needs in these areas cannot be addressed with the same thoroughness and efficiency" as at APS.
- since Fusion did not intend to have a nurse on site, it would have to discriminate "on the basis of disability"
- all APS teachers are licensed and Fusion teachers are not all licensed

- the professional development program of APS was "robust" while Fusion's program, being unknown to Trach, was left undescribed but, by implication, wanting
- Fusion had not provided data on teacher turnover rates, subject matter expertise and teacher preparation time, which meant that Fusion could not support a finding of thoroughness and efficiency of instruction as compared to APS.

SOF ¶183.

Most of the points made in Trach's second recommendation were of a similar tenor. However, she looked at some additional items, including:

- Fusion's failure to match its courses with NCAA standards (suggesting that Trach did not read the applications with much care since Fusion had stated in the first application that it had 137 courses that matched the NCAA "clearinghouse" and, in the second application. that it maintains an NCAA course approved list)
- submission of a contract with a nursing agency that had a "DRAFT" watermark on it
- absence of a faculty/staff directory.

The last two items were submitted for the ASC's consideration, notwithstanding the fact that no approved school existed and so no need had yet arisen for an executed contract. No staff/faculty directory could be created because Fusion Andover could not operate as a school and had no way to know whether its tutoring group of teachers would be appropriate if/when it could accept students as an approved school. SOF ¶¶261-303.

Fusion, of course, disagrees with every one of Trach's points. Since the specifics of Fusion's refutations of the criticisms do not directly affect Fusion's constitutional claims, it is enough here to refer any interested readers to the three Carter reports, attached as Exhibits120-122. The findings and opinions expressed in them are unrebutted and are, therefore, undisputed. The reports belie her conclusion about inadequate hours and "extremely limited direct instructional time." Among other findings, Carter reported that, based on robust data, a higher percentage of tenth graders at Fusion's Massachusetts schools meet or exceed grade-level expectations compared to students at AHS. SOF ¶¶346-347. Regarding her "study hall" comment, *Program Evaluation* at 46-47 shows the absence of evidentiary basis that afflicts the

entirety of her comments. Her observation questioning Fusion's "capacity to provide students with direct services to address their social, emotional, and behavioral needs" is debunked in *Program Evaluation* at 48. Moreover, as noted above at p. 10, Fusion gave to Trach its 2018 Education Impact Report ten days before she finalized her April 10, 2019 recommendation. The document contained powerful evidence that, had she bothered to absorb it, would have been all the indication that she could have asked for. SOF ¶139. Carter's *1:1 Learning* at 13 addresses her teaching "license" concern. Her comment that the APS professional development program was robust exemplifies her entire approach. Since she did not ask about Fusion's "systematic approach to training," *Program Evaluation* at 42, she did not learn about Fusion's "great training, [its] serious focus on people development, and [its] mission-driven commitment to fulfill its vision 'to create the most personalized schools in the world, where every student has a path to success,'" *Program Evaluation* at 42. SOF ¶392. Of course, Trach was operating within a "non-iterative" system. So, she did not perceive any need to ask.

A few of her other points, not addressed in a Carter report, can similarly be dismissed as the product of the "non-iterative" nature of the defendants' process. For example, since data about teacher turnover rates and the like had not been listed as items to submit and since the defendants did not want to use their resources to help Fusion by asking that such data be submitted, some information was, as Trach reports, not provided. One of her points is *sui generis*. Her reference to "lab experiences" stemmed from a wholly specious statement added to a draft of her recommendation by either ASC member Blumstein or ASC member Spruce. One of them inserted into a Trach draft that labs were not permitted at Fusion's Newton school.[24] How this false statement could have entered into Trach's recommendation remains a mystery to

[24] See SOF ¶329, where the head of the Newton school during its early years makes clear that the Newton school had science labs.

Fusion. SOF ¶¶328-330.

V. Instruction at Andover Public Schools

There remains one final piece to this overview of the facts. The language of M.G.L.c. 76, § 1 calls upon a school committee, when considering an application for a private school, to give consideration not just to the applicant's ability to educate children but also to the state of its own public schools. Only in this way can a committee make the determination whether the one will "equal" the other in the characteristics mentioned in the statute. So, notwithstanding Trach's failure to address in her recommendations the realities of education at APS, it is helpful to an understanding of Fusion's constitutional claims to look at three areas that were affecting the thoroughness and efficiency of instruction at the district's schools during the relevant time frame.

The first area is documented in a submission to a state agency, authored by the defendants and dated April 6, 2020. They there certified that the information about conditions at AHS contained in the document was true and accurate.[25] SOF ¶203 (b). Among other pieces of information, the document informed its readers that:

- "[O]vercrowding compromises the instructional program and the options available to enhance student learning." SOF ¶203 (cc).
- "Severe and persistent overcrowding, coupled with poor physical conditions, negatively affects the delivery of educational services." SOF ¶203 (ff).
- "Class sizes have been maximized based on student demand." SOF ¶203 (v).
- "80% of classrooms are smaller than MSBA-recommended sizes and almost half the classes have 25+ students; classrooms are crowded, limiting activities and projects." SOF ¶203 (f).
- "AHS is limited in offering courses beyond the basic core curriculum and provides only introductory courses in arts, engineering, robotics, and computer programming. Dance and arts electives were eliminated because all space is needed for courses required for graduation." SOF ¶203 (h).
- "AHS has inadequate science lab capacity to meet the needs of its science program." SOF ¶203 (bb).
- "[Students are] not provided as many opportunities for higher order thinking or

[25] The conditions pre-existed Fusion's March 29, 2018 expression of interest in coming to Andover by several years. SOF ¶203 (a).

authentic learning opportunities, and learning is focused primarily on basic content acquisition." SOF ¶203 (pp).

- "At some point, parents will likely question whether their children are receiving the quality of education they need and deserve in order to be competitive in high school, college and beyond." SOF ¶203 (c).
- "In terms of students with special needs, the district does not offer any programs for high school students with social-emotional/mental health disabilities. A continuum of services is required by IDEA…. The fact that the district does not have a special education program for high school students with emotional disabilities is a serious gap in its programming." SOF ¶203 (mm).
- "The district cannot create new programs and reduce the unusual number of students placed out of district, even though the last two Walker Reports and DESE have made this recommendation, largely because there is no space to do so. In other words, the district is unable to follow the IDEA principles of Least Restrictive Environment due to space limitations." SOF ¶203 (nn).

In her written recommendations to the ASC, Trach did not mention any of this information. See Exs. 46 (4/10/19 Recommendation) and 92 (3/23/21 Recommendation).

The second area of instruction at APS is special education. Trach was critical of Fusion's purported inability to provide programming for students with emotional disabilities even though AHS had no such in-district programming. "We handle it by placing out. [And] the Town pays for out-of-district placements educating Andover students." SOF ¶207. Trach had mentioned in her two recommendations that Fusion Andover would not have a large specialist staff of therapists like APS and like most public school systems, which maintain such staffs because of the requirements of IDEA. To Trach, this difference meant that Fusion did not measure up to APS. She offered no explanation why it is more efficient or more thorough to maintain a large staff of such specialists as compared to the Fusion program. Fusion simply did not enroll students with disabilities so severe that its school could not accommodate them. For those that Fusion could and did accept, pre-enrollment meetings ensured that both student and parents had, or would establish, relationships with third-party specialists to provide necessary or useful therapies. Since class schedules at Fusion schools are, unlike at APS and other public schools,

unique to each student, it is quite easy to arrange classes around visits to third-party providers. SOF ¶377.

What Trach did not include in her recommendations was any mention about the weakness of special education at APS. According to the ASC, "[e]motional disabilities [had] become the most frequent reason for [Andover] students to be placed out of district in special education settings." SOF ¶205. The district did not offer any programs for high school students with social-emotional/mental health disabilities despite being required to do so by IDEA. SOF ¶203. "The fact that the district does not have a special education program for high school students with emotional disabilities is a serious gap in its programming." SOF ¶203.

During the relevant time period, with respect to "the entire annual public school budget… the major budget driver for APS is special education," SOF ¶114, and out-of-district placement "budget dollars were clearly on the rise." SOF ¶112. Berman had expressed to Scully concern that Fusion could adversely impact the APS budget by requiring Andover to pay out of district tuition to Fusion. SOF ¶109. Special education dollars going to Fusion was a concern of ASC members. SOF ¶116. "If Fusion had been approved and … an Andover family… chose to enroll their child … in Fuson and their child had an IEP that required certain services," [the] legal responsibility… to provide those IEP services" would be Andover Public Schools, not Fusion. SOF ¶119.

Several months before Fusion's second application was submitted, Lyons, the outside counsel to both defendants, had warned Berman and Trach: "Just wait until the unilateral placements, demands for public funding, and sped [special education] litigation begins." SOF ¶185. In another email to Trach, entitled "Confidential re Snake Oil," she wrote, "[i]f the SC approves of the [Fusion] 'academy,' I foresee spending a lot of time with them in Executive

Session briefing them on pending litigation…." "It's not a matter of if—it's a matter of when." SOF ¶193. [26]

In short, while Fusion's application was undergoing the exercise called for by M.G.L.c.76, § 1, special education at APS was very much on the minds of those performing the exercise.

The third area of APS instruction to consider is curriculum. In December 2021, DESE, together with American Institutes for Research, conducted a comprehensive study of APS and published a report, *Andover Public Schools Comprehensive District Review Report*. SOF ¶367. The two school years preceding the 2021-2022 school year were considered and factored into DESE's collection of data and report-writing. SOF ¶367 (a). The study was, as its published report makes clear, very much data driven. Among its many findings were the following:

- there was "an absence of consistent, vertically aligned curriculum that met DESE's definition of a high-quality curriculum." SOF ¶367 (b).
- "most curricula used the district [sic] are either not rated by DESE's CURATE system or rated as 'does not meet expectations.'" SOF ¶367 (c).
- "the review team's observations of instruction found evidence of inconsistent rigor and limited opportunities for students' ownership, choice, and autonomy." SOF ¶367 (d).
- "[p]rofessional development offerings are not implemented districtwide." SOF ¶367 (e).
- "disparities in discipline exist in both the reported experience of students and discipline data." SOF ¶367 (f).
- There was "an absence of standards-aligned curricular materials at the middle- and high-school levels." SOF ¶367 (j).
- "Interviewees said that coherence and consistency in taught curricula were a challenge. Specifically, the absence of documented curricula and staff to fill vacant curriculum director roles at the district level are hindering the district's ability to improve. Further, the superintendent connected the absence of a documented curriculum with her concerns about instruction, noting a need for more and consistent lesson planning and accountability for delivering grade-level instruction to students.

[26] On February 4, 2020, Annie Gilbert, a member of the town select board and a former member of the ASC, told Mike Van Dinther of Fusion that the defendants feared the loss of special education dollars, but they can't and won't openly say this. SOF ¶201. On or about February 10, 2021, Berman told Fusion's Michelle Flanagan, nee Houlihan that the reason Fusion's first application was denied and the second application likely also would be denied was the "district funding" issue, "100%." SOF ¶227.

> Teachers and district leaders agreed that the current vacancies for district-level curriculum directors drastically reduced instructional support for teachers." SOF ¶367 (k).

Trach's recommendations did not mention any of these identified weaknesses.[27]

ARGUMENT

In the following three sections of its Memo, Fusion addresses its constitutional claims. First, it discusses equal protection, then due process and last, the first amendment.

I. EQUAL PROTECTION

A. Introduction

Fusion in this section of its Memo shows that it is entitled to a summary judgment respecting liability on its equal protection claim. It first addresses the legal requirements of a successful claim under that clause of our Constitution, namely the existence of comparators and the level of scrutiny applied to the governmental action at issue. It then lays out additional, undisputed facts specific to this claim, primarily related to how the defendants have dealt with the comparators in contrast to their treatment of Fusion. When the undisputed facts in the Background portion of this Memo are combined with the additional facts, Fusion's entitlement to a summary judgment becomes pellucid.

B. Legal Principles

1. The Comparators Are Private Schools and Homeschool Applicants.

The equal protection clause of the fourteenth amendment guarantees that no state shall deny to any person within its jurisdiction the equal protection of the laws. This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v.*

[27] Although the DESE report did not exist at the time Trach authored her recommendations, the study explicitly considered data going back two years. The conditions identified in the study, without dispute, existed at least as early as 2019 and probably well before that year. SOF ¶367 (a).

Cleburne Living Ctr., 473 U.S. 432, 439 (1985). An equal protection claim starts with the question: treated differently than whom? Identifying a similarly situated comparator is a way to show that disparate treatment has, in fact, occurred and sets "a clear standard against which departures, even for a single plaintiff, [can] be readily assessed." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601-602 (2008) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)).

An equal protection complainant bears the burden of identifying a similarly situated comparator class that received preferential treatment. When a plaintiff challenges application of a statute that, by its terms, imposes regulatory burdens on a specific class of persons, in this case, private schools, "there's no need to identify a comparator; the classification appears in the text of the statute itself." *Monarch Beverage Co. v. Cook*, 861 F. 3d 678, 682 (7th Cir. 2017) (citing and quoting *Engquist* and *McGowan*). "The regulation that imposes the burden does the work for us." *St. Joan Antida High School, Inc. v. Milwaukee Public School District,* 919 F. 3d 1003, 1010 (7th Cir. 2019) (citing *Monarch Beverage Co.*). The ASC admitted in its amended answer to the operative complaint that, "[a]ccording 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.'" SOF ¶7.

In short, private schools operating in Andover provide a comparator group. There is, in addition, a second such group. The Supreme Judicial Court established that homeschool applications are to be approved or disapproved based on the same standard as private schools. *Care and Protection of Charles,* supra at 331. *See. also, Brunelle v. Lynn Public Schools*, 428 Mass. 512, 513 -- 514 (1998). The defendants admit that homeschool applications are subject to the same standard as private schools. Thus, Fusion's treatment can be compared with this group

as well. Under state law, discriminating among private schools and homeschoolers in the same district is neither permitted nor an available means to achieve policy goals. [28]

2. The Appropriate Standard of Judicial Review is Strict Scrutiny

The next step in the equal protection analysis is to determine the level of scrutiny to be applied to the government's actions. If the actions interfere with a fundamental right, then strict scrutiny must be applied. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 16-17 (1973); *Troxel v. Granville,* 530 U.S. 57, 80 (2000) (strict scrutiny applies to infringement of the fundamental right of parents to educate their children announced in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), (Thomas, J. concurring in the judgment)). See, also, *Mass. Board of Retirement v. Murgia,* 427 U.S. 307, 312 (1976) (equal protection analysis requires strict scrutiny when state action interferes with the exercise of a fundamental right); *Mulero-Carrillo v. Roman-Hernandez,* 790 F. 3d 99, 107 (1st Cir. 2015); *Medeiros v. Vincent*, 431 F.3d 25, 29 n.3 (1st Cir. 2005).

This Court has already held that fundamental rights are at issue. Fusion has properly asserted "the liberty of parents and guardians to direct the upbringing and education of the children under their control" (quoting *Pierce* at 534-35). Doc. No. 30 at 10. It has also held that "Fusion Academy has a liberty interest in its academic freedom and arguably a property interest in the amount expended on the lease of the school site." Doc. No. 30 at 14.

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[28] In one of the Supreme Court's earliest equal protection decisions, it held that:

> [t]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration … with a mind so unequal and so oppressive as to amount to a practical denial… of the equal protection of the laws…. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1885).

3. Strict Scrutiny Shifts the Burden of Proof to the Government Actor

Strict scrutiny shifts to the government the "heavy burden of justification;" the governmental action is "not entitled to the usual presumption of validity;" the government "must demonstrate that its [action] has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives…." *San Antonio Independent School District* at 16-17. "[W]e have treated as presumptively invidious" state action that impinges upon the exercise of a fundamental right and "enforced the mandate of equal protection by requiring the State to demonstrate that its [action] has been precisely tailored to serve a compelling governmental interest." *Plyer v. Doe,* 457 U.S. 202, 216-217 (1982). See, also, *Kittery Motorcycle, Inc. v. Rowe,* 320 F.2d 42, 47 (1st Cir. 2003). Ambiguities are construed against the government. *Parents Involved in Community Schools v. Seattle School District No.1, et al*., 551 U.S. 701, 786 (2007) (Kennedy, J., concurring in the judgment).

4. Strict Scrutiny Requires the Government to Show Narrow Tailoring

Since strict scrutiny applies, cases such as *San Antonio Independent School,* supra, *Police Dept. of Chicago v. Moseley*, 408 U.S. 92, 101 (1972) and *Grutter v. Bollinger,* 539 U.S. 306, 326 (2003) require actions of municipal persons to be narrowly tailored to serve legitimate objectives. The government's selected action has to be the least drastic means of effectuating its objectives.

C. Undisputed Additional Facts Relevant to Equal Protection

As the following review of the treatment accorded all of Fusion's comparators shows, the defendants have, Fusion excepted, taken to heart the principle that equal protection is "essentially a direction that all persons similarly situated should be treated alike." *City of*

Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). Only Fusion has been singled out for special treatment.

1. The Private School Comparators

The legislature enacted the law now codified at M.G.L.c. 76, § 1 in 1878.[29] The manner in which the defendants have for the last 146 years applied the law to private schools, other than Fusion, and to homeschool applications is the best evidence of the narrowly tailored and least intrusive government action necessary to protect the state's interest in seeing that resident children receive an education. See *Reno v Flores,* 507 US 292, 300-301 (1993) (government actor's historical interpretation and enforcement of statute are important considerations in determining whether application in any given case is unconstitutional).

Within Andover, there are four private schools: Phillips Academy, Pike School, Andover School of Montessori, and St. Augustine School (hereinafter collectively the "Private Schools"). The dates of their founding, according to the defendants, are: Phillips- 1778; St. Augustine- 1914; Pike- 1926; and Montessori- 1975.[30] The Town has represented to DESE that all four are approved private schools. SOF ¶6.

The ASC has *never* required Pike or St. Augustine to seek approval to operate as a private school. It never approved them. SOF ¶¶19, 23. No one has ever considered whether the instruction in courses of study offered by these two schools equals in thoroughness and efficiency, and in the progress made therein, that of APS. SOF ¶¶20, 24.

The ASC did approve Phillips as a private school in 2010, more than a century after passage of the law prohibiting Phillips from operating as such, absent school committee

[29] See Chapter 171, §§ 1 and 2 of the acts of 1878.
[30] Defendants' Opposition to Plaintiff's Motion for Leave to File First Amended Complaint, dated September 2, 2022, Doc. No. 38 at p.2.

approval. Montessori's approval came first in 1999 for grades PK-6 and then in 2001 for grades 6-8. SOF ¶¶29, 34. On each occasion, the review process bore no relationship to that applied to Fusion.[31]

To avoid liability on Fusion's equal protection claim, the defendants have the burden of proof that Fusion has been treated in the same way as its Private School comparators. It is undisputed that they have no proof. The defendants have allowed Pike and St. Augustine to operate without making any determination respecting thoroughness, efficiency and progress. They have allowed Phillips and Montessori to operate without reviewing or having made any determinations related to, *inter alia*,

- teacher and administrator selection, qualifications, hiring, oversight, evaluation, retention and/or whether they are licensed by DESE.
- whether their student services and staffing having to do with students with learning disabilities and/or special needs is comparable to in-district student services provided by Andover Public Schools.
- nurse staffing or provision of medical services to students.
- the progress of their students as compared to those of APS in all the studies required by law.
- whether their courses have received NCAA approval.
- compliance with any state public school mandates for structured learning time or with requirements for student learning time or time on learning;[32]
- admissions criteria and policy.
- school operations.
- compliance with any of the state public school mandates respecting the number of instructional hours taught in each course per week and per semester, the topics covered in each course and thoroughness of learning by students in any course.

[31] The defendants' evidence of its approval of the Montessori consists of two letters from former superintendent Claudia Bach. One, dated March 17, 1999, notified the school that at the March 16, 1999 ASC meeting, the ASC approved it as a private school for grades PK-6. The other letter, dated October 19, 2001, notified it that at the ASC meeting on June 19, 2001, the ASC had approved the addition of a middle school program, grades 6-8. SOF ¶29. There is no evidence showing what standards were applied or what the review process consisted of. Respecting the 2010 approval of Phillips, the defendants' evidence consists of its 12/9/2010 meeting minutes and a recorded audio-video tape of the meeting. According to the ASC 12/9/10 meeting minutes: "Dr. McGrath [then Superintendent of Schools] stated she has read and reviewed the curriculum/program of study documents and deems all requirements have been met and is therefore recommending approval." SOF ¶¶35-36. Phillips has no knowledge of the defendants' approval other than what is stated in the meeting minutes. SOF ¶39.

[32] "Structured learning time" is a DESE defined term. The other two terms get thrown around by the defendants even though the definitions of the terms are nowhere to be found.

- compliance with any of the state public school mandates respecting minimum credit requirements for graduation.
- whether their science labs, music and physical education facilities are adequate.

This list could go on and on. SOF ¶¶29-39.

If the defendants truly believed that the government's interest in the education of Andover children meant satisfaction of all the points that the defendants found wanting at Fusion Andover, they would have enforced the requisite statutory approval process as to Pike and St. Augustine and applied the same approval process to Montessori and Phillips as was done to Fusion.It is undisputed that they never applied Fusion's review process to the Private Schools before Fusion and have done nothing since.

The DESE Advisory, which the defendants invoke repeatedly, tells school committees that they "are encouraged to adopt a private school approval policy that incorporates a periodic review of previously approved schools." Ex. 4, at p.2. The defendants have ignored the advice. This fact itself is powerful evidence that whatever their reasons for rejecting Fusion, those reasons had nothing at all to do with the state's interest in educating children.

2. Homeschool Comparators

The most salient aspect of the defendants' treatment of homeschool applications is the absence of evidence that any application has ever been denied. The Court will recall that, over their vehement objection, the defendants were ordered to produce a representative sample of the dozens of homeschool applications that were submitted during certain years relevant to Fusion's applications. The following facts are undisputed, based on this sample.[33]

There is no evidence that even one home school application has been denied. The

[33] Following the Court's resolution of the discovery dispute, the Town identified 108 home school applications submitted during the school years 2018 through 2022. The Town admits that it approved 100 applications and is unable to admit or deny whether the remaining 8 were approved. It produced, pursuant to the Court's order, fifteen randomly selected and appropriately redacted homeschool applications.

defendants' homeschool policies are instructive of how the defendants view the protection of the state's interest in educating children, aside from those whose parents want to choose Fusion. ASC policies IHBG-R and IHBG – Home Schooling stress cooperation and interaction between parents and school officials. The process is decidedly iterative, in marked contrast to what ASC chair Scully and superintendent Berman insisted upon for Fusion. SOF ¶¶87, 88, 89, 94.

The Home School Policy includes explicit procedures for the approval process, including a form of application, a timetable,[34] requested documentation, means for measuring progress following approval; records and materials required to be maintained; and the criteria for measuring the "thoroughness and efficiency" of instruction in such areas as the program of studies and curriculum, student performance assessment procedures, the length of school year, parental requirements and obligations, textbooks and materials. SOF ¶¶87, 89.

According to the defendants, when they review homeschool applications, they do so in a manner that if home instruction is deemed "inadequate," the superintendent will confer with the parents "to find mutually acceptable ways to correct any deficiency." SOF ¶94. In Fusion's case, the review process was non-iterative and, as to both applications, Fusion was given roughly a day's notice of alleged deficiencies after months of silence. SOF ¶¶94, 156, 246-247.

An applicant's ability to discover specific requirements needing clarification and to modify the application accordingly makes the chance of a disqualifying inadequacy and a resulting denial vanishingly small.

E. Defendants' Treatment of Fusion

The defendants' treatment of Fusion bears zero relationship to that of the Private Schools

[34] The timeline for approval is markedly different. Based on the representative samples produced, it takes less than 30 days to approve the vast majority of the applications.

and the homeschool applicants. Fusion need not repeat here the undisputed material facts set out in its Background section (pp. 2-26 above). Significant data points that emerge from the evidence of how Fusion's comparators have been treated include: a) the vast difference in information deemed essential for the protection of the state's interest; b) the iterative nature of the homeschool process compared to the aggressively non-iterative process described by chair Scully; c) the existence of clear instructions in policy documents for homeschool applicants in comparison to the absence of even the most rudimentary guidance for Fusion.

In order to appreciate the dramatic gulf between Fusion's treatment and that afforded its comparators, it is now time to take a closer look at what Trach considered in her written recommendations. As already noted, her recommendations were the principal basis for the negative votes of ASC members. While reading about what she said, it is vital to keep in mind that, in Fusion's view, she made a vast number of factual errors, analytical errors and knowing misrepresentations. However, for equal protection purposes, the important point is to compare what happened to Fusion to the treatment accorded the comparators.

1. Fusion's First Application

Trach's specific findings of inadequacies in Fusion's first application are listed above at pp. 19-20. Fusion will not repeat the list here. None of the items that Trach found important in Fusion's case was mentioned when Fusion's comparators were approved or, in the case of Pike and St. Augustine, allowed to operate without approval.

For anyone interested in Fusion's refutation of Trach's criticisms, ample data exists. Respecting her observations about seat time and curriculum, Fusion points to the undisputed opinions of Carter, noted above, particularly its comparison of tenth grade students at Fusion's Massachusetts schools in comparison to their AHS counterparts. Respecting supposedly absent

data/information, Fusion notes the absence of guidance, the "non-iterative" nature of the defendants' process (granting their ad hoc approach the benefit of the term "process") and Trach's unequivocal endorsement of Fusion's cooperation.[35] As for a supposed inability to provide for students with special needs, Fusion offers two points: a) Fusion data show that Fusion does well with students having social/emotional challenges, SOF ¶379; and b) in the defendants' own words, "the district does not offer any programs for high school students with social-emotional/mental health disabilities … [which] is a serious gap in its programming." As for teacher certification, the defendants have not and cannot offer any evidence that teachers certified by DESE are more thorough or more efficient than Fusion teachers.[36] Carter found from its metastudy of the literature on 1:1 learning that: "[i]t also appears from the research literature … that trained teachers are at best only marginally more effective than teaching assistants or volunteers, when used within a structured 1:1 model." "This is an interesting finding as it implies an element of 1:1 learning that can cut through the teacher qualification argument and focus on asking who the teacher *is*, and what the teacher *does*, rather than what the teacher *knows*." SOF ¶364.

2. Fusion's Second Application

As with the first application, Fusion received no feedback to its requests whether Trach wanted or needed additional information and whether there were any concerns or deficiencies to be addressed. Her second recommendation dated March 23, 2021, more than doubled in size her

[35] It is difficult to view her reference to Fusion's failure to provide information "despite repeated requests" as anything other than a lie. During her comments to the ASC during its March 7, 2019 hearing, she related that "Fusion has been incredibly cooperative with me; and "anytime I've asked for something that might be missing they do produce it." SOF ¶163. At deposition she testified to the same effect. SOF ¶376.

[36] It is not self-evident that teachers trained to teach in large traditional classrooms would be effective teachers in a 1:1 model. On another matter related to teacher training, Fusion points to Trach's wholly incorrect statement, this one in her second recommendation where she tells the ASC that Fusion teachers do not necessarily have to have a bachelor's degree. SOF ¶¶290-291.

first recommendation. However, the essence of her comments was the same.

The merest glance at her second recommendation shows, beyond dispute, that Fusion was treated dramatically differently than the comparators. See Trach's March 23, 2021 Recommendation (Ex. 92). As with the first application, Fusion disputes the validity of every one of Trach's negative observations.

F. Defendants' Treatment of Fusion Cannot Survive Strict Scrutiny

When state law places persons in the same class and directs local governments to treat them uniformly, local governments cannot discriminate on the very terms forbidden by state law and expect to survive rational-basis review, let alone strict scrutiny. *Alleghany Pittsburgh Coal Co. v. Cty. Commonwealth of Webster Cty., W. Va., 488 U.S, 336, 343-346 (1989).* In *Alleghany,* which applied a rational basis standard, the court reviewed a tax assessment methodology used by a West Virginia county. State law mandated that taxation be equal and uniform throughout the state, *id*. at 338. The county's assessment scheme "systematically produced dramatic differences in valuation." *Id.* at 341. Because the valuation method consistently produced results that transgressed the state-law uniformity mandate, it was not rationally related to a legitimate governmental purpose or otherwise plausible policy justification. *Id.* at 343-45.

While enough may already have been said to establish Fusion's right to a summary judgment order on equal protection grounds, Fusion is constrained to add that application of M.G.L.c. 76, § 1 must be narrowly tailored to achieve the state's objective. Compliance with public school mandates, which defendants required of Fusion, is not essential to ensuring that all children shall be educated. Defendants uniformly do not require any of the Private Schools to comply with or be measured against public school regulations and mandates.

According to the defendants, when they review homeschool applications, they do so in a

manner that if home instruction is deemed "inadequate," the superintendent will confer with the parents "to find mutually acceptable ways to correct any deficiency." SOF ¶94. A minimal amount of scrutiny of the undisputed material facts shows the vast differences between the homeschool approval process and the Fusion approval process.

The undisputed facts are clear that the defendants did absolutely no tailoring for Fusion. Since their process was non-iterative, it permitted no tailoring whatsoever, never mind the narrow kind.

G. Conclusion Respecting Equal Protection

In summary, rather than adhere to the approach employed for nearly a century and a half with all comparators, defendants, as to both of Fusion's applications, resorted to a "far-reaching, inconsistent and *ad hoc"* application of the statute, *Parents Involved in Community Schools* at 786*,* "with a mind so unequal and so oppressive as to amount to a practical denial …of the equal protection of the law." *Yick Wo at 373-374.*

II. DUE PROCESS

A. Introduction

Fusion here shows its entitlement to a summary judgment respecting the defendants' liability for violations of Fusion's procedural due process rights. The Court, in its ruling on the defendants' motion to dismiss, already made the determination that "Fusion Academy has a liberty interest in its academic freedom and arguably a property interest in the amount expended on the lease of the school site." Doc. No. 30 at 14. In addition, both Fusion and parents interested in educating their children at Fusion have a constitutionally protected interest in government

decisions affecting their interest. *Mirabelli v. Olson,* 2023 WL 5976992 (USDC, S. D. Cal.) at 12, citing to *Troxel, Pierce,* and *Meyer.* There is no need to discuss this threshold issue further.[37]

Fusion's due process claim has three, independent aspects. One rests on the concept of unconstitutional vagueness of ASC Policy LBC. The second aspect relates to Fusion's right to notice and an opportunity to be heard when a government agency makes a determination directly affecting its legal rights. Third, the right to an unbiased decisionmaker, though constitutionally required, was absent during Fusion's three-year Andover saga.

B. Policy LBC Respecting Private School Approval Was Impermissibly Vague

1. Standard of Review

A law or a government policy is unconstitutionally vague "if it 'fails to provide a person of ordinary intelligence fair notice … or is so standardless that it authorizes or encourages seriously discriminatory enforcement.' This creates two avenues by which to attack a vague statute: discriminatory enforcement and lack of notice." *Frese v. Formella,* 53 F. 4th 1, 6 (1st Cir. 2022) (quoting from *U.S. v. Williams,* 553 U.S. 285, 304 (2008) (other citations omitted)). A government policy "authorizes an impermissible degree of enforcement discretion -- and is therefore void for vagueness -- where it fails to 'set reasonably clear guidelines for … officials and triers of fact in order to prevent arbitrary and discriminatory enforcement,'" and silence is not reasonably clear guidance. *Frese* at 7 (citations omitted).

Where burdening of a fundamental right is implicated by application of a policy, as here, the government will be subject to strict scrutiny, including a requirement for a higher standard of

[37] The Cout went on in that ruling to dismiss Fusion's due process claim because of the defendants' argument that Fusion had an adequate post-deprivation remedy. When Fusion subsequently pointed out that the defendants' support for its post-deprivation remedy claim was clearly inapplicable (Doc. No. 51 at pp.8-10), the Court reversed the dismissal, noting that "Andover does not seem to contest that there is no available post-deprivation remedy." Doc. No. 53. The Court, at the same time, allowed Fusion's amendments alleging additional bases for its due process claim.

specificity. "[T]he most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates,* 455 US 489, 498-99 (1982).[38]

This case points up the wisdom of the due process vagueness doctrine. Fusion travels *Frese's* notice avenue in subsection 2 below. In subsection 3, it takes the "discriminatory enforcement" avenue.

2. The ASC Admits That its Policy Was Standardless

ASC Policy "BG- School Committee Policy Development" states that its policies should "be specific enough to give clear guidance." SOF ¶49. The only policy of the defendants that dealt with approval of private schools was LBC.[39] In its amended answer to the operative complaint, the ASC admits that:

> The [LBC] policy offers no timetable for the application process to unfold.
>
> *******
>
> 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.

SOF ¶¶46-47. The ASC was perfectly capable of providing guidance when it wanted to do so. See discussion of homeschooling applicants above at pp. 32-33.

The defendants understood that they should have but did not have policies and procedures for private school applicants. Two weeks after Fusion's March 28, 2018 notification of its intention to apply, Berman wrote that Policy LBC "is very weak and doesn't comply with guidance on the DESE website." Ten days later, he wrote that the ASC "has no policy or

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[38] See, also *National Organization for Marriage v. McKee,* 649 F. 3d 34, 55-56 (1st Cir. 2011) (because Maine PAC laws did not impose burdens on speech, strict scrutiny not applied). "[E]conomic regulations are subject to a relaxed **vagueness** test, laws with criminal penalties to a stricter one, and laws that might infringe constitutional rights to the strictest of all." *Rubin v. Garvin,* 544 F.3d 461, 467 (2d Cir.2008).

[39] The policy is quoted in full above at p. 6, n.10.

procedure for reviewing [Fusion's] request." In September, according to him "we need a review process, and the school committee does not have that in place." SOF ¶83.

On October 24, 2018, Berman met with ASC chair Scully. Rather than do the right thing, they agreed that "we shouldn't change policies now (could be bad if Fusion sues us)." SOF ¶84. This remarkable statement was recorded when the review process of Fusion's first application had scarcely begun.[40] In hindsight, it appears that the absence of policies, procedures and standards was of no moment to the defendants because they expected Berman's hope -- that Fusion would just go away -- to be fulfilled.

The absence of a meaningful policy and procedure allowed Trach the freedom to identify specific items that Fusion failed to include in its application, for instance digital platforms, SOF ¶¶273-280, and teacher turnover rates, SOF ¶168. It gave her the freedom to list all sorts of ways in which Fusion's program did not match that of APS. When Trach's program heads were solicited for comments on the Fusion applications, they were given the entirely wrong standard. Respecting the first application, Trach instructed them, "[t]he law states that a private school should be equivalent to the same time on learning as public schools;" as to the second application, to keep in mind "that private school curriculum must generally be 'equivalent' to that [of APS]. This includes but is not limited to time on learning…."[41]SOF ¶¶72-74, 216.

Fusion's due process right to clear guidance was ignored.

3. Defendants' Enforcement of Policy LBC Was Discriminatory

As noted in *Frese*, supra, vagueness creates two avenues to attack. Having explored lack of notice in the immediately preceding subsection, Fusion here addresses discriminatory

[40] It is also worthy of a footnote that, during most of 2018, the ASC was conducting a comprehensive review of all of its policies and updating them so as to remain in compliance with legal requirements. True to the agreement between Berman and Scully, LBC was left unchanged. SOF ¶85.
[41] This email must have caused Justice Frankfurter to turn over in his grave.

enforcement. What Fusion has already said about equal protection is applicable to this aspect of its due process claim. Application of Policy LBC, or lack thereof, to the Private Schools and to homeschool hopefuls, when compared to its application to Fusion, is proof enough of discrimination.

There was no notice, let alone an adequate one, from which Fusion could discern what was required of it. The absence of a policy, of standards for judging Fusion's application and of procedures to light the path of the review process permitted the defendants to create their own unspoken rules and to erect one obstacle in Fusion's path after another.[42] The lack of guides placed unfettered discretion in the hands of Berman, who handed it over to Trach. Since Berman's hope from the beginning was that Fusion would just go away, SOF ¶101, and since Trach's job was, according to her, to follow the direction of the superintendent, SOF ¶202, the result was, unbeknownst to Fusion, pre-ordained.

The undisputed facts show discriminatory treatment of Fusion.

C. Vagueness Aside, Fusion Was Not Given the Procedural Safeguards Due It

1. The Process Due a Government Applicant

Goldberg v. Kelly, 397 U.S. 254 (1970), provides a useful itemization of due process elements in the context of administrative determinations affecting important rights. Insofar as applicable to Fusion, one element is the opportunity to be heard. Due process principles

> … require that a recipient have timely and adequate notice detailing the reasons for a proposed [decision], and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important … where [persons] have challenged proposed [determinations] as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases….

[42] See pp. 8-9, supra, for discussion regarding defendants requiring Fusion to obtain a certificate of occupancy as a prerequisite to consideration of approval.

Id. at 267-68

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Greene v. McElroy, 360 U.S. 474, 496 (1959).

As noted above, the Court has already determined that "Fusion Academy has a liberty interest in its academic freedom and arguably a property interest in the amount expended on the lease of the school site." Doc. No. 30 at p.14. See, also, *Aponte v. Calderon,* 284 F.3d 184, 192–93 (1st Cir. 2002) ("when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." (quoting *Hannah v. Larche,* 363 U.S. 420, 442 (1960)). The injury to Fusion, as well as to parents who might choose it for their children, certainly qualifies as "serious."

2. Standard of Review

According to *Mathews v. Eldridge,* 424 U.S. 319, 334–35 (1976), whether the administrative procedures provided Fusion were constitutionally sufficient "requires consideration of three distinct factors." The first *Mathews* factor calls for identification of the private interest that will be affected by the official action. The private interests involved here were Fusion's first amendment right to academic freedom and its property rights. In addition, the right of parents to control the upbringing of their children, recognized in cases such as *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), were also directly at issue. These are not minor or inconsequential interests.

The second *Mathews* factor calls for a weighing of the risk of deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. The third *Mathews* factor looks at both the government interest and the burdens of substitute procedures. Fusion has already articulated the government's interest above at p. 7 ("[t]"he great object of these provisions of the statutes has been that all children shall be educated, not that they shall be educated in any particular way." *Comm. v. Roberts,* 179 Mass. 372, 374 (1893). As for the value and burden of additional or substitute procedures, a recitation of the details surrounding the hearings on Fusion's two application will clarify how to use these *Mathews* factors in analyzing the defendants treatment of Fusion's due process rights.

3. Defendants Denied Fusion Notice, the Opportunity to be Heard and to Present its Evidence

Before diving into the details, Fusion wants to remind the reader that: a) in April 2018, Berman expressed the hope, sight unseen, that Fusion would just go away; b); in October 2018, he and Scully, while discussing Policy LBC, agreed that "we shouldn't change policies now (could be bad if Fusion sues us);" c) in mid-2020, he assured his subordinate, Trach, that he had no intention of recommending Fusion for anything; d) in March 2021, he told a Rotary Club gathering that, regardless of changes, Fusion's second application would not be approved. Given this backdrop, it is little wonder that approval was not forthcoming. Of course, Fusion did not know these undisputed facts at the time.

a. Fusion's First Application

Setting aside vagueness issues, the process story can start on March 8, 2019, just over a month before the ASC vote and at least six months after Trach had been assigned the job to review the first application. On that date, Berman emailed the school superintendents of Newton

and Burlington that he would be recommending against approval of Fusion. SOF ¶127. Publication of Trach's recommendation was a month away. Yet, Berman knew what was to come.

About a week later, Trach offered Fusion the opportunity to make a presentation to the ASC at its March 21 meeting.[43] This opportunity would have been a positive factor in a due process analysis, except for the fact that the die had already been cast. Looked at with hindsight, the offer can only be characterized as a cynical maneuver designed to mislead Fusion. In any case, at the March 21 meeting, several Fusion representatives made a presentation and engaged in dialog with ASC members and some APS administrators, who asked a number of questions and expressed an interest in having additional information. A couple of business days later, Fusion asked Trach for a list of open issues or outstanding items, as suggested at the March 21 meeting. Trach's response was that she had no further questions.[44] SOF ¶¶129-132.

Perhaps the most remarkable facet of that meeting, looked at retrospectively, is that Berman sat there for about an hour of the Fusion portion, knowing full well how things would turn out, while 6 Fusion representatives talked about their program and answered questions and while all five ASC members plus several school department employees, in addition to Berman, listened, posed questions and asked Fusion for additional information. Astoundingly, he even asked questions, as if the prospect of approval was open for consideration. See March 21, 2019 ASC Meeting Transcription, Ex. 29.

On March 29, contrary to the state Open Meeting Law, M.G.L.c. 30A, §20, communications occurred amongst Berman and at least a quorum of the ASC, including Tracey

[43] Fusion was finally given a copy of Trach's March 5 report on the morning of March 21, less than 12 hours before it was to make its presentation. SOF ¶128.

[44] The inquiry was directed to Trach because the ASC had instructed Fusion to direct all communications to her. SOF ¶55.

Spruce, Susan McCready and Joel Blumstein.[45] The group discussed two media articles of doubtful quality that painted Fusion in a negative light. These articles had come into their possession via their outside counsel, Lyons. Since the defendants' process was non-iterative, no one bothered to ask Fusion for comment about the articles. SOF ¶¶122-123, 133-135.

On April Fool's Day, Berman transmitted to all five members of the ASC an email stating that "Sandy [Trach] will be recommending against approving Fusion's application…. I support that recommendation." SOF ¶136. It will not, at this point, surprise the reader to learn that Fusion remained in the dark.

Between March 5 and April 2, several representatives of the defendants had made revisions to Trach's March 5 report. SOF ¶¶138, 141-144, 147-149. On April 2, again in violation of the Open Meeting Law, a quorum of the ASC, including Scully, Spruce and Blumstein, discussed and deliberated over Fusion's application amongst themselves, and further edited Trach's report "to better support publicly their sham vote to be taken at the upcoming April 4 ASC meeting."[46] SOF ¶142.

The next morning, April 3, Berman undertook to update his colleagues at Burlington and Newton on the current state of Andover's process. Since both municipalities had many months earlier approved Fusion's application – identical to that still pending before the defendants –, it is unclear why Berman thought to provide the information. In any event, he sent them a copy of Trach's report, as revised through April 2, along with the aforementioned negative media articles. SOF ¶145. That evening, Berman again emailed the Newton and

[45] The defendants are likely to ask the Court to ignore Open Meeting Law violations because that statute contains a provision that addresses violations. Since the evidence establishing this and other Open Meeting Law violations is undisputed, it is available to factor into whether the defendants violated Fusion's due process rights.

[46] It was at this time that the false information about Fusion's Newton school not having a science lab made its way into Trach's report. See discussion supra, pp. 21-22.

Burlington superintendents to tell them that the defendants had decided to revise Trach's report still further and to postpone the final ASC vote on Fusion from April 4 to a later date. He requested they not share the latest version of Trach's report with anyone. SOF ¶150. None of this information was communicated to Fusion prior to discovery in this case. As of April 3, Fusion was still hopeful of approval.

On April 8, Trach emailed Fusion that the ASC would vote on its application at its April 11 meeting. Finally, after the close of business on April 10, at about 5:30 pm, approximately 25 hours before its hearing, Fusion was emailed a copy of Trach's written recommendation. SOF ¶156.

At 10 am the next morning, Fusion emailed Scully a request that Fusion be removed from the evening's agenda because it had received Trach's recommendation less than 24 hours earlier. The email also noted the absence of a substantive response to Fusion's request, made after the March 21 ASC meeting, for a list of any open issues or outstanding items. SOF ¶157. Scully responded by email at 3:51 pm, declining to remove Fusion from the agenda. She wrote: ***"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.) SOF ¶160.

Having admitted in this lawsuit that a quorum of the ASC had edited and changed Trach's report "to better support publicly their sham vote," it is evident that Fusion was not provided a fair and impartial hearing on its first application in violation of its due process rights.

b. Fusion's Second Application

In the approximately ten months between the date of submission in June 2020 and March 16, 2021, despite repeated inquiries by Fusion representatives as to the timeline for review, and

despite numerous offers to provide any missing information or discuss any possible inadequacies, the defendants provided little feedback of substance. On March 16, the ASC publicly posted the agenda for its March 18 meeting, which was to be conducted via Zoom. Fusion's application was listed as a discussion item. At no time prior to the meeting had any representative of the defendants informed Fusion of a concern about its second application. SOF ¶¶231-232.

The conduct of the meeting produced its own due process issues. The ASC's published policy on the conduct of meetings provided 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.) It also had a policy of providing for a public comment period at the start of each meeting, prior to discussion of agenda items. SOF ¶¶234-236.

In an email sent on March 18 to APS administrators, chair Scully directed that Fusion representatives not be invited to that part of the meeting when the Fusion agenda item would come up and instead, "[t]hey can make use of the public comment if they would like." SOF ¶233. When Fusion's application came up as an agenda item, Scully refused to permit Fusion representatives to participate in the discussion or respond to the comments of the ASC members and the testimony of Trach.[47] SOF ¶237.

[47] At this meeting, Trach stated that student learning time raised questions as to whether Fusion rises to the equivalency of the public schools. She incorrectly described "structured learning time," a DESE-defined term. She commented that she had not been given access to Fusion's digital learning platforms but withheld from the audience that she had never requested access nor responded to Fusion's many inquiries of what else it could provide to her. She 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, the defendant Town is obligated to provide for and oversee such services for students in private schools located in the district. She mischaracterized a two-week-old Department of Education announcement about changes to COVID restriction. SOF ¶¶238-240; see also March 18, 2021 ASC Meeting Transcript, Ex. 91.

The conduct of the hearing deprived Fusion of its right to be heard in a meaningful way.

In the afternoon of March 23, the ASC posted its agenda for its March 25 meeting. Fusion's application was listed as a "vote" item. Scully did not, at that time, permit the posting of any written report with the agenda. On March 24, at about mid-day, a memorandum from Trach to Bach, dated March 23 ("2021 Recommendation"), was added to the ASC website. The memorandum, 15 pages long, recommended that the ASC deny Fusion's application. Fusion, 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. SOF ¶¶245-247.

At the meeting, Scully again refused to permit Fusion representatives to address ASC questions and comments when its application came up as an agenda item. As at the March 18 meeting, they were restricted to addressing the 2021 Recommendation during the public comment session at the start of the meeting and before agenda items came up for discussion. SOF ¶¶249-250. Although Fusion had asked before the start of the meeting that its responsive letter be read during the hearing and be posted to the ASC website for public review, Scully refused to do either. SOF ¶248.

Fusion's representatives could not present their own evidence during the discussion of their application; they could not correct many misstatements by Trach and others; they could not exercise those rights that due process makes mandatory.[48]

In any event, the undisputed material facts show that Fusion was not provided a fair and impartial hearing on its second application in violation of its due process rights.

[48] In retrospect, it may be that none of those rights would have mattered, given the fact that the outcome had been pre-determined.

We can now look again at the *Mathews* factors that ask about the value and burden of additional or substitute procedures. Assuming that the result of each vote had not been preordained, then the value of providing Fusion with adequate time to digest and respond to Trach's written recommendation would have been very valuable.

The proof of this pudding is that Fusion's response to the 15-page, error-filled, 2021 Recommendation, which Fusion cobbled together on extremely short notice, persuaded one ASC member, the only professional educator on the committee, to vote in favor of its application. SOF ¶96; see also March 25, 2021 ASC Meeting Transcript, Ex. 93. It remains unknown what would have happened with a process that began iteratively, remained open throughout and allowed for exchanges during the ASC meetings when the topic was Fusion. Such substitute procedures, while probably increasing the time Trach spent dealing with Fusion's applications, can hardly be a disqualifying "cost" that the government ought not to bear. It surely would not have slowed down the progress of the applications to their ultimate fate. After all, Newton took about 16 weeks to approve Fusion's application; Burlington took 19 weeks and Hingham 17 weeks.

However, this analysis makes sense only on the assumption that the decision was not preordained. The undisputed facts, direct from Berman and from ASC admissions in its amended answer to the operative complaint, show that the assumption is wrong. Under that circumstance, no amount of due process would have made a difference.

D. Fusion Was Denied the Right to Disinterested Decisionmakers

It is now time to address the third leg of Fusion's due process claim. An essential element of this right is that the decisionmaker be impartial, disinterested and free from hostility and bias. *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980) (citations omitted). It is well established that "a biased decisionmaker (is) constitutionally unacceptable (and) our system of law has always

endeavored to prevent even the probability of unfairness." *Withrow v. Larkin,* 421 U.S. 35, 47 (1975). Personal bias, hostility, animus or ill-will (hereinafter collectively "hostility") of a decisionmaker alone, apart from any other basis, is sufficient proof of unconstitutional behavior. *Hortonville Joint School District No. 1 v. Hortonville Educ. Ass'n,* 426 U.S. 482, 492 (1976).

The partiality of an agent to whom the decisionmaker has delegated the task of review and recommendation is imputed to the decisionmaker if that agent had influence over the decision making. *Cariglia v. Hertz Rental Corp.*, 363 F.3d 77, 85-88 (1st Cir. 2004) (Title VII liability). As foreshadowed above and demonstrated below, the defendants' agents, to whom were delegated the review and recommendation process, harbored hostility toward Fusion.

There is no need to look beyond the words and deeds of the key actors. As already pointed out, a) in April 2018, Berman expressed the hope, sight unseen, that Fusion would just go away; b) in October 2018, he and Scully chose not to change Policy LBC in case Fusion sues; c) on June 19, 2019, he told a Fusion representative that he was worried about special ed students going to Fusion and diverting dollars from APS to Fusion; d) in mid-2020, he assured his subordinate, Trach, that he had no intention of recommending Fusion for anything; e) he told a Rotary Club gathering that, regardless of changes, the second application would not be approved; and f) Trach's job, according to her, was to follow the direction of the superintendent.

There is more. In addition to taking direction from Berman, Trach relied on Lyons, outside counsel to both defendants. Much more clearly than Berman, Lyons was open about her hostility to Fusion.[49] For example, weeks before Trach had finished her review of the first application, Lyons provided her with "*additional ammo"* against Fusion. SOF ¶122. Lyons' mindset may be gleaned from her quite extensive email correspondence with Berman, Trach and

[49] Since the defendants waived attorney-client privilege respecting advice from Lyons during the application process, Fusion has discovered considerably more about her attitude than might be expected *ex ante*.

others, in which she repeatedly communicated the threat posed by Fusion of special education litigation and loss of funding. According to Lyons, parents who send their children to Fusion for services they don't receive at APS "will have a very good claim that they are entitled to reimbursement for these services." SOF ¶186.

Upon learning that Fusion would be submitting a second application, Lyons told Berman, Trach and Sara Stetson, the head of special education at APS: "Just wait until the unilateral placements, demands for public funding, and sped [special education] litigation begins." SOF ¶185. In her January 12, 2020 email exchange with Trach, which she entitled "Confidential re: Snake Oil," in reference to Fusion, Lyons explained:

> It never ceases to amaze me how some people can say so much and yet say nothing at all. I guess it's called marketing. I must say, I do look forward to cross-examining the director[50] on her claims. I sincerely hope it's not an Andover case, but at some point we're going to have one. It's not a matter of if – it's a matter of when. *If the SC approves of the 'academy,' I foresee spending a lot of time with them in Executive Session briefing them on pending litigation….*[51] (emphasis supplied)

SOF ¶193. She referred to Fusion as the "Purple Menace"[52] and its chief Andover representative as "Fusion Barbie." SOF ¶186. She suggested to APS employees that Fusion was claiming that it could cure Covid-19. SOF ¶210. According to her deposition testimony, she was just trying to bring some levity to the stressful times created by COVID and her email was a "joke." Fusion does not see the humor in being accused of making misleading claims.

On at least two occasions, Lyons, together with Stetson, covertly organized Town employees to act as "moles" by using false names so as to "spy" on Fusion sponsored

[50] This is a reference to Fusion's primary representative in Andover, Michelle Flanagan, nee Houlihan.
[51] Lest there be doubt about who or what "snake oil" refers to, according to the Cambridge Business English Dictionary, a "snake oil salesman" is defined as "someone who deceives people in order to get money from them."
[52] Fusion uses purple in much of its marketing.

community events. Of course, the events were open to the public. SOF ¶¶188, 191, 195, 228. When a local service provider gave a presentation at one such event, according to one mole, "I was recognized, and my cover blown." Stetson responded that, "[n]ext time we will have to be more crafty and send someone they will never suspect." Lyons looked at the bright side: "[t]he good news is now we know [the service provider] is in bed with Fusion." SOF ¶195. For a more detailed explanation of these and other communications from Lyons, see SOF ¶¶107, 122-124, 147-149, 155, 186-199, and 228.

Special education issues, the "budget driver" detailed above at pp. 23-24, and a central focus for Lyons, may have been the reason for the hostility or they were, perhaps, simply an added weight against Fusion's cause. In either case, they gave the defendants an institutional pecuniary interest in the denial of Fusion's applications. The presumption of a decisionmaker's impartiality may be overcome by a showing of personal or institutional pecuniary stake in the outcome. *Brooks v. New Hampshire Supreme Ct.,* 80 F.3d 633, 640 (1st Cir. 1996).

Where a decision maker has declared that his budget is driven by the costs of special education, including out of district placements, and where that same decision maker views the applicant for his approval as a threat to increase such costs, there is an undisputed pecuniary stake in the outcome of the approval process.

III. FIRST AMENDMENT – ACADEMIC FREEDOM

Fusion shows in this section of its Memo that the defendants' treatment of each of its applications violated its first amendment right to academic freedom. Two cases, *Asociacion de Educacion Privada v. Garcia-Padilla*, 490 F. 3d 1 (1st Cir. 2007) (*"Asociacion"*) and *Turner*

Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) ("*Turner 1"*), will leave no room to doubt this point.[53]

I. Applicable Legal Standards

A. Nature of Fusion's First Amendment Right

As *Asociacion* noted, citing *Shelton v. Tucker,* 364 U.S. 479 (1961), "we find that … private schools have a First Amendment right to academic freedom." 490 F.3d at 11. It described in considerable detail the contours of this right, *id.* at 8 – 10, and paraphrased Justice Frankfurter's well-known words that an educational institution's right to academic freedom includes 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." *Id.* at 9 – 10.

B. Level of Scrutiny

Given Fusion's right to this protection, the next question is the level of scrutiny to be applied to the actions of the defendants. "[R]egulations intended to serve purposes unrelated to control of the regulated speech, despite their incidental effects on speech, expression, or message are subject to intermediate scrutiny." *Id.* at 15. See, also, *Turner 1* at 662. Solely for the purposes of its Motion, Fusion does not claim that the acts of the defendants affecting its first amendment right are subject to strict scrutiny.[54] Given this concession, the Court should "apply intermediate scrutiny to determine whether the [defendants'] interest is substantial and whether the effect of [their actions] on speech and academic freedom is no greater than necessary to protect [their] interest." *Asociacion* at 16.

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[53] The Court's rejection of the defendants' motion to dismiss Fusion's first amendment claim ably set out key cases in this area. Doc No. 30 at pp. 9-13.

[54] Fusion reserves to another day its right to argue that the defendants' acts should be "deemed content-based [because] the municipality differentiates between speakers *for reasons unrelated to the legitimate interests that prompted the regulation." National Amusements, Inc. v. Town of Dedham,* 43 F.3d 731, 738 (1st Cir. 1995) (emphasis in original). For the sake of clarity, Fusion's concession here has no relevance to the level of scrutiny applicable to its other constitutional claims.

Fusion concedes that the governmental interest at stake is, *in the abstract*, important. However, it is vital here to keep in mind the teachings of *Turner 1*.

> "When the Government defends a regulation on speech as a means to … prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (CADC 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."

Turner I at 664. "[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist,'" (quoting *Home Box Office v. FCC,* 567 F.2d 9, 36 (CADC 1977), which, in its turn, took language from *City of Chicago v. FPC*, 458 F.2d 731, 742 (CADC 1971). *Id.*

Even where a restriction on first amendment rights may be justified, it must be "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). The Constitution requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interests served,' … that employs not necessarily the least restrictive but … a means narrowly tailored to achieve the desired objective." *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (quoting *Board of Trustees v. Fox*, 492 U.S. 469,480 (1989)).

C. Burden of Proof and Substantial Evidence

The key point is that the defendants bear the burden of proving that Fusion's proposed Andover school would not satisfy the statutory criteria *and* that the defendants' response to Fusion's applications "does not 'burden substantially more speech than is necessary to further the government's legitimate interests' Ward 491 U.S. at 799." *Turner 1* at 665. *See, also, Asociacion* at 18 (quoting *Turner,* the government entity "must 'demonstrate that the recited harms are real, nor merely conjectural, and that the regulation will in fact alleviate these harms in a direct and

material way.'"); *Rideout v. Gardner,* 123 F.Supp.3d 218, 231 (D.N.H. 2015) (while government interests may be plainly compelling in the abstract, the mere assertion of such interests cannot sustain a speech restriction; government "must demonstrate that [its action] addresses an actual problem.").

Since the government has the burden of proof, the court "cannot conclude that [the government] has a legitimate state interest in fixing a problem that it has not shown to exist. Moreover, because there is no evidence of a problem, [the government's] proposed solution cannot be narrowly tailored to it." *Asociacion* at 18. The court's "obligation is 'to assure that, in formulating its judgments [the government] has drawn reasonable inferences based on substantial evidence.'" *Turner Broad. Sys. Corp. FCC,* 520 U.S. 180, 195 (1997) (*Turner II)*, quoting *Turner I* at 665.

As for what constitutes substantial evidence, *U.S. v. Playboy Entertainment Group, Inc.,* 529 U.S. 803 (2000), provides the answer. The government there sought to save a Congressional enactment regulating the transmission of sex-oriented material over cable television. "Without some sort of field survey, it is impossible to know how widespread the problem in fact is, and the only indicator in the record is a handful of complaints." *Id.* at 821. "[T]he Government must present more than anecdote and supposition. The question is whether an actual problem has been proved…." *Id.* at 822. See *McCutcheon*, supra at 210, applying *Playboy's* teaching to invalidate certain limits on political contributions where the scenarios offered by the government in support of the limits were "far too speculative."

This circuit applied *Playboy's* teaching in *Comcast of Maine/New Hampshire, Inc. v. Mills,* 988 F.3d 607 (1st Cir. 2021), a first amendment challenge to a Maine statute regulating cable television. The legislature "did not hear from expert witnesses or commission a Maine-

specific study to determine what impact the Act would have…." *Id.* at 609. Following the analysis of *Turner 1*, the court had little difficulty invalidating the state's action. See, also, *National Amusements, Inc. v. Town of Dedham,* 43 F.3d 731, 741 (1st Cir. 1995) holding that "a governmental interest woven exclusively out of gossamer threads of speculation and surmise cannot be termed substantial."

D. Undisputed Additional Facts Relevant to First Amendment

As may already be evident, the Andover defendants do not have even one anecdote by means of which to suggest a genuine issue of material fact. According to the ASC, the most important part of Trach's two recommendations was her statement that the program described in each of Fusion's application did not comply with Massachusetts student learning time requirements.[55] Trach had told the ASC in her second recommendation, "I cannot conclude that a student could meet the breadth and depth of the curricular requirements (i.e. enduring understanding, essential questions, student abilities, performance tasks including labs textbook reading, and final exams) within Fusion's extremely limited direct instructional time." SOF ¶183. Although Trach provided the ASC with her belief,[56] she did not provide it with any evidence to substantiate her belief. SOF ¶¶339-365. She did not look at or provide to the ASC any published studies, peer reviewed articles, data or evidence-based research to support her belief. SOF ¶340.[57]

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[55] "Student learning time" is the heading of a group of DESE regulations that appears at 603 CMR 27.00. It is not a defined term or an identifiable requirement for public schools. Almost all of Trach's criticisms focused on what DESE defines as "structured learning time." Trach misused and misapplied DESE regulations in making her two recommendations. SOF ¶391, *Carter Report: DESE Regulations,* Ex. 122.

[56] Fusion acknowledges that, for summary judgment purposes, it has to accord Trach's statement of belief the benefit of genuineness. However, as noted above, there is every reason to believe that Trach was not following her instincts but rather, as she testified at deposition, was following the direction of her boss, Berman. SOF ¶202.

[57] Notwithstanding her stated belief in her recommendations, she agreed with the ASC statement in its FY 2021 Budget, that "smaller class sizes enable teachers to provide more personal attention to students, analyze data on individual student progress, and differentiate instruction to address individual needs. The research shows that class size matters …." SOF ¶322.

It did not occur to her to inquire how any of Fusion's many operating schools taught the curriculum. SOF ¶324. She did not ask the Fusion schools at Newton or Burlington whether the students there were learning the curriculum. SOF ¶¶324-325. She did not take available steps to obtain data from Fusion to understand how its operating schools addressed curriculum management. She declined Fusion's invitations to visit one of its schools in Connecticut or New York where she could have seen how the curriculum is managed. SOF ¶390.

Assuming that Trach genuinely wanted to evaluate Fusion's application, her task was doomed from the outset by her superiors, Berman and Scully, who imposed a non-iterative process. As Scully put it, "I have concern that Fusion seems to think evaluation of their application will be an iterative process, where Andover resources help them identify deficiencies and suggest improvements to their program …." SOF ¶224.[58] Given Policy LBC, which provided Fusion no information about what to include in its application, and given a non-iterative process, it was inconceivable that Fusion would receive its first amendment due. If Fusion did not include digital platforms as a part of its application, then Fusion had failed to provide evidence that its proposed school could function in the manner stated in the applications. No second chances allowed!

The defendants created a process that placed the burden on Fusion to justify its proposed school.. The law is unequivocal that the burden is on the government, not on the person in Fusion's position, to provide the evidence justifying a first amendment restriction.

The defendants have never produced *evidence* that a problem existed with Fusion's proposed school. They sought out no evidence whatsoever about how Fusion's operating schools

[58] This January 14, 2021 email from Scully was directed to ASC attorney, Catherine Lyons, with copies to Bach and Trach. Lyons did not point to the contrary law, cited herein nor the contrary advice of the DESE Advisory. Since the defendants have waived attorney-client privilege in respect of Lyons' advice concerning the application process, Fusion is confident that its statement is accurate.

were functioning during the lengthy periods that the two applications were under review. Had they done so, they would have discovered what is depicted in the Carter reports.[59] They had during the saga and they have now no evidence of any problem, not even anecdotes.[60]

They may tell the Court that Trach is an experienced educator, an "expert" with ample years of teaching and administration and capable of making informed judgments about schools. To the extent that the defendants want to rely on Trach's opinion as evidence of Fusion's failure to meet the statutory criteria, they needed to disclose her as an expert. They have not done so. It is now too late. See Scheduling Order, Doc. No. 76. To the extent that they will offer her testimony as a lay witness, they fall afoul of both Rule 701(a) because Trach did not perceive any aspect of Fusion's operations long enough to judge their effectiveness or lack thereof[61] and Rule 701(c) because the defendants themselves claim that Trach is an "expert" and that is why they relied on her recommendations.

In any event, *Playboy, Turner 1, Asociacion* and the other precedents cited above leave no room for such an argument.

As *Asociacion* teaches, the Court should "apply intermediate scrutiny to determine whether … the effect of [the government actions] on speech and academic freedom is no greater than necessary to protect [their] interest." *Id.* at 16. What Fusion said in the context of equal protection regarding narrow tailoring, see p. 29 above, is applicable here. Since the process was non-iterative, it allowed for no tailoring at all, never mind the narrow kind. When the defendants argue that no one told Fusion what to teach or how to teach, they will omit the fact that, by their

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[59] Among other data in the Carter reports are those showing that more tenth grade students at Fusion's Massachusetts schools score above average than tenth grade students at AHS. SOF ¶¶345-346.

[60] Both of Trach's written recommendations were devoid of facts about how Fusion students actually performed. Her one, concrete data point came in the first recommendation. She there reported to the ASC that Fusion Newton had no science labs. The statement was false. See pp. 21-22 above and SOF ¶¶328-330.

[61] She spent about an hour in one operating Fusion school, Newton. SOF ¶¶326-327.

actions, they told Fusion that it could not teach at all in Andover unless the teaching was a clone of APS.

CONCLUSION

Based on the undisputed evidence and the legal authorities described above, Fusion is entitled to a summary judgment finding that the defendants are liable to it for their violations of Fusion's right to equal protection of the laws, for their violations of Fusion's due process rights and for their violations of Fusion's rights under the first amendment.

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Dated: April 29, 2024

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 April 29, 2024.

/s/ Joseph J. Wadland
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