BOARD OF ELEMENTARY AND SECONDARY EDUCATION

MYSTIC VALLEY REGIONAL CHARTER SCHOOL, **Appellant,** **v.** **MITCHELL D. CHESTER, COMMISSIONER OF ELEMENTARY AND SECONDARY EDUCATION, AND DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION,** **Appellees.**

MEMORANDUM IN SUPPORT OF MYSTIC VALLEY REGIONAL CHARTER SCHOOL'S APPEAL OF THE COMMISSIONER'S DECISION IMPOSING RENEWAL CONDITIONS AND DENYING AN AMENDMENT OF THE SCHOOL'S CHARTER

Dated: May 16, 2013

By: _____

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This is an administrative appeal pursuant to 603 CMR 1.11(6) and Chapter 30A of the Massachusetts General Laws by the Mystic Valley Regional Charter School ("the School" or "MVRCS"). The School seeks review of the decisions of the Commissioner of Elementary and Secondary Education (a) to impose five conditions on the School's charter (Letter from Commissioner Chester, Feb. 15, 2013 (A-1)[1]) and (b) denying the School's request to increase enrollment. Letter from Commissioner Chester, March 12, 2013 (A-2). The School maintains that it has a superior record of compliance with the Open Meeting Law; that the facts do not show otherwise; that its procedures, meetings and governance have been faithful to its charter and its obligations of public accountability and that assertions to the contrary by the Department are wholly unsubstantiated. Demonstrated academic success undermines any suggestion that the School's governance structure jeopardizes the School's organizational viability. The School maintains in this appeal that the conditions imposed on its charter renewal are arbitrary, capricious and discriminatory, without factual bases, and improperly and unlawfully expose its charter to forfeiture.

BACKGROUND

The School applied for a charter on January 5, 1998. The application confirmed an intention to develop a "challenging core curriculum" and "rigorous academic program" with "rich educational resources, high academic expectations for all students and ambitious goals for student achievement . . . [to] offer the area's families a fundamentally different choice in K-12

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[1] Supplied with this Memorandum and made part of this appeal is a Record Appendix containing documents retained or published by the Department of Elementary and Secondary Education or derived from publicly available information and referred throughout this Memorandum as "(A-__)". All references are hyperlinked to allow the reader to view the cited documents on the disk that has been provided.

public education. In so doing, the founders aim to revitalize public education and set the standard and the pace for school reform in Massachusetts." A-3, part I. Among other things, the charter application confirmed that there would be a small board. "It is the experience of the founders that small boards create a more effective body for managing an emerging organization . . . . Accordingly, the Board will begin with a limited number of individuals chosen because of their unyielding commitment to education reform and their leadership in the community. The Board is diverse and will remain so through the School's development." *Id.*, part II.7.B. The Charter was granted on February 25, 1998. The School's by-laws state that "The Board of Trustees shall consist of not less than five Trustees and not more than 11 Trustees . . . ." A-4. Thus, as approved, the charter and by-laws included no requirement for term limits and no conditions.

MVRCS opened in September 1998 to a diverse student population of approximately 510 children in grade K-5. Founded by a dedicated group of parents, educators, businesspeople, and civic activists, the School sought to extend the promise of a world-class education to families throughout Malden and surrounding communities. Nevertheless, in the formative period of its growth, the School encountered multiple obstacles from the educational establishment in Malden and surrounding towns, including opposition from unions, local politicians and educators who challenged the integrity of the proposed curriculum and the very necessity of a charter school. Through the efforts of its committed board, MVRCS persevered.

Originally, MVRCS was located in a Malden building. For the school year 2003-2004, the School educated over 1000 students on two campuses in Malden and Melrose. Currently, MVRCS is located on three campuses in the city of Malden, primarily serving Everett, Malden, Medford, Melrose, Stoneham, and Wakefield. The Eastern Avenue facility in Malden is a new

building that houses a pool and a gymnasium, all of the kindergarten classes, and administrative offices. On May 15, 2013, the School closed on its purchase of the Emerson School Building at 230 Highland Avenue, which is strategically located two blocks from the high school building.

The School successfully obtained renewal of its charter without conditions in 2002 and again in 2007. The School's charter was amended in November 2009 to increase the School's enrollment from 1,400 to 1,500. As of October 1, 2012, the School's enrollment was 1,497.

The School has shown tremendous capacity for growth, including 14 years of unqualified audit opinions with over $20,000,000 in net assets. The School has a Level 1 designation, and has been ranked the 4th best high school in Massachusetts according to Newsweek magazine. Likewise, US News & World Report has ranked the School in the top 1% of high schools in the United States and the 8th best in Massachusetts. The School's Math & ELA results were in top 10 percent in the Commonwealth; in fact, average proficiency levels across all grades were 24% higher for Math and 21% higher for ELA than that of the School's sending districts. The School has a 97% 5-year graduation rate and a 100% college acceptance rate, ranging from local community colleges to Ivy League. The overwhelming majority of parents (rating of 9.2 out of 10) are highly satisfied with their decision to have their child attend MVRCS. *See* A-5.

The MVRCS Board of Trustees is composed first and foremost of individuals who share deep personal bonds with both the School and the City of Malden. Collectively, fourteen of the Trustees' children attend or have graduated from MVRCS. Through their children, the Trustees have experienced all that MVRCS has to offer, from the dedicated teachers who have shaped their children's lives, to the extensive extracurricular activities that fostered their children's passions. The Trustees' history in the City of Malden also runs deep. All of the Trustees were

raised in or around Malden, and two of their families – those of Fran Brown and Neil Kinnon – have lived in the City for over 100 years.

Beyond their board service, the Trustees serve the Malden community in many other ways. Mr. Brennan, for example, serves as the Assistant City Solicitor; Mr. Brown is a member of the Malden YMCA board of directors; Mr. Kinnon represents residents in the City Council; and Ms. Williams donates her time to local religious organizations. Ms. Bissex, a resident of Melrose, has authored books about health and nutrition. The Trustees also possess advanced degrees and a broad range of professional expertise in the fields of finance, law, education, health and nutrition, accounting, and government and military service. They are leaders in both the community and in their professions, overseeing employees, managing funds, caring for families, and shaping public policy. Their combined experiences and unwavering commitment to MVRCS's academic success establish a strong foundation upon which the School community thrives.

In 2002, the Renewal Inspection Report for MVRCS noted that "the Board of Trustees has been a stable and effective body since the school's inception. The Board has effectively handled all organizational challenges and issues it has faced. All members participate regularly in BOT meetings and school functions and clearly understand and support the components of the instructional program . . . . Almost all Trustees send their children to the school.... The Board of Trustees is a viable and active force in the governance of the school." A-6, pp. 19, 28. The School's October 2012 Renewal Inspection Report confirms that "The MVRCS board of trustees has been stable and remains committed to the vision and mission originally conceived when the school was chartered." A-7, p. 22.

Request for Major Amendment

In July 2011, MVRCS applied to BESE to increase the School's maximum enrollment to 1,900 students, thereby enabling the School to add approximately 40 students each year over the next ten years. In December 2011, BESE denied the request. By letter dated July 30, 2012, MVRCS resubmitted its application, seeking a major amendment of its charter pursuant to 603 CMR § 1.11(1) to expand its enrollment cap from 1500 students to 1900 students over a period of twelve (12) years. The School's request cited the availability of seats in one of the School's sending districts (Everett), the School's extensive wait list (2,711 students), and the likelihood that siblings of current students would not be able to attend the School due to cap constraints. A-8.

An internal DESE Amendment Review document identified multiple "strengths" weighing in favor of the School's requested charter amendment, including:

- The School's demonstration of sufficient demand for its educational program;
- The School's waitlist in excess of 2,000 students;
- The School's designation as a Level 1 school and its rank in the 64th percentile.
- The completion of a new School facility in November 2011;
- The School's gradual, phased expansion plan; and
- The School's academic design and curriculum structure.

A-9 (Amendment Request Review Chart).

Moreover, the School's October 2012 Renewal Inspection Report confirmed that the School met all three measures related to faithfulness to its charter, met five of the six measures related to academic program success, and met all three measures in its accountability plan related to organizational viability. A-7, pp. 9, 20, 29, 31-33. The School's request to increase enrollment was thus well supported and justified. Nevertheless, apparently because of anonymous complaints and because of alleged failures to comply with the Open Meeting Law, which the School maintains are baseless, the Commissioner imposed conditions on the School's

renewed charter in February 2013 (A-1) and denied the School's cap increase request in March 2013. A-2.

I. THE COMMISSIONER'S DECISION WAS NOT BASED ON FACTS AND NOT THE RESULT OF EVEN-HANDED APPLICATION OF OBJECTIVE CRITERIA.

A. Administrative Law Principles Require Fair and Uniform Application of Objective Criteria.

Not only are facts required to support administrative decision-making, but agencies are not lawfully entitled to take inconsistent positions on a particular issue. *Lowney v. Comm'r of Revenue*, 67 Mass. App. Ct. 718, 723-24 (2006). Indeed, when an agency's decision is inconsistent with prior decisions, the decision may be challenged as arbitrary and capricious. *Higgins v. Dep't of Envtl. Prot.*, 64 Mass. App. Ct. 754, 759 (2005) (suggesting agency decision would be arbitrary and capricious if inconsistent with prior cases).

It is also clear that arbitrary conditions are impermissible when unrelated to existing objective criteria. *See, e.g., Cape Cod Builders, Inc. v. Commonwealth*, 2009 BL 180199, at *2 (Mass. Super. Ct. Mar. 26, 2009) (indicating that agency must carefully adhere to "objective criteria" where applicable in rendering decision); *Nichols v. Brewster Conservation Comm'n*, 2008 BL 273079, at *8 (Mass. Super. Ct. Sept. 2, 2008) (where an "agency is limited by narrow and objective criteria," the agency's decision-making must conform to that criteria to avoid being arbitrary and capricious). It is also arbitrary to impose requirements on one party but not uniformly apply the same requirements to similarly situated parties. *See Fieldstone Meadows Dev. Corp. v. Conservation Comm'n of Andover*, 62 Mass. App. Ct. 265, 268 (2004).

In short, fairness requires objective decision-making made pursuant to reasonable procedures. *Goldstein v. Bd. of Registration of Chiropractors*, 426 Mass. 606, 612 (1999) ("fundamental considerations of fairness require [administrative] decisions . . . to be made

objectively, under reasonable procedures") (alterations in original) (quoting *Milligan v. Bd. of Registration in Pharmacy*, 348 Mass. 491, 495 (1965)). The School submits that it has been treated differently, in disregard of objective criteria, reasonable procedures, and the relevant facts.

B. The Commissioner Did Not Consistently Apply Criteria Relating to Open Meeting Law Compliance.

The MVRCS Amendment Review document (A-9) notes that one of the few "weaknesses" in the School's application for charter amendment was a concern about its "adherence to open meeting law requirements." MVRCS submits that it is doubtful that any public entity, including the Department, can claim perfection in compliance with the Open Meeting Law. Indeed, while the School's record on compliance with the Open Meeting Law may not be perfect, its compliance is far beyond a mere passing grade. Meetings of the Trustees are regularly posted at the School, on the website, in public places and in a broadcast e-mail to parents. Most meetings contain an opportunity for public questions and comments. No complaint has even been received by the School from any member of the public about non-compliance with the open meeting law. The Attorney General has not notified the School of, or acted on, any complaint.

The only comments in the Department's records or reports respecting the School's compliance were the following:

* The team's review of board meeting minutes, including minutes of executive sessions, indicated that some topics discussed in executive session did not appear consistent with the ten specific purposes for which an executive session may be convened under the open meeting law, M.G.L. c. 30A, §§18-25. For example, the board minutes for the meeting held on June 25, 2012 stated: "It was then MOVED, SECONDED and unanimously VOTED to go into executive session to discuss pending litigation, personnel matters, contracts, strategies." However, the minutes of the executive session consisted of only one sentence: "Reviewed recommended merit based increases and Leadership team bonuses for the 2011/2102 (sic) school year for the Leadership team." The executive session minutes did not reference litigation, contracts, or strategies. Moreover, the discussion of merit-based increases and bonuses for the leadership team did not appear to fall within one of the ten specific purposes identified in the open meeting law, which

allows an executive session to be held to discuss "the reputation, character, physical condition or mental health, rather than professional competence, of an individual." The executive session minutes indicate that the board has also reviewed mathematics class issues and tests and a music trip, which do not appear to fall within the ten purposes specified in the open meeting law.[2]

* The board meeting minutes indicate that the board has appointed various committees for certain purposes, including the oversight of building projects and finances, and board members stated that other committees are created from time to time such as education and nutrition committees. Most of these consist of one board member and one or two administrators. Administrators and board members reported that the building committee has kept detailed minutes, but that other committees have been much more informal and reportedly have not kept minutes, as required by the open meeting law.

A-10 (Summary of Review, Feb. 2013), pp. 26-27; A-7 (Renewal Inspection Report, Oct. 2012), pp. 24-25.

The foregoing does not support a factual finding that the School has failed to comply with the Open Meeting Law. Rather, this confirms that the Open Meeting Law problem, such as it is, appears primarily to be confined to the interesting question of whether a one person subcommittee can have meetings that violate the Open Meeting Law. In each case, any one Trustee that served in such a capacity was clearly being asked by colleagues to investigate an issue for the board and report back. The reporting back was fully captured by the board minutes.[3]

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[2] While the School agrees it would have been preferable for the motion to convene in executive session to have omitted the word "litigation" from the list of topics that would be discussed, the Open Meeting Law permits discussion in executive session "to conduct strategy sessions in preparation for negotiations with nonunion personnel... or contract negotiations with nonunion personnel." Mass. G.L. c. 30A, § 21(2). The discussion of compensation that the Trustees propose to offer employees in a subsequent contract, including strategies relating to the negotiation of merit-based increases and bonuses for the leadership team, is an appropriate matter for discussion in executive session. *See* Letter from Shapiro & Hender, Nov. 8, 2012 (A-11).

[3] A fair reading of the Open Meeting Law suggests that a subcommittee comprised of a single member of the board, even if working with other non-members, does not qualify as a "subcommittee" under the Open Meeting Law. Mass. G.L. c. 30A, § 18 (defining "Public body" as "a multiple-member board, commission, committee or subcommittee within ... any county, district, city, region or town... established to serve a public purpose... and provided further, that a subcommittee shall include any multiple-member body created to advise or make recommendations to a public body."); *see also* A-29 (Charter School Administrative and Governance Guide), p. 11 ("Task forces comprised of Board members and members of the school community that discuss and make

The comment and the criticism, apart from its lack of merit, hardly warrants a forfeiture condition.[4]

In contrast, other schools with undisputed and serious Open Meeting Law compliance issues were renewed without conditions. It cannot be appropriate to violate the Open Meeting Law in Springfield but not in Boston. In the School's case, any conditions arising out of perceived violations is unfair and unsupported. Finding "a violation [of the Open Meeting Law] is a matter for the exercise of sound judicial discretion," and accusations of violations should not be alleged absent a thorough inquiry. *Johnson v. Sch. Comm. of Sandwich*, 81 Mass. App. Ct. 812, 815 (2012). There was no thorough inquiry, no facts to support any "concern" and obviously no uniform enforcement process. What is clear from the record is that the School has been in substantial compliance with the Open Meeting Laws and that any deviations were somewhat ambiguous and quite clearly at the margins. In fact, DESE chose to ignore multiple

(continued...)

recommendations in an area that is the responsibility of the school leader are not subject to the requirements of the Open Meeting Law provided a quorum of the Board is not present.")

[4] Indeed, if the Attorney General, who is charged with enforcing the Open Meeting Law, were to pursue a complaint and find a violation of the Open Meeting Law, the consequence that the Department seeks to impose is more harsh than those contemplated in the Open Meeting Law, where, "upon the finding of a violation, the attorney general may issue an order to:

(1) compel immediate and future compliance with the open meeting law;

(2) compel attendance at a training session authorized by the attorney general;

(3) nullify in whole or in part any action taken at the meeting;

(4) impose a civil penalty upon the public body of not more than $1,000 for each intentional violation;

(5) reinstate an employee without loss of compensation, seniority, tenure or other benefits;

(6) compel that minutes, records or other materials be made public; or

(7) prescribe other appropriate action."

Mass. G.L. c. 30A, § 23.

instances of other schools failing to keep adequate trustees' minutes and did not even consider such failures to constitute "weaknesses" when evaluating the schools for renewal or charter amendment. Some of these schools made no pretense at compliance. Some failed to keep minutes at all. Although the Department was fully aware of these circumstances, these schools had charters renewed without conditions.

For example, the Renewal Inspection Report for **Academy of the Pacific Rim Charter School** states: "The board committees have not maintained minutes of their meetings, as required by the open meeting law . . . . The team received and examined minutes of the board's regular meetings and executive sessions for school years 2009-2011. Board members confirmed that they have not kept minutes for committee meetings . . . ." A-12, p. 29; *see also id.*, p. 38 ("The school has not complied with all laws, rules and regulations: the Coordinated Program Review identified some compliance issues, and the board has not maintained minutes of committee meetings as required by the Open Meeting Law."). However, DESE's Amendment Review form indicates that no "weaknesses" were identified in connection with APRC's amendment request. A-13.

The Renewal Inspection Report for **Excel Academy Charter School** shows that the inspection team was not provided with any board committee minutes. A-14, pp. 25-26. However, the DESE's Amendment Review form for Excel does not list Open Meeting Law violations as "weaknesses." A-15.

The Amendment Review document relating to **Codman Academy** also does not include any violations of the open meeting law as a "weakness." A-16. However, Codman's Renewal Inspection Report (A-17), p. 29, states: "Codman did not provide the team with meeting minutes from any committees other than minutes from the finance committee for the past school year and

minutes of one development committee meeting. In addition, Codman did not provide minutes of an executive session reported in the board meeting minutes. Thus, it appears that the board has not fully complied with the requirements of the open meeting law (M.G.L. c. 30A, §§18-25) . . . . The board members interviewed by the team acknowledged that the board had not fully complied with the law in these respects."

The Commissioner also overlooked violations of the Open Meeting Law at **Community Day Charter Public School** ("CDCP"). *See* A-18. Page 30 of CDCP's Renewal Inspection Report says:

> The team's review of board and committee meeting minutes for the period of July 5, 2005 to December 17, 2008 indicated that the minutes did not provide a complete or accurate picture of board and committee activities. During the interview with board members, the team learned that the board had held additional meetings for which no minutes were provided to the team. In addition, the team learned that some meeting minutes provided to the team were inaccurate. Some meeting minutes indicated that members of the boards of CDCPS and TCG served jointly on several committees, including an investment committee and a building committee; however, the board members interviewed by the team stated that the boards of CDCPS and TCG are separate and do not have committees with members from both boards. They said that the meeting minutes indicating otherwise were incorrect.

A-19.

In each of the above cases, the charters were renewed without conditions. *See also* A-20, p. 26 (Foxborough Regional Charter School was renewed without conditions, despite the lack of committee meeting minutes.)

There was no basis to treat MVRCS any differently from these schools, and courts have overturned the decisions of other school boards that similarly have imposed unequal standards. In *Montessori Regional Charter School v. Millcreek Township School District*, for example, a Pennsylvania appellate court determined that the school board acted arbitrarily and capriciously when it required one charter school to satisfy certain conditions beyond those placed on other

schools. 55 A.3d 196, 200 (Pa. Commw. Ct. 2012). The court rejected the school board's argument that statutory and regulatory silence entitled the board to impose indiscriminate conditions at its discretion. *Id.* at 202.

C. The Commissioner Did Not Consistently Apply Criteria Relating to Term Limitations and Charter School Governance.

The Commissioner objects to the long tenure of certain board members at MVRCS. MVRCS currently has a five-member board. The Commissioner wants to change the School's trustees, although his reason appears to be abstract that it may be a good thing to have changes in trustees. No trustee here has been accused of any impropriety. The contention here is hardly "factually warranted . . . in the sense of having adequate evidentiary and factual support . . . ." *In re Goodwin's Case*, 82 Mass. App. Ct. 642, 644 (2012). The present trustees have disagreed with the Commissioner not because term limits are never appropriate, but because, as the School's original charter application stated, the trustees do not believe term limits are worthy of consideration until and unless the School has passed through its formative period of growth. *See* A-3. Ironically, the Commissioner's refusal to increase the cap is frustrating that growth.

General Laws c. 71, §89(aa) provides that "the internal form of governance of a charter school shall be determined by the school's charter." The School's charter has not contained term limits and it has been renewed each time without conditions. The fact that it has no term limits was never concealed and the School's board has acted faithfully in conformity with its charter. The Commissioner's new "policy" regarding term limits has been applied selectively to this School; the trustees' position about board size and function has been consistent from the start, clearly expressed in the initial charter application. *See* A-3. So the School's charter renewal is now being subject to a forfeiture condition precisely because the trustees have acted in full compliance with the preexisting rules for the School's governance in its original charter. How

can this make sense, legally or equitably? And on what basis can the Commissioner force a charter amendment as a condition for avoiding forfeiture– a condition which has not uniformly been applied to all charter schools? This new term limitation condition conflicts sharply with the Commissioner's treatment of other charter schools, many of which have similarly long-serving board members. In fact, most charter schools do not have term limits.

(a) The **Foxborough Regional Charter School** does not have a cap on the number of three-year terms a board member may serve. The school currently has a five-member board, and two members have served at least five three-year terms (15 years minimum). Foxborough's charter application was renewed without conditions, despite meeting only three out of seven measures related to academic program success. New by-laws without term limits were approved in the last two years. A-20, pp. 6, 32-36.

(b) The **Academy of the Pacific Rim** does not have term limits. As of October 2011, the board was composed of ten members, with one member who has been on the board for 17 years. APR's charter was renewed without conditions regarding its board (one condition was imposed regarding fixing Special Education Program), despite having met only five of the seven measures related to academic program success. A-21, pp. 6, 34-38.

(c) **Codman Academy** does not have term limits. As of September 2010, at least one board member had served for ten years. Codman's charter was renewed without conditions despite having met only one of two goals pertaining to academic success, and two of three related measures. Codman did not meet its goals related to viability. A-22, pp. 7, 9, 15, 25.

(d) **Prospect Hill Academy Charter School** does not have term limits, and has a member who has served for 16 years. A-23, p. 6. Prospect Hill's charter was renewed without conditions despite not having met any of the goals in its accountability plan related to academic success and meeting only one of seven goals pertaining to the school's faithfulness to its charter. *Id.*, pp. 9, 14. Moreover, only 14 of the 18 board members attended at least 75% of all board and designated committee meetings in the 2009-2010 school year. *Id.*, p. 31.

(e) **Neighborhood House Charter** lists a number of "Trustees for Life" on its website.

There is no legal basis for the Commissioner to require the School to change its by-laws to set term limits. In the absence of a rule generally applicable to all charter schools, the Commissioner cannot impose it selectively through the threat of forfeiture. *Town of Norton v.*

Gillis, 2007 BL 238248, at *3 (Mass. Super. Ct. Mar. 14, 2007) (selectively enforcing rule may be arbitrary and thus unlawful). A no-term limits rule is fully compliant with state law and the terms of pre-existing and approved charters.

If term limits are intrinsically worthwhile, they should be applied to every charter school through the process of rulemaking and not made potentially forfeiting conditions for only one or a few charter schools. *See Lighthouse Masonry, Inc. v. Taylor*, 2012 BL 99920, at *4 (Mass. Super. Ct. Apr. 2, 2012) (indicating that administrative policies should be uniformly applied). Certainly, term limits should not be a condition of charter renewal subjecting an otherwise compliant school to forfeiture of its charter.[5] If it is a policy question, which internal DESE documents suggest that it is,[6] it is simply not an appropriate condition to apply on an ad hoc basis especially under threat of forfeiture. *See Anusavice v. Bd. of Registration in Dentistry*, 451 Mass. 786, 794 (2008) (stating that agency may adopt policies either through formal rulemaking or adjudication). Indeed, the imposition of sanctions for not providing term limits suggests that the Commissioner is acting upon an "ad hoc agenda" "for reasons that are extraneous to the prescriptions of the regulatory scheme." *Fafard v. Conservation Comm'n of Reading*, 41 Mass. App. Ct. 565, 568 (1996). The conditions penalize MVRCS for complying with its own

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[5] There is also an ongoing debate regarding the propriety of term limits. *See, e.g.*, M. Hrywna, *On Board for Term Limits*, The Non-Profit Times (2013)(A-24) ("[T]here's ongoing debate whether [term limits are] appropriate or not. Limits can force new blood on a board, which can be a good thing but sometimes organizations lose people who are competent, who can serve and want to serve, but can't. There's a valid debate on both sides of the issue . . . . I think an organization ought to be able to manage itself without forcing people off the board. Sometimes . . . groups get stuck and can't remove people who they want to. It's a matter of considerable debate.'").

[6] *See* A-25a. On October 5, 2010, Associate Commissioner Jeff Wulfson confirmed that there is "no state requirement" that a charter school have a particular number of trustees, and instead referred to the School's by-laws which describe the number of trustees. Though DESE may wish to implement policy requiring board restructuring, there is no present legal requirement that a board have a certain number of members or that it set term limits. *See* A-25b (Wulfson email, 2/6/13) ("The assumption is that if you have board members with appropriate skills who attend and participate, bring in new faces periodically, comply with OML, have full discussion of major issues, and periodically self-evaluate, it strengthens the school and will improve student learning.")(emphasis added).

previously-ratified charter. Mass. G.L. c. 71, § 89(aa). "[T]he basis for the action is not uniform, and, it follows, is not predictable." *Fafard*, 41 Mass. App. Ct. at 568.

Although the independent team that prepared the MVRCS Renewal Inspection Report suggested a concern about the longstanding and continuous service of the School's board without membership changes, the team did not imply or suggest that such continuity in any way harmed the School or that the School should be penalized for it. The School has survived many challenges and achieved much growth as a result of a stable and dedicated board whose constancy has promoted the success of this School. Whether or not term limits make sense at some point after the School is fully grown, or whether the Department wants to insist on some kind of term limits for all charter schools, this School should not be penalized with a condition, selectively imposed, that requires it to alter the lawful governance arrangement in its existing charter.

The significance of imposing conditions for a fairly mature school cannot be understated. This School has a $7 million bond obligation outstanding and other significant financial relationships. The underlying circumstances do not justify creating the appearance of a risk that the charter will be lost. Even if the Department does not believe such a risk is realistic, third parties relying on the integrity of the charter and evaluating risk have no way of knowing that.

D. The Charter School Statutory Regime Requires Even-Handed Application of Specific Objective Criteria.

The statutes and regulations governing charter school applications and charters call for the application of objective criteria. Although the Commissioner may choose to characterize his evaluation as being "unique" to each school, the criteria of approval and renewal are not intended to be unpredictable or wobble from school to school or satisfy ad hoc experiments in school governance.

These conditions expose the charter to forfeiture. It is not lawful to impose a forfeiture condition respecting term limits or open meeting laws on one school because the Department staff may subjectively become annoyed with a particular group of trustees or choose to credit anonymous complaints. In this case, it would be difficult to challenge the remarkable success of this School or attribute any failure of performance to this collection of very capable trustees. It is clear that the Legislature did not intend that charter applications or renewal standards be subjectively determined or applied. The Board delegates to the Commissioner the authority to evaluate applications for charters, charter renewals, and charter amendments, subject to the Board's review. The Commissioner is bound by Mass. G.L. c. 71, § 89 and 603 Code Mass. Regs., § 1.00 et seq. The statute and regulations acknowledge that the Commissioner may impose conditions on charter schools, but it is clear that such conditions must be based on specific, objective criteria, even-handedly applied.

Chapter 71, § 89(j) states: "The board shall make the final determination on granting charter school status and may condition charters on the applicant's taking certain actions or maintaining certain conditions. The board shall establish criteria for the approval of a charter application and recommendations to the board shall be based upon and reference those criteria." This section speaks to "established criteria" for charter approval and section 89(ee) acknowledges that the failure to accede to specified conditions can result in forfeiture of the charter. Mass. G.L. c. 71, §89(ee) ("The board may revoke a school's charter if the school has not fulfilled any conditions imposed by the board in connection with the grant of the charter or the school has violated any provision of its charter. The board may place conditions on a charter or may place a charter school on a probationary status to allow the implementation of a remedial plan after which, if said plan is unsuccessful, the charter may be summarily revoked."). All of

this is to achieve compliance with "established criteria." The use of conditions makes it abundantly clear that any such conditions may be life-threatening to the charter and must only be imposed subject to established criteria referenced in section 89(j) even-handedly applied. 603 Code Mass. Regs. 1.00 ("The purpose of 603 CMR 1.00 is to provide uniform rules and procedures governing the establishment and operation of charter schools.") (Emphasis added).[7]

Likewise, Chapter 71, § 89(dd) addresses charter renewals. This section spells out the specific criteria to which the board must be attentive in renewing a charter: "progress made in student academic achievement, whether the school has met its obligations and commitments under the charter, the extent to which the school has followed its recruitment and retention plan by using deliberate, specific strategies towards recruiting and retaining [certain] categories of students . . . and the extent to which the school has enhanced its plan as necessary." The language of the section explicitly states the kinds of renewal circumstances to which conditions may be applied: "The board may impose conditions on the charter school upon renewal if it fails to adhere to and enhance its recruitment and retention plan as required." This School has done that and has done that well. The statute does not leave room for the Commissioner to impose conditions in these circumstances.

At the time of original charter application, the statutory framework is based upon the existence of required and rational objective criteria. Renewal is based upon progress markers explicit in the statute. Conditions on renewal are allowable "if it [the School] fails to adhere to and enhance its recruitment and retention plan as required." There is no finding of failure here.

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[7] It is also reasonable for charter schools to expect that objective criteria will be employed to evaluate whether a charter amendment is warranted, as set forth in Technical Advisory 11-1, entitled "Charter Amendments." That Advisory focuses on a school's academic success, need, capacity, finances, and planned implementation.

There can be no doubt that this School has fully satisfied its renewal and retention plan. The Department has admitted as much. The conditions are not only without a basis in fact but they bear no relationship to the standards for renewal or retention, which standards have been fully met. Moreover, the statutory provisions require objective criteria in the initial application process, and in the context of renewal, certain objective progress markers. The statute makes it clear that the consequences of failing to fulfill charter conditions are significant. Conditions expose a school to probation and forfeiture or revocation of the charter. Mass. G.L. c. 71, §89(ee); 603 CMR § 105(3); *see* A-1 (Feb. 15, 2013 Letter) ("This renewal is explicitly conditioned as follows. Failure to meet this condition may result in the Board placing Mystic Valley Regional Charter school on probation, revoking its charter, or imposing additional conditions on the charter.")

Conditions that are either not based upon facts or unrelated to legitimate objective criteria or the statutorily identified progress markers are therefore unlawful. *See Franchi v. Falmouth Conservation Comm'n*, 2007 BL 194549, at *5 (Mass. Super. Ct. July 10, 2007) (conditions not reasonably related to regulatory scheme are arbitrary and capricious). The dire consequences that can result from failed conditions entitle the School to a decision-making process that is fair, factually based and governed by appropriate criteria applied in a consistent manner. *See Bd. of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 594 (2008) (agency imposed "conditions" that threaten party's very existence operate as a "de facto" forfeiture and entitle aggrieved party to "the same exacting standards as a" forfeiture). Instead, the Commissioner's conditions initiate "a hybrid [charter] revocation process that [is] riddled with inconsistencies." *Williamsburg Charter High Sch. v. N.Y. Dep't of Educ.*, 950 N.Y.S.2d 658, 673 (N.Y. Sup. Ct.

2012) (finding unpredictable, informal conditions resulted in arbitrary charter revocation process).

In this case, the substantial weight of the relevant considerations strongly favor granting the School's amendment request with no conditions. The barriers that have been imposed by the Commissioner do not comport with well-established administrative principles, legal requirements, or basic notions of fairness.

E. The Commissioner's Decision Was Arbitrary and Capricious Because It Apparently Credited Anonymous Complaints about the School.

The Commissioner apparently based the charter conditions, and therefore the denial of the enrollment cap increase, on "specific concerns" that were supposedly "raised repeatedly surrounding board governance and adherence to open meeting law requirements." *See* A-9. A careful review of the communications that DESE has provided to the School makes clear that the majority of the communications are not "complaints" but rather inquiries or requests for information. A-26. Moreover, to the extent communications can be characterized as complaints, the majority were either not provided to the Board or were submitted anonymously.

Finally, there are no facts in the Department's files which can support the contention that the board is over-managing the School, should be term limited or treated as non-compliant with open meeting laws.

1. Communications From Named Parents or Citizens.

The Charter School regulations require that complaints about a charter school be filed directly with the School's board of trustees. 603 CMR, § 1.10. The board must respond within 30 days. Only if a complaining party believes that the board has failed to address the complaint should the person submit the complaint to the Commissioner.

At the School's request, the DESE recently provided copies of all "complaints" which

formed the basis of the decision to impose conditions. There are twelve (12) distinct email chains from persons who provided their identities. Only three (3) of those complaints were addressed to the School and then elevated to DESE. None of those complaints relate to "board governance and adherence to open meeting law requirements."[8]

There are nine (9) email chains from persons who provided their identities but were not required by DESE to follow the prescribed complaint procedures. Only one (1) such communication can be characterized as a complaint. In that communication, a parent accused the School of purchasing a home for its Superintendent. The complaint was completely baseless. Not only were the allegations in the complaint false, but the complaint was never disclosed by the Department to the School, and the School never had an opportunity to respond. In any event, these alleged complaints do not relate to "board governance" or open meeting law procedures.[9]

2. "Complaints" Submitted by Anonymous Parties Should Be Rejected.

The Commissioner's decision was apparently influenced by anonymous complaints that all appear to have come from a single source in September and October 2010. That source has remained anonymous. It initially sent anonymous emails (from "Unofficial MVRCS"), but when DESE refused to respond to anonymous communications, the author then used an alias

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[8] These consist of: 1) a complaint by parent who missed the lottery, 2) complaints about the School's transportation policies, a matter that was addressed with DESE and resulted in reimbursement of fees to parents; and 3) a challenge by the Everett Public Schools about residency statistics.

[9] Of the remaining communications, three (3) involve requests for information about the School's processes and two (2) appear to be providing general information to DESE. The final grouping of internal DESE communications from a named party pertain to the School's handling of a claim of abuse or neglect of a student under Mass. G.L. c. 119, §51A. Notably, the Department of Children and Families subsequently determined that the School was not responsible and DESE also acknowledged that the School had resolved the situation to its satisfaction.

("Christian Korando-Block"). There is no such person. To the extent the Commissioner considered the anonymous email communications, his decision is inherently flawed.

First, the communications have no legal force and effect because they were never disclosed to the School, in violation of 603 CMR 1.10. Rather than confirming that complaints had been shared with the School, DESE responded to almost every communication directly.[10] Presumably, this unorthodox procedure was followed because the same anonymous source had been communicating with the Governor's office. However, even to eliminate annoying harassment of the Governor or his staff, the Department is not privileged to credit any complaints made on an anonymous basis. *See id.;* A-27 (DESE Problem Resolution System Information Guide), question 5: "The Department cannot take action to investigate and resolve a problem that was reported anonymously . . . . Department procedures require that a complainant sign the written complaint, and include his or her contact information in it." Apparently, not in this case. Reliance on anonymous complaints in issuing sanctions (particularly where such reliance is expressly prohibited) is inherently unfair. *See Fieldstone Meadows Dev. Corp.*, 62 Mass. App. Ct. at 270 n.7 ("The commission's reliance on anonymous sources alone . . . would not be sufficient . . . .").

Second, although persistent and strident, the anonymous attacks on the School's board by such a source cannot reasonably be characterized as "specific concerns" that "have been raised repeatedly." Even the Commissioner's staff grew frustrated with the author's cloak of anonymity and refused to respond unless he revealed himself. A-28. It is unclear why the

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[10] In only one circumstance did DESE ensure that the proper complaint procedures had been followed, and in that instance, DESE learned that the complaining party had sent his complaint to non-existent email addresses at the School. When DESE notified the School of the complaint, the School prepared a prompt response.

Department would provide any more credence to an author whom they acknowledged was using an alias than one who wrote anonymously, but in any event, DESE has not provided any documentation showing that it investigated the complaints that "Mr. Korando-Block" raised. See 603 CMR 1.10(4) ("A complaining party who believes the complaint has not been adequately addressed by the charter school board of trustees may submit the complaint in writing to the Commissioner, who shall investigate such complaint and make a written response.") (Emphasis added). Courts will not hesitate to disturb an agency's action predicated on violations of the agency's own regulations. *See TBI, Inc. v. Bd. of Health of N. Andover*, 431 Mass. 9, 16-17 (2000).

3. The Commissioner Does Not Possess Information, Through The Investigation Of "Complaints" Or Otherwise, To Support A Conclusion That The Board Lacks Transparency Or Accessibility.

The Department also claims to have received complaints that the School is over-managed by this Board. This may be a less than complimentary way of acknowledging an attentive board. The contention here is that this collection of trustees paid too much attention to curriculum, although there is no obvious example cited. The board did not draft the curriculum. It did review it. However, none of the alleged instances of overstepping are supported by any facts or evidence. For example, the Commissioner's staff has pointed to minutes that show the board's attention to curriculum issues, suggesting that the Director of the school or its faculty should be left alone to attend to such matters exclusively. However, the statute explicitly provides: "The board of trustees, in consultation with the teachers, shall determine the school's curriculum and develop the school's annual budget." Mass. G.L. c. 71, §89(w). These are not delegable duties.

The relevant statutory and regulatory law grants to the Board of Trustees of a Charter School broad powers to control and oversee the school. The DESE guide entitled "Charter School Administrative and Governance Guide: An Overview of the Laws and Regulations that

School Leaders and Boards of Trustees Need to Know" confirms that the Board of Trustees is the primary governing body of the School, with the overriding power to manage and direct the school. A-29 (Charter School Guide), p. 2 ("[T]he members of the Board of Trustees of a charter school are responsible for governing the schools and hold the charter for the school, as it is granted by the Board of Education. A strong Board of Trustees defines the mission of the school, develops school policies and changes them when appropriate, hires qualified personnel to manage the school's day-to-day operations and holds them accountable for meeting established goals, and formulates a long-range plan and charter school Accountability Plan that will ensure the school's continued stability.").

The Commissioner has not demonstrated any factual basis to suggest that this "strong Board" exceeded its authority or, in fulfilling its statutory duty, involved itself unduly in the management of the School. The Commissioner's decision is therefore untenable. *See Rivas v. Chelsea Housing Auth.*, 464 Mass. 329, 334 (2013) (stating that court may set aside agency decision unsupported by reliable evidence).

Apparently to attempt to justify a condition of charter renewal, the staff took liberties with the findings of the Renewal Inspection Report. The Renewal Inspection reported:

> board meeting minutes reviewed by the team indicated that stakeholders have expressed their concerns to the board about various issues, such as bus routes, the use of Nooks and Kindles in school, book purchases from Amazon to save money, suggestions such as a daily bulletin board, MCAS results, class sizes, and new security for schools. In addition, parents told the team that the school has a parent-teacher organization (PTO) and a parent advisory committee to create a sense of community with teachers and administrators as well as to sponsor fundraising events. Team members reviewed a survey that assistant directors sent to parents annually; the surveys included no questions about the board. Administrators also reported that department heads and assistant directors have an opportunity to submit proposals during the development of the budget, which is then reviewed by the director and the treasurer before submission to the board.

A-7 (2012 Renewal Inspection Report), p. 25.

The Department's staff "summarized" those statements as follows:

> Board meeting minutes reviewed by the year twelve site visit team indicated that stakeholders had expressed their concerns to the board about various issues. The site visit team reviewed a survey that assistant directors sent to parents annually; the surveys included no questions about the board. The renewal inspection site visit team observed **similar practices of stakeholder exclusion and board inaccessibility** during the year fourteen.

A-10 (Summary of Review, Feb. 2013), p. 24 (emphasis added). The bolded language was not in the Renewal Inspection Report but represented a new gloss offered by the staff in supposedly summarizing the Report. In turn, this staff twist has become the justification for the condition imposing term limits but is not based on the facts found by the Renewal Inspection team.

F. The DESE's Decision-Making Process Relating to the Imposition of Conditions Was Not Transparent.

The School is concerned that there are no documents evidencing internal DESE discussions regarding the School's charter amendment request between the date it submitted its application and December 26, 2012, when Associate Commissioner Chuang advised a staff member that MVRCS and two other schools were "lower priority, and may not be moving forward in the [proven provider] process for other reasons." A-30a. There are no facts set forth that show Open Meeting Law violations of any meaningful consequence, or show any conduct on the part of these individual trustees that would warrant term limitations as to them. There may be "concerns" and there may be anonymous complaints, but there is nothing in the Department's files that justify recognizing the success of this School with any conditions or warrant exposing its charter renewal to conditions of forfeiture.

On January 9, 2013, Mr. Chuang asked his team whether there was a "preliminary verdict" about MVRCS. A-30b. In response, Ms. Bagg indicated that "we have had ongoing concerns regarding governance/enrollment," but she did not disclose the basis for those concerns.

That same day, Mr. Chuang again confirmed to a staff member that "we may decline [MVRCS's request] for other reasons." A-30a. The "other reasons" are never stated. Reliance on these unsubstantiated "other reasons" raises serious concerns regarding the DESE's decision-making process. *See Cadle Co. v. Mass. Div. of Banks*, 2006 BL 127823, at *8, *10 (Mass. Super. Ct. Nov. 17, 2006) ("agency must rely on evidence bearing sufficient indicia of reliability," and unsupported reasons may suggest ad hoc agenda).

The circumstances surrounding the development of the conditions imposed on the School's charter are also troubling. In his February 8 memorandum to BESE, the Commissioner acknowledged that MVRCS "is an academically successful school . . . is faithful to its charter, has disseminated models of best practices for replication, implemented a Recruitment and Retention plan, and met a majority of the measures contained in its accountability plan." Nevertheless, he concluded that there is a "clear record of insularity and opaque decision making" at the School. A-31. But there is no such record and nothing is offered to explain the basis of this assertion. Indeed, the Department's records and the objective achievements of this School confirm its entitlement to renewal without conditions.

The Commissioner's rhetoric is not supported by the Renewal Inspection Report, the Summary of Review or the Amendment Review form. The conditions attached to renewal here are simply not contemplated by the statutory language and do not fall within the purview of the objective criteria required by the statute. None of the conditions attached to the renewal relate to facts in the Department's records which could warrant forfeiture or probation. The Department will admit as much. It will also admit that it cannot force term limits under existing Massachusetts law. It will further admit that where there has been serious and demonstrable non-compliance with the Open Meeting Laws, it has renewed charters without conditions. What

is happening here is the use of excessive regulatory power to strong arm this School into compliance with policies that have not been adequately vetted or uniformly applied. There is no justification to make this School a regulatory precedent for new initiatives or an example of regulatory control. Policy changes should be accomplished through rulemaking and other statutory options and not through "opaque" reasoning and insupportable charter conditions.

CONCLUSION

The Commissioner's decision to impose conditions and reject the Charter Amendment lacks any reasonable factual or legal basis. It exposes the School and those families within the districts served to unfair and disparate conditions and those conditions unreasonably expose the School to the forfeiture of its charter. The Commissioner's action was arbitrary and capricious and needlessly harms the communities and families served by the School.

The School respectfully requests that the Board renew the School's charter without conditions and grant the School's Charter Amendment Request.