

COMMONWEALTH OF MASSACHUSETTS

Bristol, ss.

Superior Court Department  
Civil Action No.

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RICARDO ROSA, BENVINDA ROSA, )  
JOHN FERNANDES, CAROL STRUPCZEWSKI, )  
LEILA ROSA, CORIN THOMAS, )  
ADRIAN VENTURA, HANNAH COUNCIL, )  
JOSHUA COUNCIL and JOSE A. SOLER )  
as they are TEN TAXABLE INHABITANTS )  
OF THE CITY OF NEW BEDFORD, )  
MASSACHUSETTS, and the MASSACHUSETTS )  
TEACHERS ASSOCIATION, )  
Plaintiffs, )  
v. )  
CITY OF NEW BEDFORD, MASSACHUSETTS, )  
NEW BEDFORD SCHOOL COMMITTEE, )  
ALMA DEL MAR CHARTER SCHOOL, and )  
MASSACHUSETTS DEPARTMENT OF )  
ELEMENTARY AND SECONDARY )  
EDUCATION, )  
Defendants. )

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**COMPLAINT**

Plaintiffs, 10 taxable inhabitants of the City of New Bedford (the “Individual Plaintiffs”) and the Massachusetts Teachers Association (the “MTA”), seek declaratory and injunctive relief against Defendants the City of New Bedford (the “City”), the New Bedford School Committee (the “School Committee”), Alma del Mar Charter School (“Alma del Mar”), and the Massachusetts Department of Elementary and Secondary Education (“DESE”) regarding a proposed transfer of land and other things of value by the City and the School Committee to Alma del Mar that would violate the Anti-Aid Amendment to the Massachusetts Constitution, Mass. Const. art. 18, § 2, as revised by Articles 46 and 103 (the “Anti-Aid Amendment”).

## The Parties

1. The Individual Plaintiffs are taxable inhabitants of New Bedford residing at the following addresses:
  - a. Ricardo Rosa, 36 Cindy Lane, New Bedford, MA 02740.
  - b. Benvinda Rosa, 36 Cindy Lane, New Bedford, MA 02740.
  - c. John Fernandes, 129 East Rodney French Blvd., New Bedford, MA 02740.
  - d. Carol Strupczewski, 1075 Braley Rd., New Bedford, MA 02745.
  - e. Leila Rosa, 23 Clover St., New Bedford, MA 02740.
  - f. Corin Thomas, 356 County St., New Bedford, MA 02740.
  - g. Adrian Ventura, 193 Phillips Ave., New Bedford, MA 02746.
  - h. Hannah Council, 58 Borden St., Apt. 1, New Bedford, MA 02740.
  - i. Joshua Council, 58 Borden St., Apt. 1, New Bedford, MA 02740.
  - j. Jose A. Soler, 30 New Plainville Rd., Apt. C18, New Bedford, MA 02745.
2. The MTA is a union representing 110,000 teachers, faculty, professional staff and education support professionals at public schools, colleges and universities across Massachusetts, including public school teachers employed by the City. It has a principal place of business at 2 Heritage Drive, 8th Floor, Quincy, MA 02171.
3. The City is a municipal corporation organized under Massachusetts law with a principal place of business at 133 William Street, New Bedford, MA 02740.
4. The School Committee is an elected body organized under G.L. Chapter 43, Section 31, with a principal place of business at 455 County Street, New Bedford, MA 02740.
5. Alma del Mar is a private non-profit educational corporation organized under G.L. Chapter 180 with a principal place of business at 515 Belleville Avenue, New Bedford, MA

02746. It is affiliated with three Section 501(c)(3) corporations, Alma QALICB, Inc., Alma QALICB II, Inc., and Alma del Mar Foundation, Inc., which maintain its facilities and otherwise support it.

6. DESE is an agency of the Commonwealth established under G.L. Chapter 15, Section 1, with a principal place of business at 75 Pleasant Street, Malden, MA 02148.

### **Jurisdiction and Venue**

7. The Court has subject matter jurisdiction over this action pursuant to G.L. c. 249, § 4 and G.L. c. 40, § 53.

8. This Court is the proper venue for this action pursuant to G.L. c. 223, § 8 because the Individual Plaintiffs and three of the Defendants reside or have their principal place of business, and the actions described in this Complaint occurred, in Bristol County.

### **The Facts**

9. In late 2018 or January 2019, Alma del Mar applied to DESE to amend its charter and expand by establishing a new charter school in New Bedford with a requested enrollment of 1,188 seats.

10. Under the laws and regulations governing charter schools, the City would be required to pay Alma del Mar tuition fees for each student enrolled. The City raised concerns about the devastating financial impact that Alma del Mar's proposed expansion would have on it.

11. DESE preliminarily approved Alma del Mar's application, but proposed two alternatives. Under its first proposal, DESE proposed that the parties enter into an agreement under which the City would give Alma del Mar, at no cost, the Horatio A. Kempton Elementary School (the "Kempton School"), a public school property, and surrounding land at 135 Shawmut Avenue in New Bedford, and DESE would limit the number of seats granted to Alma del Mar for

its proposed school to 450. If the City failed to accept that proposal, Alma del Mar would be granted 594 seats, but not the Kempton School, under DESE's second proposal.

12. A new 594-seat charter school would cost the City an additional \$4.4 million above the cost of a 450-seat school, which it cannot afford. Faced with what New Bedford Mayor and School Committee Chair John Mitchell has called "financially untenable choices," the City was financially coerced into agreeing to the 450-seat deal in exchange for giving the Kempton School to Alma del Mar.

13. On January 11, 2019, the City, Alma del Mar, and the Commissioner of DESE signed a Letter of Intent ("LOI") outlining the deal.

14. On March 12, 2019, the City, the School Committee and Alma del Mar signed, and the Commissioner of DESE approved, a memorandum of understanding ("MOU") describing the agreement in more detail. The MOU stated that it was subject to approval by the School Committee. A copy of the MOU is attached as Exhibit A.

15. Under the MOU, the City would give Alma del Mar the Kempton School and its surrounding land for its new charter school that it would otherwise have to find and acquire on the open market. It also includes two other provisions that benefit Alma del Mar and cost the City. First, whereas other charter schools obtain their students through a city-wide lottery to which parents voluntarily apply, Alma Del Mar would be a neighborhood school to which all the children in a defined neighborhood would be assigned. MOU, § 2. Second, the City would be obligated to pay Alma Del Mar guaranteed tuition fees annually, regardless of how many students chose to attend it. Specifically, the City would have to pay Alma del Mar guaranteed tuition payments for 200 seats in the 2019-2020 school year, 300 seats in 2020-2021, 400 seats in 2021-2022, and 450 seats in 2022-2023 and thereafter. MOU § 9. Both provisions contravene

the enrollment and funding requirements set forth in Chapter 71, Section 89, the state charter school statute.

16. By letter dated March 18, 2019, the MTA objected to the MOU as violating the Anti-Aid Amendment, as well as statutes on public bidding and the disposition of municipal property. *See* G.L. c. 30B (the Uniform Procurement Act) and c. 40, § 15A.

17. On March 21, 2019, the School Committee held a public hearing on the proposed MOU. The MTA reiterated its objections. All the School Committee members recognized that the Committee and the City were being coerced into giving the Kempton School to Alma del Mar for free because, although a 450-seat charter school would hurt the City financially, a 594-seat charter school would cripple it. They stated, among other things: “It’s tantamount to outright blackmail by DESE,” the “MOU has been basically shoved down our throats,” and the MOU “makes for a very unfair process.” Faced with that coercion, the School Committee voted 5-2 to approve the MOU.

18. On April 25, 2019, the City Council voted to request special legislation by the Massachusetts legislature to authorize the transfer of the Kempton School without compliance with Chapter 30B, Chapter 40, Section 15A, and Chapter 71, Section 89.

19. Giving away the Kempton School would substantially injure the Plaintiffs. The individual Plaintiffs include parents who rely on the New Bedford public school system for their children’s education. Privatizing public educational resources—giving away a public school property—would significantly impair that system. Public school teachers, including MTA’s members, are also harmed by the privatization of public educational resources, which results in fewer employment opportunities and resources for those teachers to educate Massachusetts children in public schools.

### **Count I – Violation of the Anti-Aid Amendment**

20. Plaintiffs incorporate by reference the allegations above.

21. The Anti-Aid Amendment states:

No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both.

22. Although the charter under which Alma del Mar operates was granted by the state, Alma del Mar is a private entity. It is a Commonwealth charter school, and as such operates independently of the New Bedford School District. It is governed by an independent board of trustees. Alma del Mar is neither publicly owned nor under the exclusive control, order and supervision of public officers or public agents. The Inspector General has recognized that Commonwealth charter schools, in contrast to Horace Mann charter schools, are not subject to public procurement requirements. *See* Office of the Inspector General, *The Chapter 30B Manual* (Nov. 2016) at 2.

23. The City and School Committee's gift of the Kempton School to Alma del Mar for free, and DESE's authorization—or more accurately, imposition—of that gift, would violate the Anti-Aid Amendment. The primary purpose of that transfer is to aid Alma del Mar, it would have the primary effect of substantially aiding Alma del Mar, and it would implicate political and economic abuses that led to the passage of the Anti-Aid Amendment. DESE's actions effectively forcing the City to give its public property to a private party, under the threat of approval of a charter school that would devastate the City's finances, open the door wide to political abuse stripping poorer municipalities of their assets.

24. The other two provisions of the MOU described above confirm that the gift of the Kempton School to Alma del Mar would violate the Anti-Aid Amendment. The neighborhood district for Alma del Mar's enrollment would give it an automatic student base and enable it to avoid having to attract students from the public school system. Students living in the district could avoid attending Alma del Mar only by affirmatively opting out. And even if enough students opt out that Alma del Mar fails to attract its target enrollment in any year, the City still would have to pay it for that target enrollment. The City would have to pay Alma del Mar money for students that the City, not Alma del Mar, is educating. These provisions confirm that the deal's primary purpose is to aid Alma del Mar, its primary effect would be to substantially aid Alma del Mar, and it would implicate the political and economic abuses that led to the passage of the Anti-Aid Amendment.

25. The Individual Plaintiffs have standing to bring this case under G.L. c. 40, § 53.

That statute states:

If a town ... [is] about to raise or expend money or incur obligations purporting to bind said town ... for any purpose or object or in any manner other than that for and in which such town ... has the legal and constitutional right and power to raise or expend money or incur obligations, the supreme judicial or superior court may, upon petition of not less than ten taxable inhabitants of the town, ... determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power.

The term "town" in Section 53 includes a city. G.L. c. 4, § 7, cl. Thirty-fourth.

26. By its plain terms, the statute applies to situations where a municipality is about to either "raise or expend money" or "incur obligations purporting to bind" it. The statute initially applied only to raising or expending money, but the reference to incurring obligations was added in 1898. *See* Chapter 490 of the Acts of 1898.

27. Plaintiffs acknowledge that, in *Lynch v. City of Cambridge*, 330 Mass. 308 (1953), the Court held that granting an easement that caused no future loss or detriment did not

constitute incurring an obligation under § 53, and subsequent appellate cases have stated that disposing of an interest in land does not constitute incurring an obligation within the meaning of § 53. However, in view of the plain language of the statute and the specific addition of the “incur obligations” phrase, the Supreme Judicial Court is likely to distinguish or overrule *Lynch* and hold that illegally giving away the Kempton School can be restrained under Section 53 as much as illegally spending money. The financial impact of the former on the City and its taxpayers is as significant and immediate as that of the latter.

**Count II – G.L. c. 249, § 4 (Action in the Nature of Certiorari)**

28. The Plaintiffs incorporate by reference the allegations above.

29. The MTA on behalf of its members and the individual Plaintiffs have standing under G.L. c. 249, § 4 to seek review of the School Committee’s and the City’s decisions to give the Kempton School to Alma del Mar.

30. The School Committee’s and City Council’s proceedings were quasi-judicial under *City of Revere v. Massachusetts Gaming Comm’n*, 476 Mass. 591 (2017). They heard statements for and against the proposed agreement, and they made individualized determinations to give the Kempton School to Alma del Mar, as opposed to adopting a generally-applicable rule. Those determinations were based on findings regarding the financial impact that the proposed 450-seat or 594-seat Alma del Mar charter school would have on the City.

31. The Plaintiffs have no other reasonably adequate remedy.

32. The School Committee’s and the City’s decisions approving the MOU are not in accordance with law.

**Count III – Declaratory Judgment under G.L. c. 231A, § 1**

33. The Plaintiffs incorporate by reference the allegations above.



34. There is an actual controversy among the parties regarding the legality of the proposed transfer of the Kempton School to Alma del Mar.

**Count IV – Violation of Uniform Procurement Act (G.L. c. 30B)**

35. The Plaintiffs incorporate by reference the allegations above.

36. The proposed transfer of the Kempton School to Alma del Mar would violate the Uniform Procurement Act because the City has not followed the process for disposing of property required by G.L. c. 30B, § 16. In light of the MOU, the City cannot conduct a good-faith public bidding process for disposal of the Kempton School and surrounding land.

**Count V – Violation of G.L. c. 40, § 15A**

37. The Plaintiffs incorporate by reference the allegations above.

38. The Kempton School and the land on which it sits are held by the City for the specific purpose of education.

39. To transfer the land to Alma del Mar under G.L. c. 40, § 15A, the City must declare that the land is no longer needed for an educational purpose, and the transfer must be approved by 2/3 of the City Council and by the Mayor.

40. The City has not made a determination that the Kempton School is no longer needed for an educational purpose. It cannot make any such determination in good faith where the property would be used by Alma del Mar for the same purpose—that is, operating a school for children in that neighborhood.

**WHEREFORE**, Plaintiffs request that this Court:

1. Preliminarily and permanently enjoin the City and the School Committee from transferring the Kempton School and its surrounding land to Alma del Mar pursuant to the MOU;

2. Preliminarily and permanently enjoin the City and the School Committee from making tuition payments for annual target enrollment to Alma del Mar, regardless of the number of students actually attending Alma del Mar, pursuant to the MOU;

3. Declare that the transfer of the Kempton School to Alma del Mar pursuant to the MOU would violate the Anti-Aid Amendment;

4. Declare that the transfer of tuition payments for annual target enrollment to Alma del Mar, regardless of the number of students actually attending Alma del Mar, pursuant to the MOU would violate the Anti-Aid Amendment;

5. Declare that the transfer of the Kempton School to Alma del Mar pursuant to the MOU would violate the Uniform Procurement Act and G.L. c. 40, § 15A;

6. Award Plaintiffs their attorneys' fees and costs; and

7. Grant them such other relief as the Court deems just and proper.

By their attorneys,



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Dated: May 10, 2019

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**PLAINTIFFS' MOTION TO CONFIRM THAT ONLY A SINGLE FILING FEE IS DUE  
IN THIS CASE**

Pursuant to G.L. c. 262 §§ 4A and 4C, plaintiffs move to confirm that only a single filing fee of \$275 needs to be paid in this case. That filing fee is submitted with this motion.

In support of this motion, plaintiffs state:

1. With this motion, plaintiffs are filing a Complaint under G.L. c. 249, § 4, G.L. c. 40, § 53, and c. 231A, § 1.
2. The fee “for the entry in the superior court department of the trial court of a complaint” is \$240, there is a \$20 security fee, and there is a \$15 surcharge for “[a]ny party entering a complaint ... in any court of the commonwealth ... in which an initial filing fee is

payable, and to which a separate docket number is assigned.” G.L. c. 262, §§ 4A and 4C. Those fees and surcharge total \$275.

3. The Rules of Civil Procedure provide that, “[i]n any action in which persons not asserting any right to recover jointly join as plaintiffs, and in which the relief sought is not wholly equitable, the entry fee shall be an amount equal to the aggregate of the entry fees which would have been required had separate actions been brought.” Mass. R. Civ. P. 20. Those circumstances are not present here. All the plaintiffs are bringing all the claims (except only the 10 individuals can bring the 10-taxpayer claim under G.L. c. 40, § 53), and they seek wholly equitable, identical relief.

4. Accordingly, plaintiffs request that the Court confirm and the total filing fee in this case is \$275, the amount submitted herewith.

By their attorneys,



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Dated: May 10, 2019