IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

MICHIGAN ASSOCIATION OF PUBLIC SCHOOL ACADEMIES, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF EDUCATION, *et al.*, Defendants.	No. 1:22-cv-00712-PLM-SJB

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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Plaintiffs Michigan Association of Public School Academies (MAPSA), Thomas B. Fordham Institute (Fordham), Delaware Charter Schools Network (DCSN), West Virginia Professional Charter School Board (WVPCSB), and the North Carolina Coalition for Charter Schools (NCCCS), by counsel, respectfully respond in opposition to the Motion to Dismiss for Lack of Subject Matter Jurisdiction (ECF No. 19), filed by Defendants U.S. Department of Education, Secretary Miguel Cardona, and Deputy Assistant Secretary Ruthe E. Ryder (collectively, the Department).

Plaintiffs are organizations in five states that are dedicated to expanding educational opportunities through public charter schools. In many school districts in these states, particularly those serving low-income and disadvantaged kids, traditional public schools have failed to deliver on the promise of a quality education. Plaintiffs work tirelessly to ensure that public charter schools, which have the flexibility to offer innovative educational programs, provide an educational lifeline to those students and their parents.

While Congress recognized the great untapped potential for public charter schools and set aside hundreds of millions of dollars per year to fund innovative, high-quality charter school programs nationwide, the Department has done its best to undermine that aim. In a final rule that is the subject of this lawsuit, the Department has set out new criteria for grant awards that are designed to decrease charter school programs, and ensure that failing public schools don't have to compete with innovative alternatives.

But the Department's attack on the charter school program it is tasked with administering is unlawful. Not only does the Department lack the authority to issue any new criteria; the proposed factors will punish the most successful charter school programs, particularly in school districts that

enroll large numbers of minority students. All the while, the rule comes from an agency employee and lacks even the blessing of a properly-appointed officer of the United States.

Rather than engage with the negative consequences, or even the stated goal of its new rule, the Department seeks only to avoid judicial scrutiny. Indeed, the Department does not defend the legality of the rule at all. Instead, it claims that Plaintiffs, who collectively represent the interests of hundreds of public charter schools as well as the hundreds of thousands of students served by those schools, lack a concrete interest in challenging the rule's complete rewrite of the allocation of federal grant funds.

The Department is wrong. Plaintiffs are the representatives of scores of public charter schools that will be burdened by onerous new application requirements, and significantly and unlawfully disadvantaged in future competitions for grants. They have a profound legal interest in challenging the rule and protecting the future educational opportunities of their students. The Department's motion should therefore be denied.

I. RELEVANT FACTUAL ALLEGATIONS

As set out in Plaintiffs' First Amended Complaint, the federal Charter Schools Program (CSP) helps pay costs to start and expand public charter schools, through the Expanding Opportunity Through Quality Charter Schools Act. ECF No. 17 at ¶¶ 38-40. The Act obligates the Secretary of Education to distribute hundreds of millions in dollars in grants annually. *See* 20 U.S.C. §§ 7221a(b), 7221b, 7221d.[1] Most of these funds are directed toward "supporting the

[1] Factual assertions here are drawn either from the Amended Complaint or from the relevant statute and challenged rule, which were referenced in the Amended Complaint, and which may be properly considered on a motion to dismiss. *See Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997); Fed. R. Civ. P. 10(c) ("[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes").

startup of new charter schools, the replication of high-quality charter schools, and the expansion of high-quality charter schools." 20 U.S.C. § 7221a(a)(1).

Some grants are earmarked for state entities that award subgrants to help eligible parties open or expand high-quality charter schools or expand high-quality charter schools. 20 U.S.C. §§ 7221b(b)(1)(A)–(C). Other funds are set aside for direct grants to "charter management organization[s]" (CMOs) for the "replication and expansion of high-quality charter schools." 20 U.S.C. § 7221d(b). If a state does not have an active CSP state entity grant, funds may also be directed to charter school developers. ECF No. 17 at ¶ 45.

On July 5, 2022, Defendant Deputy Assistant Secretary Ryder issued the final rule, *Final Priorities, Requirements, Definitions, and Selection Criteria—Expanding Opportunity Through Quality Charter Schools Program (CSP)—Grants to State Entities (State Entity Grants); Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools (CMO Grants); and Grants to Charter School Developers for the Opening of New Charter Schools and for the Replication and Expansion of High-Quality Charter Schools (Developer Grants)*, 87 Fed. Reg. 40,406, 40,428 (July 6, 2022). The rule set out "two priorities, three application requirements, and two selection criteria for CMO Grants and Developer Grants; six application requirements and one selection criterion for State Entity Grants; and several assurances, definitions, and selection criteria applicable to CSP State Entity Grants, CMO Grants, and Developer Grants." 87 Fed. Reg. at 40,406. "These priorities, requirements, definitions, and selection criteria are effective August 5, 2022." *Id*.

The rule established both "priorities" and "requirements" for applicants, both of which are to be used to grade applicants and guide decision-making for the Department. *Id.* at 40,410, 40,414, 40,426.

The priorities will be designated "as absolute, competitive preference, or invitational" in specific future grant applications applying the rule. *Id*. 40,420. "Under an absolute priority, [the Department will] consider only applications that meet the priority." *Id*. The Department also made clear that it retains "discretion to designate [any] priority as invitational, competitive preference, or absolute in any given competition[.]" *Id*. at 40,412. Indeed, the Department emphasized that "when establishing a priority for use in a program, [it] generally do[es] not identify the priority as absolute, competitive preference or invitational, to allow the Department flexibility to determine how the priority should be used in any future competition." *Id*. at 40,410.

The "requirements" meanwhile establish mandatory components of an application that constitute the "final selection criteria" of proposed projects. *Id*. at 40,426. "[P]eer reviewers" selected by the Department will evaluate "the quality of an applicant's response to all application requirements. The overall quality of an application, and whether it is recommended for funding, is evaluated by peer reviewers based on an applicant's responses to the specific selection criteria and any competitive preference priorities established for the competition." *Id.* at 40,414.

A. The Final Priorities

The rule establishes two priorities applied to all Charter Management Organization or Developer Applicants. *Id.* at 40,420. As the rule noted, "If a State does not have an active CSP State Entity Grant, the Department may award Developer Grants to eligible applicants in the State on a competitive basis to enable them to open and prepare for the operation of new charter schools and replicated high-quality charter schools, or to expand high-quality charter schools." *Id.* at 40,407.

Priority one states, "an applicant must propose to open a new charter school or to replicate or expand a high quality charter school, that is developed and implemented" "[w]ith meaningful

and ongoing engagement with current or former teachers and other educators; and" "[u]sing a community-centered approach that includes an assessment of community assets, informs the development of the charter school, and includes the implementation of protocols and practices designed to ensure that the charter school will use and interact with community assets on an ongoing basis to create and maintain strong community ties." *Id*. The applicant "must provide a high-quality plan that demonstrates how its proposed project would meet the[se] requirements," "accompanied by a timeline for key milestones[.]" *Id*.

Priority two says that "an applicant must propose a new collaboration, or the continuation of an existing collaboration, with at least one traditional public school or traditional school district" that "includes implementation of one or more of" nine types of collaboration or sharing of resources between the traditional school district and the applicant. *Id*. Additionally, "an applicant must provide a description of the collaboration that—(1) Describes each member of the collaboration and whether the collaboration would be a new or existing commitment; (2) States the purpose and duration of the collaboration; (3) Describes the anticipated roles and responsibilities of each member of the collaboration; (4) Describes how the collaboration will benefit one or more members of the collaboration, including how it will benefit students or families affiliated with a member and lead to increased educational opportunities for students, and meet specific and measurable, if applicable, goals; (5) Describes the resources members of the collaboration will contribute; and (6) Contains any other relevant information." *Id*. And an applicant must also "provide evidence of participation in the collaboration." *Id*. 87.

B. The Final Requirements

The rule also established various requirements that apply to Charter Management Organization, Developer Applicants, and State Entity Grants. *Id.* at 40,421–22. As relevant here,

Requirement 1 applies directly to Charter Management Organization and Developer Applicants, while for State Entity Grants the state applicant "must certify that it will require each subgrant applicant to provide a needs analysis" identical to the one required of direct applicants. *Id.* at 40,422.

Under Requirement 1 each applicant (or sub-applicant to a state recipient) "must provide a needs analysis" for the project. *Id.* at 40,421, 40,423. The needs analysis "must include" consideration of six elements. *Id.* at 40,421. First, the needs analysis must include "[d]escriptions of the local community support, including information that demonstrates interest in, and need for, the charter school; benefits to the community; and other evidence of demand for the charter school that demonstrates a strong likelihood the charter school will achieve and maintain its enrollment projections." *Id*. Second, and relatedly, the needs analysis must include "[i]nformation on the proposed charter school's projected student enrollment, and evidence to support the projected enrollment based on the needs analysis." *Id*. Third and fourth, the charter school must produce a "robust family and community engagement plan designed to ensure the active participation of families and the community," and an explanation for how "the plans for the operation of the charter school will support and reflect the needs of students and families in the community, including consideration of district or community assets and how the school's location, or anticipated location if a facility has not been secured, will facilitate access for the targeted student population." *Id.* at 40,421.

Fifth, the applicant must address the racial makeup of the school in two elements. It must provide an "analysis of the proposed charter school's projected student demographics and a description of the demographics of students attending public schools in the local community in which the proposed charter school would be located and the school districts from which students

are, or would be, drawn to attend the charter school; a description of how the applicant plans to establish and maintain a racially and socioeconomically diverse student body, including proposed strategies (that are consistent with applicable legal requirements) to recruit, admit, enroll, and retain a diverse student body." *Id*. 96. Furthermore, the applicant must provide a "description of the steps the applicant has taken or will take to ensure that the proposed charter school (1) would not hamper, delay, or negatively affect any desegregation efforts in the local community in which the charter school would be located or in the public school districts from which students are, or would be, drawn to attend the charter school, including efforts to comply with a court order, statutory obligation, or voluntary efforts to create and maintain desegregated public schools; and (2) to ensure that the proposed charter school would not otherwise increase racial or socioeconomic segregation or isolation in the schools from which the students are, or would be, drawn to attend the charter school." *Id*.

C. The Final Selection Criteria

Finally, the Department set out its "final selection criteria" for evaluating these requirements. *Id.* at 40,426. Applicants—whether they seek direct grants from the Department or from a state entity—are graded on the "quality of the needs analysis." *Id*. "In determining the quality of the needs analysis, the Secretary considers one or more of the following factors: (1) The extent to which the needs analysis demonstrates that the proposed charter school will address the needs of all students served by the charter school, including underserved students; will ensure equitable access to high quality learning opportunities; and demonstrates sufficient demand for the charter school. (2) The extent to which the needs analysis demonstrates that the proposed charter school has considered and mitigated, whenever possible, potential barriers to application,

enrollment, and retention of underserved students and their families. (3) The extent to which the proposed charter school is supported by families and the community[.]" *Id.*

D. The Estimated Regulatory Burden on Applicants

According to the Department, the new "priorities, requirements, definitions and selection criteria, contain information collection requirements. These are new requirements for applicants to conduct a needs analysis and to submit detailed information on their management contracts with for-profit entities, including non-profit charter management organizations operated by or on behalf of for-profit entities." *Id.* at 40,427. Further, "the new package also requires applicants to describe the project for which funding is requested, identify the objectives, activities, and timelines for the funding period requested; describe the qualifications of key personnel; and provide a detailed budget and description of resources." *Id.* The Department thus estimates "that it will take each applicant 60 hours to complete and submit the application, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information." *Id.*

E. The Plaintiffs

Plaintiffs are three nonprofit member organizations representing public charter schools, and two state authorizers of public charter schools. *See* ECF No. 17 at ¶¶ 1-26. Plaintiff Michigan Association of Public School Academies (MAPSA), represents 250 public charter schools, most of which operate through charter management organizations, 33 charter management organizations, charter school developers, and 8 charter school authorizers across the state of Michigan. *Id.* at ¶¶ 1-2. MAPSA advocates for its members' interests concerning public charter schools. *Id.* at ¶¶ 3-4. Plaintiff Delaware Charter Schools Network (DCSN) represents all of Delaware's 23 public charter schools, charter school developers, and proposed charter schools in

the state. *Id.* at ¶¶ 10-11. It too advocates for its members' interests. *Id.* at ¶ 11-13. Plaintiff North Carolina Coalition for Charter Schools (NCCCS) represents 72 public charter schools, 42 of which are charter management organizations, in North Carolina, which serve over 60,000 students. *Id.* at ¶¶ 22-23, 26. NCCCS also actively serves its members' interests. *Id.* at ¶¶ 24-26.

Members of all three member organizations plan to apply for CSP grants in the 2023 or 2024 grant cycles. *See id.* ¶¶ 129, 173-74, 208. Unfortunately, the new rule will disadvantage these member applicants, as they serve large concentrations of minority students, and traditional public schools in those communities have not shown a willingness to cooperate with charter school programs. *See id.* ¶¶ 130-34, 182-86, 216-18.

Plaintiff Thomas B. Fordham Institute (Fordham), on the other hand, is not only an advocate for public charter schools, but is also an "authorizer" of 12 public charter schools in 2021-22 and 13 in 2022-23. *Id.* at ¶¶ 6-9, 146-47. These authorized schools are eligible to apply for CSP grants. *Id.* at ¶ 151. Sadly, however, while some of Fordham's schools intend to apply for CSP grants in the 2023 cycle, they too will be disadvantaged by the new rule because the source districts are not over-enrolled, their charter programs serve large concentrations of minority students, and traditional public schools in those communities have not shown a willingness to cooperate with charter school programs. *Id.* at ¶¶ 152, 163.

Plaintiff West Virginia Professional Charter School Board (WVPCSB) is an independent, statewide charter school authorizer in West Virginia. *Id.* at ¶ 14. As an "authorizer" under West Virginia law, WVPCSB is tasked with approving or rejecting public charter school applicants, and then conducting oversight of those schools. *Id.* at ¶¶ 17-19. It currently oversees all of West Virginia's public charter schools and charter management organizations, and has approved and will oversee two schools that intend to apply for CSP funds in 2024. *Id.* at ¶¶ 20-21, 188-90.

Two of the public charter schools overseen by WVPCSB have committed to applying for CSP grants in 2023. *Id.* at ¶¶ 194-199. They too will be disadvantaged by the new rule, again because local school districts have not shown a willingness to collaborate with them and are not over-enrolled. *Id.* at ¶¶ 201-02.

The new rule, however, is unlawful because the Department lacks statutory authority to issue new criteria, has acted arbitrarily and capriciously, did not provide Plaintiffs a meaningful opportunity to comment on the proposed rule, and was unlawfully issued by a career civil servant. *See* ECF No. 17, Counts I-IV.

II. PLAINTIFFS HAVE STANDING TO CHALLENGE THE RULE

The Constitution limits federal courts to deciding "Cases" and "Controversies." Art. III, § 2. "Among other things, that limitation requires a plaintiff to have standing." *Fed. Election Comm'n v. Cruz*, 142 S.Ct. 1638, 1647–48 (2022). The requisite elements of Article III standing are well established: A plaintiff must show (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–561 (1992).

"However, only one plaintiff needs to have standing in order for the suit to move forward." *Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 710 (6th Cir. 2015). "For standing purposes, [a court must also] accept as valid the merits of [a plaintiff's] legal claims[.]" *Cruz*, 142 S.Ct. at 1647; *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("standing in no way depends on the merits of the plaintiff 's contention that particular conduct is illegal"). Finally, "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth*, 422 U.S. at 501.

A. Plaintiffs Will Be Harmed by the Department's Unlawful Rule Because They Will Be Disadvantaged in CSP Grant Allocation and Will Incur Significant Compliance Costs

"It is common ground that … organizations can assert the standing of their members." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). This is true "even when … the entity itself alleges no personal injury." *Ass'n of Am. Physicians & Surgeons v. United States Food & Drug Admin.*, 13 F.4th 531, 537 (6th Cir. 2021). "An organization may sue on behalf of its members if it shows that: (1) its members would otherwise have standing to sue in their own right; (2) the interests that the suit seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id*. (citation omitted).

Moreover, plaintiffs can "suffer a real and concrete injury by having their application" for discretionary grants disadvantaged by a government action. *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021). This is true even when those plaintiffs "may not ultimately succeed" in their application, and lack a definitive entitlement to those awards. *Id.* at 358; *see also Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing."). The injury is not the denial of the grant, but the denial of fair consideration. *See Assoc. Gen. Contractors of Am.*, 508 U.S. at 666 ("And in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract."). "And that injury is redressable by a decision ordering the government not to grant priority consideration based on" the improper criteria. *See*

Vitolo, 999 F.3d at 359; *accord Doster v. Kendall*, 2022 WL 17261374, at *11, 54 F.4th 398 (6th Cir., Nov. 29, 2022) (standing based on allegedly improper criteria applied to religious waiver of vaccination requirement).

Furthermore, "agency action under the Administrative Procedure Act is presumptively reviewable." *Arizona v. Biden*, 31 F.4th 469, 478 (6th Cir. 2022). This is often because "compliance costs are a recognized harm for purposes of Article III." *Kentucky v. Yellen*, 2022 WL 17076099, at *13, 54 F.4th 325 (6th Cir., Nov. 18, 2022). Indeed, being the subject of a regulation is the classic *example* of an injury-in-fact: "When the suit is one challenging the legality of government action or inaction … [and] the plaintiff is himself an object of the action (or forgone action) at issue" "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561–62; *see also*, *e.g.*, *Cruz*, 142 S.Ct. at 1647 (cognizable injuries existed based on "threatened enforcement of the provisions they now challenge"); *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015) ("The Rule also offers a safe harbor, but banks such as State National Bank must incur costs to ensure that they are properly complying with the terms of that safe harbor. ... Under *Lujan*, the Bank therefore has standing to challenge the constitutionality of the Bureau."); *Grand River Enters. Six Nations, Ltd. v. Boughton*, 988 F.3d 114, 121 (2d Cir. 2021) (collecting cases).

All Plaintiffs are organizations that have alleged two distinct injuries to their members because of the rule, and all therefore have standing to challenge its validity. First, each organization has members who will be unlawfully disadvantaged in future grant cycles. Each organization has members who plan to apply for CSP grants in either 2023 or 2024, which will thus be subject to the new rule. *See* ECF No. 17 at ¶¶ 129, 151-52, 173-74, 188-90, 208. But each organization will

be disadvantaged because they serve the wrong kind of student—large concentrations of minority students, in communities that have space in existing public schools and the public schools have not shown a willingness to cooperate with charter school programs. *See id.* at ¶¶ 130-34, 152, 163, 182-86, 201-02, 216-18. Accepting as valid the merits of Plaintiffs' claims that the new rule is unlawful, being improperly disadvantaged in future grant cycles creates a concrete injury. *See Vitolo*, 999 F.3d at 360.

Second, members of each organization will be forced to incur significant compliance costs when they apply for CSP grants in future cycles. While each organization has members that will apply for future grants, the Department tells us that when these members do so, the new rule will impose many "new requirements" beyond existing applications, and "it will take each applicant 60 hours to complete and submit the application, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information." 87 Fed. Reg. at 40,427. These new "compliance costs are a recognized harm for purposes of Article III." *See Kentucky*, 2022 WL 17076099, at *13.[2]

With these injuries in mind, there's no doubt that Plaintiffs seek to protect interests that are germane to their organizational purpose with this litigation, and the common concerns of all of their members are better considered collectively. After all, each plaintiff works on behalf of its charter school members, and Fordham, not only advocates for charter schools broadly but supervises specific schools, and in West Virginia actually administers and advances the cause of public charter schools under state law. *See* ECF No. 17 at ¶¶ 3-4, 6-9, 11-13, 17-19, 24-26.

[2] Unsurprisingly, when government action either disadvantages an applicant for a grant or imposes compliance costs, an order invalidating the challenged action redresses that injury. *See Kentucky*, 2022 WL 17076099, at *13 (compliance costs are redressable by vacating government action); *Vitolo*, 999 F.3d at 359 ("injury is redressable by a decision ordering the government not to grant priority consideration" pursuant to challenged policy).

Certainly then, the latter two requirements for associational standing have been met. *See Am. Physicians*, 13 F.4th at 537.

B. Plaintiffs Have Suffered a Redressable Procedural Injury by Being Denied a Meaningful Opportunity to Comment on the Rule

Besides suing on behalf of its members, an entity may, of course, sue "on its own behalf because it has suffered a palpable injury as a result of the defendants' actions." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (citation omitted). And a plaintiff suffers a procedural injury when it shows that it was denied procedures "designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Lujan*, 504 U.S. at 573 n.8. In the rulemaking context, when an agency undertakes improper or inadequate notice-and-comment procedures, and the plaintiff has claimed this failure is connected to an injury, then standing is assured. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013); *see also California v. Azar*, 911 F.3d 558, 573 (9th Cir. 2018) (plaintiffs had standing to allege procedural violation under the APA when they were denied opportunity to comment on proposed rule); *California v. Bernhardt*, 460 F.Supp.3d 875, 889 (N.D. Cal. 2020) (the failure to "provide meaningful opportunity to comment" as required by the APA constitutes procedural injury). Furthermore, "the causation and redressability requirements are relaxed for procedural injuries" "because the stakes in most procedural-injury cases involve merely a lost chance to secure a concrete interest." *Rice v. Vill. of Johnstown, Ohio*, 30 F.4th 584, 592 (6th Cir. 2022) (cleaned up). A plaintiff therefore "need not show that but for the alleged procedural deficiency the [government] would have reached a different substantive result." *Id.* at 593 (cleaned up).

Plaintiffs have alleged, on their own and on behalf of their members, that the Department violated the APA's requirement for a meaningful opportunity to comment on the proposed priorities, when it adopted an extremely truncated comment period and then failed to consider or

meaningfully respond to the many valid objections to the rule. *See* ECF No. 17 at ¶¶ 241-45. They thus suffered a procedural injury under the APA. And because, as discussed above, they have also alleged that the rule harms their interests by imposing large compliance burdens and disadvantaging their members' future applications, this procedural injury allows suit here.

III. THE DEPARTMENT'S ARGUMENTS ARE UNAVAILING

Faced with the consequences of its rule, and the clear impact it will have on Plaintiffs and their members, the Department tries in vain to sow confusion concerning certain claims and certain plaintiffs. None of these arguments show that the final rule, specifically designed to hamper the expansion of public charter schools, has no effect on Plaintiffs.

A. Plaintiffs Have Sufficiently Identified Their Members' Intent to Apply for Grants in Future Cycles

The Department devotes substantial attention to its claim that the member organizations "cannot establish standing to sue on behalf of their members because none of them has identified a member that intends to apply for a CSP grant." ECF No. 20 at 10. In the Department's view, the allegations are too general and unspecific to establish standing. *See id.* at 10-13. But Plaintiffs have listed significant numbers of identifiable members, and their concrete plans to apply for CSP funds in the next two cycles. That is all that is required to show standing to sue.

The Department's argument follows from an erroneous premise—the Department insists that unless Plaintiffs have "named" a specific member that will apply for a grant, it cannot establish standing. ECF No. 20 at 10, 16. But the Sixth Circuit has held that an organization can have standing on behalf of its members, even if it has "not identified" the specific members by name who will suffer the harm. *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004). Indeed, associational standing exists as an alternative to an individual plaintiff's suit. Thus, the "individual participation of an organization's members is not normally necessary when

an association seeks prospective or injunctive relief for its members." *Id.* (citation omitted). Simply, "the failure of an association to name a member is not fatal to associational standing." *Ass'n of Am. Physicians & Surgeons v. Food & Drug Admin.*, 479 F.Supp.3d 570, 581 n.8 (W.D. Mich. 2020) (Jonker, C.J.), *aff'd by Am. Physicians*, 13 F.4th 531; *see also Disability Rts. Wisconsin, Inc. v. Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 802 (7th Cir. 2008) (concreteness requirement "still allows for the member on whose behalf the suit is filed to remain unnamed by the organization"); *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999) (no requirement for "the association [to] name the members on whose behalf suit is brought").

While not always providing the *name* of the member school, Plaintiffs have plainly *identified* at least *one* member that has a concrete injury from the rule. While the Department complains that the time frame for grant application is too tenuous, and the stated "intentions" of the members too "general," ECF No. 20 at 11, the Amended Complaint provides ample specificity.

First, there's no confusion at all about *when* the relevant schools intend to apply for future grants. They will all do so during the annual grant cycle in both 2023 and 2024. ECF No. 17 at ¶¶ 6-9, 129, 146-47, 173-74, 188-90, 208. And even if that wasn't enough, Plaintiffs have identified specific schools that have committed to applying for CSP grants in the 2023 grant cycle, and others in the 2024 cycle. *See id.* at ¶¶ 152, 163, 174, 188-90. DCSN points to a specific "developer that seeks to expand its existing public charter school program in 2024," in New Castle County, Delaware. *Id.* at ¶¶ 174-75. It even notes that this member will confirm its intention with its state authorizer by December 31, 2022. *Id.* at ¶ 178. Likewise, Fordham sponsors 13 specific schools in Ohio, some of which intend to apply for CSP funds in the 2023 cycle. *Id.* at ¶¶ 147, 150-51. Finally, WVPCSB has identified by *name* three public charter schools that have committed to applying for CPS grants in the 2023 cycle. *See id.* at ¶¶ 193-99. These schools, readily identified in the

Amended Complaint, have even confirmed in writing that their budgets rely on this potential funding source. *See id.* These aren't "some day" intentions, they are firm commitments.

There's also no doubt about which members are involved. To be sure, many of the member schools haven't begun to apply for grants that will be awarded several years from now, but the Amended Complaint alleges both that public charter school members will apply, and, moreover, have applied and received CSP funds in past cycles. *See id.* at ¶¶ 6-9, 106, 129, 146-47, 149, 170, 173-74, 188-90, 206, 208. It's not wholly speculative for Plaintiffs to expect to file future applications. And the Amended Complaint identifies key examples of schools that *will* apply. DCSN identifies a "developer" in New Castle County, Delaware, while WVPCSB has identified by *name* three public charter schools that have written commitments to apply. *Id.* at ¶¶ 174-75, 193-99.

The Department responds to these specific allegations with dubious legal reasoning. For DCSN, the Department concedes that it has specified a member's planned application, it just claims that is insufficient because "the plaintiffs do not name this DCSN member." ECF No. 20 at 13. As discussed, that is not the standard. *See Sandusky Cnty. Democratic Party*, 387 F.3d at 574. Indeed, the authorities the Department relies on don't establish a rule that individual members must always be identified by name. To be sure, both the Court in *Summers*, 555 U.S. at 498, and the Sixth Circuit in *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 255 (6th Cir. 2018), referred to the need to "name the individuals" affected by the challenged actions, but there is a significant difference between *identifying* an affected member, and literally providing its name.[3] Indeed, in *Waskul* the Sixth Circuit quoted *Summers*'s operative phrase that an association

[3] *Summers* is also inapposite because the Court's concern was the lack of *evidence* supporting a complaint's allegations when considering the issue on summary judgment. *See* 555 U.S. at 498.

must point to one "identified member" to show that at least one member had standing, and because the plaintiffs had failed to do so, by either naming them or otherwise identifying them, standing was lacking. 900 F.3d at 255 (quoting 555 U.S. 498). There's no absolute rule, however, that a *name* must be given. The Sixth Circuit has therefore found associational standing when an organization sued on behalf of anonymous members who were sufficiently identified to establish that they had standing in their own right. *See Doe v. Porter*, 370 F.3d 558, 561–62 (6th Cir. 2004).

For Fordham and WVPCSB, on the other hand, the Department insists that neither can assert harm at all, even though multiple schools were named, because "they are charter school authorizers," not membership associations. *See* ECF No. 20 at 14. But the Department cites no authority to suggest that it gets to decide which entities qualify for associational standing, and instead merely repeats the familiar requirement that individual plaintiffs must suffer individual harms to sue. *See id.*

Associational standing typically refers to "organizations," and "entities." *See Am. Physicians*, 13 F.4th at 537. But rather than show membership rolls or some other particular criteria, the analysis merely requires a showing that "the interests that the suit seeks to protect are germane to the organization's purpose." *Id.* Both Fordham and WVPCSB meet that requirement. Fordham not only advocates for all public charter schools and their interests in Ohio, it "contracts with charter schools for their right to open" in Ohio, and then "provide[s] oversight and technical assistance" to its schools. ECF No. 17 at ¶¶ 6-9, 143. Clearly, the availability of funding is germane to the oversight and assistance roles Fordham plays for these specific schools. WVPCSB likewise serves a statutory role of expanding public charter schools in West Virginia, approving new

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Here, on the other hand, this Court must accept as true all allegations in the Amended Complaint. *See Lujan*, 504 U.S. at 561.

schools, and conducting "oversight" of existing schools. ECF No. 17 at ¶¶ 16-21. Part of WVPCSB's oversight involves reviewing the finances of proposed projects, which is *why* three identified charter schools have committed in writing to applying for CSP grants in 2023. *Id.* at ¶¶ 193-99. The availability of future funding is thus plainly "germane" to WVPCSB's organizational objectives.

B. Plaintiffs Have Alleged that the Final Rule Will Impact the Availability of CSP Grants in the States in Which They Operate

The Department also attempts to distinguish between different types of CSP grants and argues that none of them will apply to any of the plaintiffs. *See* ECF No. 20 at 15-16. But this argument ignores the fact that the rule will apply in all 50 states, no matter how the grants are administered. Indeed, CSP grants are administered either directly from the Department or through subgrants made by State Entities. ECF No. 17 at ¶ 45. One or the other applies. *Id.* In fact, the rule itself says, "If a State does not have an active CSP State Entity Grant, the Department may award Developer Grants to eligible applicants in the State on a competitive basis[.]" 87 Fed. Reg. at 40,407. And the rule applies to both types of grants, as do the challenged criteria. *See* ECF No. 17 at ¶ 88. Thus, it hardly matters that the Department insists on one hand that some plaintiffs can't challenge the rule because there "is no active State Entity Grant in either Ohio or West Virginia, the States of interest to Fordham and WVPCSB, so State Entity subgrants are not available in those States," while the rest are barred because there "are active State Entity Grants in Michigan, Delaware, and North Carolina, the States of interest to MAPSA, DCSN, and NCCCS, so Developer Grants are not available in those States." ECF No. 20 at 16. The rule applies either way. *See* ECF No. 17 at ¶¶ 45, 88. Moreover, even if the argument was valid, the Department's focus on current state awards ignores the fact that the relevant state entity grants expired or were not renewed at the

time the Amended Complaint was filed. *See* ECF No. 17 at ¶¶ 108, 138-39, 168-69, 187, 204, 207-08.[4]

C. There Is a "Substantial Risk" That the Department Will Use Its Rule in Future Grant Cycles

The Department finally argues that Plaintiffs lack standing because it might choose not to use its new rule after all. Specifically, the Department says, "that the July 2022 notice does not require the Department to implement the new priorities, application requirements, and selection criteria in any future grant competition. … And even when priorities and selection criteria are implemented in grant competitions, they may be implemented in a way that has no practical effect." ECF No. 20 at 17. The Department's bold disavowal of its own rule does not insulate it from review.

"[F]uture injuries," can establish standing "if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Dep't of Com. v. New York*, 139 S.Ct. 2551, 2565 (2019) (citation omitted). A "substantial risk" is different from certainty; even an estimate that agency action will harm "as little as 2%" of those subject to it suffices to establish standing. *Id.* Generally, "one does not have to await the consummation of threatened injury to obtain preventive relief." *NRA of Am. v. Magaw*, 132 F.3d 272, 286 (6th Cir. 1997) (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974)).

When an agency issues formal regulations, it is generally "highly likely" that the rules have their intended consequences. *See, e.g.*, *Club v. U.S. E.P.A.*, 793 F.3d 656, 664–65 (6th Cir. 2015) (citing cases and holding that it was "reasonable to infer" that EPA regulation would result in

[4] The Department also repeats its refrain about how Plaintiffs "have not named any member that has a concrete plan to apply" for grants. ECF No. 20 at 16. But, as explained, that argument fails no matter how many times the Department makes it.

intended effects, thus injury was "highly likely" to occur). In fact, an agency's "refusal to regulate" "presents a risk of harm … that is both 'actual' and 'imminent'" because rules are supposed to have consequences. *Massachusetts v. E.P.A.*, 549 U.S. 497, 521 (2007). Furthermore, when a plaintiff must incur compliance costs *now*, even if further harm from government action remains speculative, it suffers an injury *now*. *Kentucky*, 2022 WL 17076099, at *13.

Even when a government action hasn't been decided with absolute certainty, a stated plan to act "in the near future" suffices. *Barber v. Charter Twp. of Springfield, Michigan*, 31 F.4th 382, 391–92 (6th Cir. 2022). After all, the "government's actions in related circumstances," such as applying its regulations as written, "may nudge a threat of injury from potential to sufficiently imminent." *See Vonderhaar v. Vill. of Evendale, Ohio*, 906 F.3d 397, 401 (6th Cir. 2018). Thus, when a plaintiff has stated its intent to apply for future consideration in a challenged application, a court considers it sufficiently likely that the government will apply its challenged criteria as written. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 46 F.4th 1075, 1090 (9th Cir. 2022) (club had standing to challenge chartering criteria that would be applied if club applied for future recognition).

Plaintiffs have alleged a sufficiently "imminent" injury based on the presumption that the Department will apply its rule, which it promulgated after notice-and-comment, and which it declared to be "effective August 5, 2022." *See* 87 Fed. Reg. at 40,406. It is absurd for the Department to claim no "likely" injury because it might actually not use its own rule. But why promulgate the rule then? It is certainly reasonable to think that the rule does *something*, and will have its stated effect. *See Club*, 793 F.3d at 664–65. After all, the Department has always used its priorities before, which suggests that it will continue to do so now. *See Vonderhaar*, 906 F.3d at 401. And while the rule says it might not use the "priorities" in future competitions, it also says it

might instead make the priorities "absolute" in all future competitions. 87 Fed. Reg. at 40,410. Moreover, while it might delay implementation of the "requirements" and "final selection criteria," these criteria will be mandatory when implemented. *Id.* at 40,410, 40,414, 40,426. If we are dealing in contingencies, then it seems far more likely that the Department will apply its rule, instead of simply discarding it.

The Department is also wrong to focus only on "future" injuries from the criteria it applies. As discussed above, Plaintiffs have standing in part because they will be forced to comply with substantial reporting obligations when filling out new grant applications. *See* 87 Fed. Reg. at 40,427. It doesn't matter, then, which priorities the Department uses, or whether they have practical effect, because the certain compliance costs of the new applications, which the department says "will take each applicant 60 hours to complete and submit," confer standing on Plaintiffs. *See id.*

CONCLUSION

The Department's motion to dismiss should be denied. The Department should therefore be directed to file an Answer to Plaintiffs' Amended Complaint, and this matter set for trial.

DATED: December 14, 2022

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Counsel for Defendant are registered with the Court's CM/ECF system and will receive a notification of such filing via the Court's electronic filing system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limit set out by LCivR 7.2(b)(i) as it contains 6,990 words. I relied on my word processor, Microsoft Word, to obtain the count.

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