

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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**No. 474 M.D. 2014**

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**TIM ALLEN, MAURA DWYER, CHRISTIANNE KAPPS, ROBIN ROBERTS,  
CHRISTINE PLUSH, SHIRLEY JOHNSON, BIANCA EBERHARDT, and  
PARENTS UNITED FOR PUBLIC EDUCATION,** **Petitioners**

v.

**CAROLYN DUMARESQ, in her capacity as Acting Secretary of the Pennsylvania  
Department of Education,** **Respondent**

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**BRIEF IN SUPPORT OF RESPONDENT'S PRELIMINARY  
OBJECTIONS TO PETITION FOR REVIEW**

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DATE: November 25, 2014

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## **STATEMENT OF JURISDICTION**

The Petition for Review is filed in this Honorable Court's original jurisdiction under 42 Pa.C.S. § 761(a)(2).

## **ORDER OR OTHER DETERMINATION IN QUESTION**

On or about September 9, 2014, Petitioners filed a Petition for Review (“Petition”) seeking equitable relief against Carolyn Dumaresq, in her official capacity as the Acting Secretary of Education (“Secretary”). The Secretary has filed Preliminary Objections to the Petition.

## STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

In considering preliminary objections, a court must accept as true all well-pled allegations of material fact and all inferences reasonably deducible from those allegations. Brendley v. Pa. Dept. of Labor and Industry, 926 A.2d 1276, 1280 (Pa. Cmwlth. 2007). The court should not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion. Id. The court should sustain preliminary objections when it appears with certainty that the law permits no recovery. Bayada Nurses, Inc. v. Pa. Dept. of Labor and Industry, 958 A.2d 1050, 1053 n.4 (Pa. Cmwlth. 2008).

Mandamus is an extraordinary writ that lies to compel an official's performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy. Pennsylvania Dental Association v. Insurance Department, 516 A.2d 647, 652 (Pa. 1986). “[M]andamus is chiefly employed to compel the performance (when refused) of a ministerial duty, or to compel action (when refused) in matters involving judgment and discretion.” Id. at 652. “It is not used to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of an action already taken.” Id. “The purpose of mandamus is not to establish legal rights, but to enforce those rights which are already established.” Jamieson v. Com., Pennsylvania Bd. of Probation and



Parole, 495 A.2d 623, 626 (Pa. Cmwlth. 1985) (*citing* Hamm v. Board of Education for the School District of Philadelphia, 470 A.2d 189 (Pa. Cmwlth. 1984)). The writ of mandamus should not be granted in doubtful cases. Pennsylvania Dental Association, 516 A.2d at 652 (*citing* Francis v. Corleto, 211 A.2d 503 (Pa. 1965)).

## STATEMENT OF THE QUESTIONS INVOLVED

I. Where mandamus cannot be used to attack the manner in which an official exercises her discretion or judgment, and the Petition is a mandamus action attacking the manner in which the Secretary has exercised her discretion or judgment, does the Petition fail to state a claim?

**Suggested Answer: Yes.**

II. Where 22 Pa. Code § 4.81 applies to “allegations of curriculum deficiencies,” does the Petition fail to state a claim of violation of that regulation based upon the failure to address allegations of non-curriculum deficiencies under this regulation?

**Suggested Answer: Yes.**

III. Where 22 Pa. Code § 4.81 does not preclude the Secretary from referring non-curricular deficiencies to a school district, does the Petition fail to state a claim of violation of that regulation based upon such a referral?

**Suggested Answer: Yes.**

IV. Where 22 Pa. Code § 4.81 does not include any requirement that complainants receive any notification regarding their allegation, does the Petition fail to state a claim of violation of that regulation based upon the Petitioners’ lack of notification or notification via a form letter?

**Suggested Answer: Yes.**

## **STATEMENT OF THE CASE**

### **Form of the Action and Procedural History**

On or about September 9, 2014, Petitioners filed a Petition for Review seeking equitable relief against the Secretary. The Secretary received the Petition via certified mail on September 11, 2014. On October 10, 2014, the Secretary filed preliminary objections to the Petition. On October 21, 2014, the Petitioners answered the preliminary objections. The Court thereafter issued a briefing schedule, setting November 25, 2014 as the filing deadline for this brief.

## Statement of Facts

Seven of the eight Petitioners are parents of students enrolled in the School District of Philadelphia (“District”), which is controlled and operated by the Philadelphia School Reform Commission (“SRC”), a local agency. *See* 24 P.S. § 6-696(a). The remaining Petitioner is Parents United for Public Education (“Parents United”), an organization that advocates for funding for the District. Respondent Carolyn Dumaesq is the acting Secretary of Education and the head of the Pennsylvania Department of Education (“PDE”).

The State Board of Education (“State Board”) is a departmental administrative board established within PDE. *See* 71 P.S. § 62. Pursuant to powers granted to it by statute, *see* 24 P.S. § 26-2603-B, the State Board has promulgated regulations that are published at 22 Pa. Code Part I. Regulations of the State Board are binding on PDE. 24 P.S. § 26-2606-B.

One chapter of regulations promulgated by the State Board is Chapter 4 – Academic Standards and Assessment. See 22 Pa. Code Chapter 4. Chapter 4 includes section 4.81 (upon which the Petition in this case is based), which provides as follows:

§ 4.81. Allegations of deficiencies.

(a) The Secretary will receive and investigate allegations of curriculum deficiencies from professional employees, commissioned officers, parents of students or other residents of a school entity.

- (b) The Secretary will notify the school entity's superintendent or chief executive of allegations and may require the superintendent or chief executive to submit one or more of the following:
- (1) Relevant descriptions of planned instruction.
  - (2) A series of written articulated courses of instructional units.
  - (3) Relevant student assessment information.
  - (4) Information on staff assignments.
  - (5) Other information pertinent to investigating a specific allegation.
- (c) If the Secretary determines that a curriculum deficiency exists, the school entity shall be required to submit to the Secretary for approval a plan to correct the deficiency.
- (d) Within 1 year of the implementation of a corrective action plan under subsection (c), the Secretary will review the actions taken to correct the deficiency. If the deficiency remains uncorrected, the Secretary will send a formal notice of deficiency to the governing board of the school entity, and the notice shall be announced at the meeting of the school entity's governing board immediately following its receipt.
- (e) If the school entity does not take appropriate actions to correct the deficiency after the notice of deficiency is announced, the Secretary will take action under State law.

22 Pa. Code § 4.81.

In or about September 2013 the District, due to budgetary restraints, reduced staff levels District-wide. In response, Parents United began a campaign to flood PDE with “allegations of curriculum deficiencies” under § 4.81. Parents United

encouraged students, parents, and teachers to submit to PDE, either directly or through Parents United, any and all complaints about District schools as “allegations of curriculum deficiencies” under § 4.81. In order to facilitate this effort, Parents United created and made available a short form “complaint” in both paper and electronic versions. Parents United went to schools where they actively encouraged submissions. Its efforts resulted in PDE receiving from District students, parents, and teachers over 800 “allegations of curriculum deficiencies” under § 4.81. The subject matters of the allegations were wide ranging, with complaints ranging from spacing between desks to toilet paper supplies.

The individual Petitioners are seven parents who have submitted “allegations of curriculum deficiencies” to PDE. Some submitted more than one allegation. Their complaints, as set forth in their submissions to PDE (Petition Exhibits H-P), are described below.<sup>1</sup>

***Petitioner Allen***

In his “allegation of curriculum deficiencies” (Exh. H), Petitioner Allen complained that the desks at his son’s high school were too close together which

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<sup>1</sup> The Petition includes additional background regarding each individual Petitioner and/or the school in question that do not appear in their allegations made to PDE. These allegations are irrelevant and not recited here.

made the classroom “dangerous.” Allen also complained that his son is taking a second-year language class<sup>2</sup> and is worried there would not be a third-year option due to staff levels.

PDE thereafter sent Allen a letter acknowledging the receipt of his correspondence and informing him that, after review, the matter was being referred to the District because it concerned entirely local matters. Petition ¶ 29; Exh. G.

Allen then was informed that another teacher was hired, but he also was told that he or she “might be cut.” Petition ¶ 25.

***Petitioner Dwyer***

In her “allegation of curriculum deficiencies” (Exh. I), Petitioner Dwyer complained that there are two first grade classrooms at her child’s elementary school, and that one was over capacity by one student and the other was two students over capacity. Petitioner Dwyer also complained that there was no guidance counselor on staff.

PDE thereafter sent Dwyer a letter acknowledging the receipt of her correspondence and informing her that, after review, the matter was being referred to the District because it concerned entirely local matters. Petition ¶ 37.

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<sup>2</sup> The Petition describes the language as French, but Allen’s submission to PDE (Exh. H) complained about lack of Spanish instruction.

***Petitioner Kapps***

In her “allegation of curriculum deficiencies” (Exh. J), Petitioner Kapps complained that her daughter had no physical education classes at her high school and that she is worried she would not be able to graduate.

Later that same day, Petitioner Kapps submitted another “allegation of curriculum deficiencies” (Exh. K). In the second one she complained that her daughter is attending honors classes at her high school and that students who should not qualify for honors have been added to her daughter’s class, and that the teacher has “watered down” the course for those students.

PDE thereafter sent Kapps a letter acknowledging the receipt of her correspondence and informing her that, after review, the matter was being referred to the District because it concerned entirely local matters. Petition ¶ 47.

***Petitioner Roberts***

In her “allegation of curriculum deficiencies” (Exh. L), Petitioner Roberts complained that her children’s elementary school did not have a full time counselor and that a full time counselor was needed to assist with high school placements.

A few months later Petitioner Roberts submitted another “allegation of curriculum deficiencies” (Exh. M). In her second submission, Petitioner Roberts complained about the state of the bathroom facilities at the elementary school.



Petitioner Roberts alleges that she has received no response to the submissions. Petition ¶ 56.

***Petitioner Plush***

In her “allegation of curriculum deficiencies” (Exh. N), Petitioner Plush complained that her child’s high school had a counselor only one day a week and that was inadequate. PDE thereafter sent Plush a letter acknowledging the receipt of her correspondence and informing her that, after review, the matter was being referred to the District because it concerned entirely local matters. Petition ¶ 62.

***Petitioner Johnson***

In her “allegation of curriculum deficiencies” (Exh. O), Petitioner Johnson complained that her child’s high school (the same high school that Petitioner Plush’s child attends) had a counselor only one day a week and this was inadequate. She demanded that PDE “show us where the money is going!!!” Johnson is “unaware of an individualized response” to her submission. Petition ¶ 68.

***Petitioner Eckhart***

In her “allegation of curriculum deficiencies” (Exh. P), Petitioner Eckhart complained that at her child’s high school one of her classes had 45 students in it, which prevents the teacher from providing additional attention to students.

Johnson is “unaware of an individualized response” to her submission. Petition ¶ 73.

***Petitioner Parents United***

Meanwhile, Parents United, through counsel, separately sent the Secretary an eight-page letter complaining about guidance counselor staffing at various schools. Petition, Exh. B. The letter acknowledged that many of the “allegations of curriculum deficiencies” were based on guidance counselor services and that he believed a shortage of guidance counselors is a curriculum deficiency that may be addressed through § 4.81. Id.

On November 13, 2013, Stephen Fisher, PDE’s Director of School Services sent a letter to the District’s General Counsel regarding Attorney Churchill’s letter. Petition, Exh. F. The letter was cc’d to Parents United’s counsel. Id. Mr. Fisher explained that, pursuant to the Public School Code and regulations, guidance counselor services are a student service, not a curriculum matter, and PDE therefore cannot act on these allegations pursuant to its § 4.81 powers. Id.

PDE nonetheless instructed the District to address these complaints through its powers under the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.9. Id. The letter enclosed Attorney Churchill’s letter and all “allegations of curriculum deficiencies” regarding District counseling services that PDE had received as of that date. Id.

Director Fisher’s letter postdates each of the individual Petitioners’ “allegations of curriculum deficiencies” described above, most of which involve complaints of guidance counselor staffing. There is no mention as to whether Parents United shared this letter with the individual Petitioners or others who submitted to PDE “allegations of curriculum deficiencies” regarding guidance counselor staffing.

## **SUMMARY OF ARGUMENT**

Petitioners assert that the Secretary has disregarded her duties under 22 Pa. Code § 4.81, which requires her to “receive and investigate allegations of curriculum deficiencies from professional employees, commissioned officers, parents of students or other residents of a school entity.” However, the facts alleged in the Petition demonstrate that the Secretary has accepted Petitioners’ submissions and taken action she deemed appropriate. The Petitioners simply disagree with the particular course of action she has decided to take. Mandamus cannot be used to compel the exercise of judgment or discretion in a particular way, or to direct the retraction or reversal of an action already taken. Furthermore, § 4.81 does not preclude the referral of non-curricular allegations to the district in question, nor does it require the Secretary to notify the person submitting the allegation of the status or outcome of that allegation. Petitioners therefore fail to state a claim.

## ARGUMENT

### **I. Mandamus cannot be used to attack the manner in which the Secretary exercises her discretion or judgment**

Petitioners claim that the Secretary has disregarded her duties under 22 Pa. Code § 4.81, which requires her to “receive and investigate allegations of curriculum deficiencies from professional employees, commissioned officers, parents of students or other residents of a school entity.” It is clear from the Petition’s own allegations, and the exhibits attached thereto, that the Secretary is in fact receiving and investigating these allegations and that the Petitioners simply disagree with the manner in which she is doing so. A writ of mandamus cannot be issued on these grounds. Chester Community Charter School v. Com. Dept. of Education, 996 A.2d 68, 75 (Pa.Cmwlth. 2010) (Where the public official has discretion in *how* to perform the act, Mandamus may compel the exercise of the discretion, but it may not interfere with the manner in which the discretion is exercised.”) (emphasis in original) (*citing* Chadwick v. Dauphin County Office of the Coroner, 905 A.2d 600, 604 (Pa.Cmwlth. 2006)).

### **II. The Secretary’s determination as to whether a curriculum deficiency is alleged complies with § 4.81 and is not subject to review via mandamus**

Section 4.81 applies only to allegations of curriculum deficiencies, regardless of how the complaint is labeled. § 4.81(a). Upon receipt of an

allegation, the investigation necessarily begins with a close examination of the allegation itself. If it is not an allegation of a curriculum deficiency, no further action is required under the regulation.<sup>3</sup>

Petitioners nonetheless seek to strip this limitation of any practical meaning by interpreting “curriculum deficiency” as anything that can ultimately have some effect on the educational experience, no matter how indirect. This simplistic argument, which is based on nothing more than cherry picking broad language from various other sections of Title 22 of the Pennsylvania Code and other authorities, allows Petitioners to argue that an allegation of deficient toilet paper supplies is an allegation of a curriculum deficiency under § 4.81.

As is evident from PDE’s letter regarding guidance counselors (Petition Exh. F), which explains that guidance counselors are a student service, the Secretary does not agree with the Petitioners’ interpretation of what does and does not constitute a “curriculum deficiency.”. Petitioners are essentially asserting that their expansive interpretation of a curriculum deficiency is correct and the Secretary’s interpretation is incorrect.

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<sup>3</sup> This does not bar PDE from taking action pursuant to some other authority, which it did in the case of complaints regarding guidance counselors and nursing staff levels. See Petition, Exhs. C, F.

Courts follow a two-step analysis when reviewing an agency's interpretation of its governing regulations: (1) whether the interpretation of the regulation is erroneous or inconsistent with the regulation, and (2) whether the regulation is consistent with the statute under which it was promulgated. Tire Jockey Service, Inc. v. Pa. Dept. of Environmental Protection, 591 Pa. 73, 108, 915 A.2d 1165, 1186 (2007) (*citing* Pelton v. Pa. Dep't of Pub. Welfare, 514 Pa. 323, 523 A.2d 1104, 1107–08 (1987); Pa. Dep't of Pub. Welfare v. Forbes Health Sys., 492 Pa. 77, 422 A.2d 480, 482 (1980)). The concern here is the first prong. “If the words of a regulation are clear and free from ambiguity, the letter of the regulation may not be disregarded under the pretext of pursuing its spirit.” Highway News, Inc. v. Pa. Dept. of Transp., 789 A.2d 802, 808 (Pa. Cmwlth. 2002). “As a matter of statutory interpretation, although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say.” Keffer v. Bob Nolan's Auto Service, Inc., 59 A.3d 621, 647 (Pa. Super. 2012) (*quoting* Hill v. Randolph, 24 A.3d 866, 869 (Pa. Super. 2011)). “An administrative agency's interpretation of a statute that the agency is charged to enforce is entitled to “strong deference” unless it is clearly erroneous.” Moonlite Cafe, Inc. v. Dep't of Health, 23 A.3d 1111, 1115 (Pa.Cmwlth. 2011) (*citing* Borough of Ellwood City v. Pa.

Labor Relations Bd., 998 A.2d 589, 594 (Pa. 2010); Bethenergy Mines, Inc. v. Dep't of Env'tl. Prot., 676 A.2d 711, 715-16 (Pa.Cmwlth. 1996)).<sup>4</sup>

The language of § 4.81 is unambiguous – it pertains to curriculum deficiencies. The word curriculum is specifically defined earlier in the chapter: “A series of planned instruction aligned with the academic standards in each subject that is coordinated and articulated and implemented in a manner designed to result in the achievement at the proficient level by all students.” 22 Pa.Code § 4.3. It is obvious from this language that curriculum refers to the topics being covered in a particular academic subject area and not to things such as proximity of desks, counselor staffing, or cleanliness of bathrooms. The Secretary’s interpretation is not erroneous or inconsistent with the regulation. Rather, it is in accordance with the plain and clear language of the regulation. To interpret § 4.81 otherwise, like Petitioners do, one must essentially ignore the word curriculum and its limited definition.

Even if Petitioners’ position of the Secretary being required to receive and investigate their “allegations of curriculum deficiencies,” was to be accepted, they are left arguing that the Secretary’s decision to end the § 4.81 investigations on the grounds that there are no curriculum deficiencies present was incorrect. This does

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<sup>4</sup> Rules of statutory construction apply as well to the administrative rules and regulations codified in the Pennsylvania Code. Keffer, 59 A.3d at 647 n. 5.



not entitle them to a writ of mandamus, as § 4.81 permits the Secretary to use her discretion in conducting an investigation

The regulation requiring the Secretary to conduct an investigation into allegations of curriculum deficiencies, in the absence of any language suggesting otherwise, necessarily grants her the discretion to determine the extent of the investigation. In a comparable case, this Court explained that a coroner's statutory duty to investigate cause of death, included the "discretionary power to decide the extent of an investigation." Chadwick, 905 A.2d at 605. As the Petition states, in some cases the § 4.81 investigation ended after a review of the allegations. The fact that Petitioners disagree with the scope of the Secretary's § 4.81 investigation or the outcome of that investigation does not entitle them to a writ of mandamus. Chadwick, 905 A.2d at 606. As this Court has held, "Mandamus does not lie to compel [state officials] to exercise their discretion in a particular way, even if the Court believes it has been exercised incorrectly." Clark v. Beard, 918 A.2d 155, 160-61 (Pa. Cmwlth. 2007).

### **III. Section 4.81 does not preclude referral of non-curricular deficiencies to the District**

Petitioners take issue with the fact that some "allegations of curriculum deficiencies" were referred to the District. There is nothing in § 4.81 setting forth the particular course the Secretary's investigation must follow. It certainly does not preclude the Secretary from referring non-curricular allegations to the District

in question. In fact, if the complaint is determined to be an allegation of curriculum deficiency, § 4.81(b) requires the Secretary to notify the school entity of the allegation.

A referral to the District makes particular sense in the examples provided in the Petition. None of those allegations indicate they were ever presented to the District. The District would obviously be in a better position to address proximity of desks in classrooms, guidance counselor staffing levels, and the cleanliness of bathrooms, which describe local issues that are unique to specific District schools.

Petitioners are again simply expressing their disagreement or dissatisfaction with the course of the Secretary's investigation. This does not provide a basis for the issuance of a writ of a mandamus.

#### **IV. Section 4.81 does not require the Secretary to notify the complainant of the status or outcome of the allegations received**

Petitioners submitted their allegations either directly to PDE or through Parents United. In the Petition, some complain about receiving a form letter in response, others complain about not receiving an "individualized" response, while one complains about receiving no response at all.

Section 4.81 does not include a requirement that the Secretary provide any notification to the complainant regarding the status of the allegations received. The regulation only requires the Secretary to receive and investigate allegations of

curriculum deficiencies and to notify the school entity of any curriculum deficiencies. Accordingly, the Secretary's notification, or lack thereof, to the complainants regarding the status or outcome of the allegations received cannot be construed as the Secretary disregarding her duties under section 4.81 or as the Secretary's failure or refusal to investigate the allegation.

Notwithstanding the Secretary's absence of a duty to respond to a complainant, PDE nevertheless notified many of the individual Petitioners directly. Alternatively, with respect to the counselor complaints, PDE notified Parents United, the conduit through which many of these complainants submitted allegations. Petitioner Roberts is the only Petitioner who alleged that she received no notice as to what happened with her complaints.<sup>5</sup> Had Petitioner Roberts and Parents United contacted one another, Roberts, who complained about counseling services, would have learned how PDE was treating her complaint. Petitioner Roberts, like any other person interested in the status of an allegation submitted, also could have simply contacted PDE for this information.

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<sup>5</sup> Petitioners Johnson and Eberhardt, who submitted allegations of insufficient counselor services, allege they did not receive "any individualized response." ¶¶ 68, 73 (emphasis added).

## CONCLUSION

For the foregoing reasons, the Petition fails to allege facts that would allow for a writ of mandamus to issue. The Acting Secretary of Education therefore respectfully requests that this Court sustain her Preliminary Objections and dismiss the Petition for Review.<sup>6</sup>

Respectfully submitted,

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<sup>6</sup> In addition to seeking a writ of mandamus, Petitioners' prayer for relief requests a declaration that the Secretary is not meeting her duties under § 4.81 premised upon the same facts and arguments supporting their mandamus claim. Petition p. 22. "[A]n action seeking declaratory judgment is not an optional substitute for established or available remedies and should not be granted where a more appropriate remedy is available." Pittsburgh Palisades Park, LLC v. Pa. State Horse Racing Comm'n, 844 A.2d 62, 67 (Pa. Cmwlth. 2004) (citing Greenberg v. Blumberg, 206 A.2d 16 (Pa. 1965)). Indeed, if the Petitioners believe a declaratory judgment provides an adequate remedy, an alternate remedy exists and the mandamus claim cannot proceed. Petitioners presumably seek to pursue this matter as a mandamus claim. See Parents Against Abuse In Sch. v. Williamsport Area Sch. Dist., 594 A.2d 796, 802 (Pa. Cmwlth. 1991) (construing action as a mandamus claim rather than one for declaratory judgment because a declaration alone would not afford plaintiffs complete relief.)

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Date: November 25, 2014

## CERTIFICATE OF SERVICE

I, Kevin Bradford, hereby certify that on November 25, 2014 I served the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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Date: November 25, 2014