

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT  
Civil Action No. 15-2788-F

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JANE DOES NOS. 1-2 and JOHN DOE NOS. 1-3, )  
 Plaintiffs, )  
 v. )  
 JAMES A. PEYSER, as Secretary of Education; PAUL )  
 SAGAN, as Chair of the Board of Elementary and )  
 Secondary Education; MITCHELL D. CHESTER, as )  
 Commissioner of Elementary and Secondary Education )  
 and Secretary to the Board of Elementary and Secondary )  
 Education; KATHERINE CRAVEN, EDWARD )  
 DOHERTY, ROLAND FRYER, MARGARET )  
 MCKENNA, MICHAEL MORIARTY, JAMES )  
 MORTON, PENDRED NOYCE, MARY ANN )  
 STEWART, and DONALD WILLYARD, as Members )  
 of the Board of Elementary and Secondary Education, )  
 Defendants. )

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**BRIEF OF AMICUS CURIAE MASSACHUSETTS TEACHERS ASSOCIATION**

**I. INTEREST OF AMICUS MASSACHUSETTS TEACHERS ASSOCIATION**

The Massachusetts Teachers Association (MTA) represents approximately 110,000 teachers, professors, administrators, other professionals and paraprofessionals in hundreds of public school districts, colleges and universities throughout the Commonwealth. Nearly 80,000 of its members are employed in public elementary and secondary schools in cities, towns, and regional school districts. While MTA does not represent personnel in the Boston Public Schools (hereinafter “BPS”), it does in most other Massachusetts cities and towns, including some serv-

ing predominantly lower-income and minority students, such as Springfield, Worcester, and Holyoke.

The bold expansion of Commonwealth charter schools sought by the plaintiffs would have dramatic and even devastating effects on already-constrained resources in many public school districts where MTA members educate their students. Although the plaintiffs are exclusively BPS students purportedly consigned to failing Boston schools, the constitutional remedy sought has nothing to do with improving education in those Boston schools. On the contrary, the remedy would have a deleterious effect on education in those schools, as well as in Boston's successful schools and, indeed, in public school districts throughout the Commonwealth. Many school districts employing MTA members already send students – and money – to charter schools, thus draining resources from already-underfunded budgets. Removing the caps on charter schools would increase the number of charters, increase the number of affected school districts, increase the amount of public money flowing to private, non-profit school enterprises, and exacerbate problems that already exist in public schools attended by the vast majority of our students. For each student who enrolls in a charter school, the Commonwealth removes public funds from the sending district's public schools.<sup>1</sup> See G.L. c. 71, § 89. Allowing more students to enroll in such schools and/or increasing the total number of charter schools will inevitably reduce the funds available for the district public schools where MTA members teach, have a negative effect on their ability to teach effectively, and worsen their working conditions by reducing district school budgets. The MTA strongly opposes the plaintiffs' attempt to enlist the court in an essentially political goal of removing the limitations that the Legislature imposed on the charter school movement in Massachusetts.

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<sup>1</sup> In this brief, the amicus will refer to the vast majority of district and regional schools in Massachusetts that are not charter schools as “district public schools.”

## II. INTRODUCTION

In plaintiffs' lawsuit, five minor children and a putative class of "all other children attending or assigned to attend constitutionally inadequate schools in Boston who have applied, but failed to gain entry via the lottery to public charter schools," are asking this Court to declare the statutory limits on certain charter schools<sup>2</sup> an unconstitutional obstruction to their right to an "adequate public education." Compl. ¶¶ 14, 28. To achieve their goal, plaintiffs would need to reverse settled law regarding the separation of powers and convince Massachusetts courts to plunge into the highly politicized educational policy debate – a path the courts have emphatically foresworn.

Under current law, plaintiffs must prove an "egregious, Statewide abandonment of the constitutional duty identified in [*McDuffy v. Secretary of the Executive Office of Education*, 415 Mass. 545 (1993)]." *Hancock v. Commissioner of Educ.*, 443 Mass. 428, 433 (2005). Since the plaintiffs seek to represent only students on the waiting lists for Commonwealth charter schools in Boston, they must convince this Court that it can legally find a violation of the constitutional duty in the case of this particular subset of students without addressing the status of other groups. As Proposed Defendant-Intervenors<sup>3</sup> logically point out, however, increasing the enormous amount (currently \$119 million) already deducted from the BPS budget to fund more Common-

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<sup>2</sup> As the Defendants point out in their Memorandum of Law in Support of Defendants' Motion to Dismiss (hereinafter "MTD"), the term "public charter schools" is not used in G.L. 71, § 89. MTD at 13. Remarkably, in Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss (hereinafter "Opp."), they still do not define that term, but, based on their use of it, they apparently intend to refer to Commonwealth charter schools. Opp. at 11.

<sup>3</sup> The Proposed Defendant-Intervenors are seven students, including students of color, students with disabilities, and English language learners (ELLs) who attend Boston district public schools and who are not on Commonwealth charter school waiting lists and also the New England Area Conference of the National Association for the Advancement of Colored People (NAACP). Proposed Defendant-Intervenors' Motion to Intervene. On April 25, 2016, the justice of the Superior Court assigned to this case dismissed the motion to intervene without prejudice to re-filing at a later stage of the litigation.

wealth charter schools will only diminish educational opportunities for the student-intervenors and their cohorts in the public schools. Memorandum in Support of Proposed Defendant-Intervenors' Motion to Intervene (hereinafter "Movants") at 2-3.<sup>4</sup>

The Massachusetts Constitution does not guarantee individual students a "fundamental right" to an education or, for that matter, to attend a particular school or kind of school. See, *Doe v. Superintendent of Schools of Worcester*, 421 Mass. 429 (1995) ("*McDuffy* should not be construed as holding that the Massachusetts Constitution guarantees each individual student the fundamental right to an education"). Even if the plaintiffs were somehow to succeed in gaining recognition as an isolated subset of victims of an unconstitutional denial of their right to education, they must next convince this Court to grant them the unique remedy they seek: an end to the statutory limits on Commonwealth charter schools.<sup>5</sup> In fashioning specific remedies for constitutional educational deficiencies, the Supreme Judicial Court has refused to usurp the role of the executive and legislative branches. See *Hancock*, 443 Mass. at 462; *McDuffy*, 415 Mass. at 555. Finally, even if this Court were to take such an unprecedented step, there is no reason why, faced with the panoply of educational enhancements, the Court would embrace only the one, narrow solution advocated by the plaintiffs. On the contrary, the SJC's previous forays into enhancing education strongly suggest the adequacy and equality of funding, not the availability of charter schools, is the key to remedying a violation of the constitutional right to education.

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<sup>4</sup> Perhaps recognizing the difficulty of surmounting this hurdle, plaintiffs seek to implicate the equal protection provisions of the Massachusetts Declaration of Rights. Opp. at 31-37. As defendants point out, however, plaintiffs fail to make out a claim: (1) they fail to allege differing treatment based on classification, (2) they have not been discriminated against, and (3) there is a rational basis for any statutory classification. Reply Memorandum in Support of Defendants' Motion to Dismiss (hereinafter "Reply") at 17-20.

<sup>5</sup> These limits, as set out in G.L. c. 71, § 89, are a cap on the number of charter schools (with the exception of one of the three types of Horace Mann Schools and certain schools that open in severely disadvantaged areas) and a cap on the percentage of a school district's budget that may be diverted to charters (normally 9%, but up to 18% in certain disadvantaged areas).

Plaintiffs blindly seek one proposed remedy to cure the maladies of public schools as if privately-run charter schools were the cure for all public education's ills. They rely heavily on "independent research," most which was financed by The Boston Foundation, an advocate for lifting the Commonwealth charter school caps. Compl. ¶¶ 79-85. None of these studies was published in a peer-reviewed academic journal. Other studies that are equally if not more compelling challenge the simplistic theory that unlimited expansion of Commonwealth charter schools will overcome the educational deprivation of urban, minority, low-income students.

In order to pursue their pro-charter agenda, plaintiffs must ignore the growing body of evidence that contradicts their single-minded faith in charter schools. Nearly a quarter century into Massachusetts' experiment with charter schools, government statistics and academic studies reveal a troubling reality beneath the proponents' rosy rhetoric. First, anyone seeking to justify increasing the number of charters must acknowledge that some charter schools have failed. At least 12 charter schools in Massachusetts (five of them in Boston) have already been closed for performance-related reasons since charters were first permitted in 1993.<sup>6</sup> See *Commonwealth v. Roxbury Charter High Public School*, 69 Mass. App. Ct. 49 (2007) (upholding the closing of a Boston charter school for performance reasons). On December 9, 2015, the Commissioner of the Department of Elementary and Secondary Education ("DESE") recommended closing yet another failing Boston charter school.<sup>7</sup>

In addition to closed failed charters, others are open, but failing their students. Ten of the 71 active Commonwealth charter schools – including several in Boston – are currently operating

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<sup>6</sup> See Center for Media and Democracy, List of Closed Charter Schools, accessed at <http://www.prwatch.org/news/2015/09/12936/cmd-publishes-full-list-2500-closed-charter-schools>; <https://www.bostonglobe.com/metro/2015/12/14/state-targets-dorchester-charter-school-for-closure/CK6lM0cpdMM8oeuH8yYFuK/story.html>.

<sup>7</sup> Accessed at <http://www.doe.mass.edu/boe/docs/FY2016/2015-12/item5.pdf>.

“under conditions or probation”, which means that DESE has identified significant performance or management issues in the schools.<sup>8</sup> There is disturbing evidence that Commonwealth charter schools in Boston do not enroll English language learners or students with disabilities at nearly the same rates as public schools. See J. Mead & M. Weber, *Review of Special Education and English Language Learner Students in Boston Charter Schools* (National Education Policy Center, Feb. 2016); Office of the State Auditor, *The Department of Elementary and Secondary Education’s Oversight of Charter Schools*, at 58 (Dec. 18, 2014) (“*Auditor’s Report*”). Some studies show that charter schools often employ rigorous “no excuses” curricula that increase test scores at the cost of other kinds of learning. G. Miron, *Review of Separating Fact & Fiction* (National Education Policy Center, Feb. 2015). Still others claim that charters use draconian disciplinary policies to suspend and eventually “push out” lower-performing students. Program on Human Rights and the Global Economy, *At What Cost? The Charter School Model and the Human Right to Education*, at 22-24 (Northeastern Univ. Sch. of Law, November 2014) (“*At What Cost?*”). As discussed elsewhere, the mechanism for funding charter schools drains resources from the district public education system, to such an extent that Moody’s Investors Service recently issued a report announcing, “Charter schools pose greatest credit challenge to school districts in economically weak urban areas.”<sup>9</sup>

The plaintiffs also misuse or ignore the data in their failed attempt to prove that charter schools provide a constitutionally-adequate education, while district public schools do not. The plaintiffs equate Level 3 schools, those in the lowest quintile of Massachusetts Comprehensive Assessment System (“MCAS”) scores, with a constitutional deprivation of education. Compl. ¶¶

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<sup>8</sup> Accessed at <http://www.doe.mass.edu/charter/reports.html>.

<sup>9</sup> Accessed at [https://www.moody.com/research/Moodys-Charter-schools-pose-greatest-credit-challenge-to-school-districts--PR\\_284505](https://www.moody.com/research/Moodys-Charter-schools-pose-greatest-credit-challenge-to-school-districts--PR_284505). Also cited in *At What Cost?*, n.121.

49-51, 56-59, 64-66. But the broad educational mandate set out by *McDuffy* does not support equating low MCAS scores – considered without regard to contextual realities or other metrics of educational success – with school failure of a constitutional dimension. An accountability system that automatically designates one out of every five schools at Level 3, regardless of actual performance, is not even an accurate tool for identifying which schools are in fact failing, much less a reliable indicator of constitutional infirmity under *McDuffy*. Level 4 designation, which takes into account many more factors than MCAS scores, is a better identifier of failing schools but even here, the plaintiffs must ignore the fact that the number of charter schools under conditions or probation (the charter school equivalent of Level 4) exceeds the number of Level 4 schools, both in Boston and in Massachusetts as a whole.

As explained below, those who advocate for charter schools and charter school expansion are *not* seeking to lift public education for all to a higher ground but instead would turn over important pieces of the public enterprise to private, non-profit entities (G.L. c. 71, § 89(d)) for the purported purpose of improving education for some while leaving everyone else behind. Even more, charter schools disrupt existing structures for educator wages, benefits, and job security, even though teachers in the Commonwealth’s district public schools – unionized in every district for years – have produced some of the best educated children in the U.S. As the defendants point out, “Massachusetts students have led the nation in reading and mathematics performance on the National Assessment of Educational Progress (NAEP), the ‘nation’s report card,’ for the past decade.” Def. at 1. While the plaintiffs would lift statewide caps on charter schools in order to redress an alleged constitutional violation in Boston, the court should not indulge a statewide “disruptive innovation” as a constitutional claim or as a judicial remedy.

### III. ARGUMENT

#### A. DEBUNKING THE CHARTER SCHOOL MYTH

Although cast as a legal argument about inadequate educational opportunity for urban children, the plaintiffs' Complaint reads more like an op-ed piece advocating for charter schools. Consigned to inadequate public schools, the plaintiffs just need this Court to lift the charter school caps and their problems will be solved. They insist that being waitlisted for a "public charter school," by which they appear to mean a Commonwealth charter school<sup>10</sup>, is a "substantial cause" of their inadequate education. *Plaint. Opp.* at 27. They neither consider nor address any alternative, despite widespread academic literature suggesting multiple possible strategies. *See, e.g.,* Jacob, Brian et al., *Improving educational outcomes for poor children* (Carnegie Corporation of New York, 2008) (recommending early childhood interventions, class size reduction, curricular and instructional interventions).

The plaintiffs' singular devotion to charter schools as the sole solution to their problems, while consistent with the agendas of organizations such as The Boston Foundation<sup>11</sup>, upon whose studies they place considerable reliance, is unwarranted. This lawsuit is part of a multi-pronged political effort to raise or lift the charter school caps that also includes a pending bill filed by Governor Baker and a proposed referendum question certified by the Attorney General. *See Opp.* at 9.

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<sup>10</sup> G.L. c. 71, § 89(a) defines "Charter school" as "commonwealth charter schools and Horace Mann charter schools unless specifically stated otherwise." The term "public charter school" is absent from the statute but is the favored self-designation of charter school proponents. *See, e.g.,* Massachusetts Charter Public School Association, <http://www.masscharterschools.org/>.

<sup>11</sup> Atty. Michael Keating, one of plaintiffs' lead counsel, serves as chair of The Boston Foundation's Board of Directors. Accessed at <http://www.tbf.org/about/meet-our-board>.



The exalted claims of the plaintiffs for the effectiveness of charter schools do not withstand scrutiny. They overstate the conclusions of the papers they cite and ignore critical analyses of their methodology. As has often been said, when your only tool is a hammer, after a while, everything starts to look like a nail. Here, the hammer is unlimited expansion of charter schools.

### **1. Charter School Structure in Massachusetts**

As explained in the Defendants' Opposition, 6-11, Massachusetts enacted legislation creating charter schools in 1993, becoming effective in 1994. St.1993, c. 71, § 55; G.L. c. 71, § 89 ("Section 89"). Charter schools, "generally speaking, are established to encourage innovative educational practices." *School Comm. of Hudson v. Board of Educ.*, 448 Mass. 565, 567 (2007) (citation omitted); G.L. c. 71, § 89(b). There are two general types of charter schools: Commonwealth and Horace Mann.<sup>12</sup> G.L. c. 71, § 89(a), (c). While Section 89 labels both types of charters as "public schools," the teachers in those schools are subject to starkly different working conditions. G.L. c. 71, § 89(c), (s), (t), (y). For most purposes, teachers in Horace Mann schools share the same wages, benefits, and job protections as their peers in district public schools. Those in Commonwealth charters receive less advantageous wages and benefits, and are almost universally employees at will.<sup>13</sup> According to the Office of the State Auditor, the average salary of charter school teachers was only 75% of the average teacher in district public schools. *Auditor's Report* at 55-56.<sup>14</sup>

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<sup>12</sup> There are three different types of Horace Mann schools. G.L. c. 71, § 89(c).

<sup>13</sup> KIPP Massachusetts, part of a national network of 183 charter schools with 70,000 students, currently operating five schools with over 1,400 students in Massachusetts, describes itself as "an employment at-will organization." <http://www.masscharterschools.org/careers/middle-school-humanities-2016-2017-school-year>.

<sup>14</sup> The average annual salary of teachers in district public schools is approximately \$74,676. Accessed at <http://www.doe.mass.edu/finance/statistics/salary.pdf>.

Teachers in district public schools are employed by a local or regional school district, and virtually all have chosen to be represented by an employee organization.<sup>15</sup> G.L. c. 150E, §§ 1, 2, 4. Negotiated collective bargaining agreements (CBAs) address “wages, hours, standards of productivity and performance, and any other terms and conditions of employment, including without limitation, in the case of teaching personnel employed by a school committee, class size and workload.” G.L. c. 150E, § 6. In Boston, as in most municipalities, all teachers are represented by an employee organization in a single bargaining unit. *See, e.g., Boston School Comm. and Boston Teachers Union, Local 66*, 36 MLC 121, 2010 WL 661986 (2010).

The BPS maintains a CBA with the Boston Teachers Union, Local 66, American Federation of Teachers, AFL-CIO, covering teachers and other educational professionals.<sup>16</sup> In addition to receiving benefits under their CBAs, public school teachers and other professional educators, if retained after three consecutive years in a school district, achieve professional teacher status, which protects them from unjust discharge. G.L. c. 71, §§ 41, 42.<sup>17</sup>

Horace Mann charter schools, although chartered by the Board of Elementary and Secondary Education (“BESE”), “operate[ ] under a charter approved by the local school committee and the local collective bargaining unit in the district in which the school is located.” G.L. c. 71, § 89(c). Horace Mann charter schools have leeway to deviate from district-wide CBA provisions covering work rules and hours of work. G.L. c. 71, § 89(s). However, employees of Horace Mann charter schools remain employees of the local school district and part of the collective

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<sup>15</sup> DESE maintains a web site of educator collective bargaining agreements at <http://educatorcontracts.doemass.org/contents.aspx>.

<sup>16</sup> CBA accessed at <http://educatorcontracts.doemass.org/view.aspx?recno=31>.

<sup>17</sup> Teachers may challenge discharge through a statutory arbitration process, however the awards rendered are subject to judicial review which is “broader and less deferential” than review of arbitral awards issued under CBAs. *School Comm. of Lexington v. Zagaeski*, 469 Mass. 104, 112 (2014); G.L. c. 71, § 42.

bargaining unit in their district. G.L. c. 71, § 89(y). Depending on the type of Horace Mann charter school, teachers retain varying levels of coverage under the local CBA but must at least receive the same salary and benefits as the other public school teachers in the district. G.L. c. 71, § 89(t). Horace Mann charter employees achieve the same professional teacher status and job protection as their colleagues in district public schools. G.L. c. 71, § 89(s).

The plaintiffs focus solely on Commonwealth charter schools, which operate under a very different legal regime. These charter schools receive their charters from BESE, are managed by boards of trustees, and operate completely independently of any locally-elected school committee. G.L. c. 71, § 89(c). Although the charter applicant must be a non-profit business or corporate entity or similar group, it may contract with a for-profit management organization to operate the school. G.L. c. 71, § 89(d), (e). Its professional employees have few of the protections afforded teachers in district public schools or Horace Mann charters. Teachers in the Commonwealth charter schools, for example, do not acquire “professional teacher status” (or “tenure”) or have statutory protection from unjust dismissal. G.L. c. 71, § 89(s). Teachers can unionize if they choose, but only one of the existing 71 Commonwealth charter schools presently has secured collective bargaining rights.<sup>18</sup>

As discussed in detail elsewhere, charter schools are funded by the school districts from which they draw students. Opp. at 7; 603 C.M.R. § 1.07. In essence, every dollar that goes to a charter school is a dollar that is taken away from the sending school district.<sup>19</sup>

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<sup>18</sup> For collective bargaining purposes, the board of trustees of a Commonwealth charter school is considered a “public employer” under the state public sector collective bargaining statute, Chapter 150E. G.L. c. 71, § 89(y). Since they are not part of the larger, existing collective bargaining units in the districts where they work, the charter school teachers can gain collective bargaining rights only within their individual charter school.

<sup>19</sup> The statute theoretically cushions the sending schools for their financial losses to charter schools, with reimbursements declining from 100% for the first year to 25% for each of the next five years. G.L. c. 71, § 89(gg). However, these reimbursements are subject to legislative appropriation.

## **2. Boston Public Schools and School Age Children in Boston**

In the 2015-16 school year, the Boston Public Schools (BPS) maintains 125 schools, of which 20 are pilot schools, six are Horace Mann charter schools, and eight are Innovation Schools.<sup>20</sup> In total, these schools educate approximately 56,650 students. BPS reports that, of the remaining 20,780 school-age children in Boston who do not attend BPS schools, 8,100 go to Commonwealth charter schools, 5,160 to parochial schools, 4,120 to non-parochial private schools, 2,800 to suburban schools through METCO, 510 are placed by BPS Special Education Dept. in non-BPS schools and programs, and 90 are home schooled.<sup>21</sup> As of October 2015, BPS enrolled 11,200 students with disabilities (20% of total enrollment) and 16,428 ELLs (students with limited English proficiency) (29% of total enrollment). As many as 72% of BPS students are identified as “high needs” (ELL, students with disabilities, or economically disadvantaged).

For the current fiscal year, the Boston School Committee has passed a budget of \$1.027 billion, which awaits City Council funding.<sup>22</sup> The budget includes cuts in special education of \$5 million and a \$2000 per student reduction in funding for children with autism.<sup>23</sup> The most recent data shows that for the current fiscal year, Boston paid \$145 million in tuition to charter schools, at a net cost to BPS of \$119 million.<sup>24</sup> The statutory reimbursement formula<sup>25</sup> called for Boston to receive \$41 million, but the city only received \$26 million, as the FY16 state reim-

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<sup>20</sup> Accessed at <http://www.bostonpublicschools.org/Page/941>.

<sup>21</sup> Accessed at <http://www.bostonpublicschools.org/cms/lib07/MA01906464/Centricity/Domain/4/BPS%20at%20a%20Glance%2015-1109.pdf>

<sup>22</sup> Accessed at <http://learninglab.wbur.org/2016/03/24/boston-school-committee-approves-controversial-bps-budget/>.

<sup>23</sup> Accessed at <http://learninglab.wbur.org/2016/03/24/boston-school-committee-approves-controversial-bps-budget/>.

<sup>24</sup> Accessed at <http://www.doe.mass.edu/charter/finance/tuition/fy16/Q3-preliminary-distsum.xlsx>.

<sup>25</sup> St. 1997, c. 46, as amended by St. 2010, c. 12.

bursement line item was significantly underfunded.<sup>26</sup> The Legislature is under no obligation to fund the \$15 million shortfall or, if it chooses, to make any reimbursement at all. Office of the State Auditor, *supra*, at 7.

### 3. The National Debate over Charter Schools

The Massachusetts experiment with charter schools arose out of a broader historical and national context. Since the enactment of the first charter school legislation in 1991 in Minnesota, followed by California in 1992, *see In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.*, 164 N.J. 316, 320-321, 753 A.2d 687, 689-90 (2000), charter schools have been sources of controversy. Promoted as laboratories of innovation outside of the district public schools, they were supposed to spread their innovative strategies across all schools.<sup>27</sup> But the experiment has escaped the laboratory and, in many jurisdictions, undermined the public schools it was supposed to improve.<sup>28</sup>

In 1965, Congress enacted the Elementary and Secondary Education Act (“ESEA”) as part of the Johnson Administration’s “War on Poverty.”<sup>29</sup> After multiple reauthorizations by Congress, in 2001 the ESEA was reauthorized as the No Child Left Behind Act (“NCLB”).<sup>30</sup>

The amended statute imposed greater accountability standards on recipient schools and local ed-

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<sup>26</sup> Accessed at <http://www.doe.mass.edu/charter/finance/tuition/fy16/Q3-preliminary-distsum.xlsx>.

<sup>27</sup> *Public Accountability for Charter Schools, Standards and Policy Recommendations for Effective Oversight*, Annenberg Institute for School Reform, 2014 at 3. Accessed at <http://annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf>.

<sup>28</sup> The City of New Orleans recently became an all-charter school system, with no oversight from local school districts. <http://www.npr.org/sections/ed/2014/05/30/317374739/new-orleans-district-moves-to-an-all-charter-system>. While some have praised the approach, critics claim the schools impose overly strict disciplinary policies, pick and choose from among students, and have created de facto segregation. *Id.* The example of New Orleans illustrates that charter school proponents no longer see charters as laboratories of innovations that will spread to district schools, but as replacements for district schools.

<sup>29</sup> Pub. L. 89-10, Apr. 11, 1965, 79 Stat. 27, codified in 20 U.S.C. §§ 6301-7941 (2006). See Dylan P. Grady, *Charter School Revocation: A Method for Efficiency, Accountability, and Success*, 41 J.L. & Educ. 513, 516-517 (2012).

<sup>30</sup> PL 107-110, January 8, 2002, 115 Stat. 1425.

ucation agencies, requiring “adequate yearly progress” standards.<sup>31</sup> Included, for the first time, were provisions for charter schools.<sup>32</sup> As part of the American Recovery and Reinvestment Act of 2009, the U.S. Department of Education (“DOE”) created the Race to the Top program.<sup>33</sup> Incentivized by billions of federal dollars, Race to the Top encouraged states to implement performance pay systems,<sup>34</sup> improve low-achieving schools, and expand charter schools. Dylan P. Grady, *Charter School Revocation: A Method for Efficiency, Accountability, and Success*, 41 J.L. & Educ. 513, 518-519 (2012). From the 1999-2000 to 2012-2013 school years, nationally, charter schools went from 1.7 to 6.2 percent of all “public schools”; enrollment increased from 300,000 to 2.3 million.<sup>35</sup>

Despite bipartisan support for charter schools<sup>36</sup> and the strong advocacy of the Obama administration, the DOE concluded in 2010:

Rigorous studies of the effectiveness of charter schools across multiple states have found that while many charters perform significantly better than state averages, many perform worse. A study of charter schools in 16 states found that 17 percent delivered learning gains for students significantly better than local public schools, but 37 percent delivered significantly worse results than local public

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<sup>31</sup> 20 U.S.C. §§ 6301-6578, 6316(b)(1)(D).

<sup>32</sup> *No Child Left Behind Act of 2001*, 20 U.S.C. Ch. 70 Subch. V Pt. B §§ 7221-7221j, 7223-7223j, 7225-7225j. Subpart 1 is the Charter Schools Program. *Id.* at § 7221. Subpart 2 is Credit Enhancement Initiatives To Assist Charter School Facility Acquisition, Construction, Renovation. *Id.* at § 7223. Subpart 3 is Voluntary Public School Choice Programs. *Id.* at § 7225. *See* Grady at n. 35.

<sup>33</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5. *See* Grady at n. 37.

<sup>34</sup> A major three-year study at Vanderbilt University did not confirm the hypothesis that significant financial rewards for teachers whose students’ academic testing scores improved would cause scores to rise. Mathew Springer et al., *Teacher Pay for Performance*, 2010, accessed at <https://my.vanderbilt.edu/performanceincentives/research/point-experiment/>.

<sup>35</sup> Accessed at [https://nces.ed.gov/programs/coe/indicator\\_cgb.asp](https://nces.ed.gov/programs/coe/indicator_cgb.asp).

<sup>36</sup> Nina Rees, *Charter Schools Bring Parties Together*, U.S. News & World Report, December 15, 2015, accessed at <http://www.usnews.com/opinion/knowledge-bank/articles/2015-12-15/every-student-succeeds-act-reflects-bipartisan-support-for-charter-schools>.

schools (CREDO<sup>37</sup>, 2009). A follow-up study focused on charter schools in New York City reversed these numbers, with a smaller percentage (12 percent in reading and 16 percent in math) of charters delivering significantly worse results and a larger percentage (29 percent in reading and 51 percent in math) delivering significantly better results (CREDO, 2010). Out of these, and other, studies, a similar picture emerges: there is a great deal of variation in quality in charter schools, with some schools achieving at levels that are higher than traditional public schools, and some schools achieving at levels that are lower.

U.S. Department of Education, *Fostering Innovation and Excellence* (May 2010).<sup>38</sup>

A working group convened in 2012-2013 under the auspices of the Annenberg Institute for School Reform and Communities for Public Education Reform, organizations that generally support charter schools, explained how its mission had morphed from improving to replacing public schools:

The semi-independent charter school model, first applied in 1991, aimed to look outside traditional school district structures and develop innovative strategies that could be applied at scale across all public schools. Early charter schools took on this challenge, and many have succeeded. But over the last two decades, those who envision charters as competing with and ultimately replacing traditional public schools have become some of the most dominant voices in the policy debate over the reform. Chartering has become an industry, and in many cases, rapid expansion has replaced innovation and excellence as goals. Forty-two states now allow chartering, and about 2.5 million students attend more than 6,000 independently managed schools. Almost 2,000 new charter schools have opened in the past five years, along with a burgeoning market of management service providers, vendors, think tanks, policy shops, and advocacy organizations.

*Id.* The same working group identified a number of common concerns about charter schools:

uneven academic performance; practices that pushed or kept students out of charter schools; overly harsh discipline policies; funding patterns that destabilized traditional public schools; and a lack of representative governance, transparency, and adequate oversight, leading to potential conflicts of interest and instances of fraud and other problems.

*Id.* These issues permeate the academic debate over charter schools.

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<sup>37</sup> Center for Research on Education Outcomes.

<sup>38</sup> Accessed at <https://www2.ed.gov/policy/elsec/leg/blueprint/fostering-innovation-excellence.pdf>.

A key problem with assessing the efficacy of charter schools is a dearth of studies that have been vetted by peer-reviewed journals. In weighing published expert opinion, a critical index of reliability is publication in a peer-reviewed journal. “[S]ubmission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-594 (1993). Massachusetts courts have also recognized the importance of publication in peer-reviewed journals in assessing the acceptance or weight given to scientific opinion. *See, e.g., Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 12 (1998).

Two national charter school studies by the Center for Research on Education Outcomes (CREDO), one in 2009<sup>39</sup> and the other in 2013,<sup>40</sup> exemplify how the press, public, and partisans can manipulate data as they see fit. Both studies compared math and English standardized testing scores between students in charters and district public schools. In its 2009 study, CREDO concluded,

Our national pooled analysis reveals, on the whole, a slightly negative picture of average charter school performance nationwide. On average, charter school students can expect to see their academic growth be somewhat lower than their traditional public school peers, though the absolute differences are small. Charter students trail the academic growth of TPS students by .01 standard deviations in reading, and by .03 standard deviations in math. Though small, these effects are statistically significant.<sup>41</sup>

In the 2013 study, CREDO reported “charter schools in 27 states are outperforming their TPS [district public school] peer schools in greater numbers than in 2009.” *Id.* at 86. As a commentator from the Brown Center on Education Policy pointed out, the 2013 CREDO report caused

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<sup>39</sup> *Multiple Choice: Charter School Performance in 16 States* (2009), accessed at [http://credo.stanford.edu/reports/MULTIPLE\\_CHOICE\\_CREDO.pdf](http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf).

<sup>40</sup> *National Charter School Study 2013*, accessed at <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf>.

<sup>41</sup> *Multiple Choice: Charter School Performance in 16 States* (2009), *supra*, at 45.



press outlets such as The New York Times to describe charter school performance as “improving”,<sup>42</sup> even though, statistically, the differences are “extremely small, so tiny, in fact, that they lack real world significance.” *Id.* at 3.

In one of the few charter school articles published in a major journal, Dr. Julian Betts and his co-authors set out the problems with charter school studies.<sup>43</sup> As of January 2012, they observed, “Unfortunately, most studies of charter schools’ impact on student achievement use sophisticated methods that tell us little about causal effects.” *Id.* at 171. A confounding problem that permeates the literature is the recognition that families who apply to charter schools are often more motivated or have more time to perform the volunteer work that such schools request of them than families of children who do not apply. *Id.* “More often than not, the difference between charter schools and district public schools reflects who enrolls at the schools more than the quality of education provided.” *Id.* Simply comparing test results of students in charters with those in district schools, therefore, yields little valid scientific information.

Dr. Betts and other commentators suggest that lottery studies might yield better data. Such studies use the waiting lists of oversubscribed charter schools to compare the test results of those on the list who receive an offer of admission to the charter and those who do not. Theoretically, this method would account for the intangible motivation or self-selection problem. While strongly advocating this approach, Dr. Betts also recognizes its limitations:

Foremost among these is that most charter schools are not oversubscribed. For example, the U.S. Department of Education released a lottery-based study of charter middle schools that found that only 130 out of 492 such schools nationwide used admission lotteries. This raises the possibility that a study of oversubscribed charters will not tell us anything about the effectiveness of charter schools that are not sufficiently popular to be oversubscribed.

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<sup>42</sup> Tom Loveless, *Charter School Study: Much Ado About Tiny Differences*, Brookings Institution (July 3, 2013).

<sup>43</sup> Julian R. Betts et al., *Better Research Needed on the Impact of Charter Schools*, *Science*, vol. 335 (January 13, 2012), accessed at <http://science.sciencemag.org/content/335/6065/171>.

*Id.* As discussed below, this reliance on oversubscribed schools that use lotteries is a significant flaw in the studies paid for by The Boston Foundation and heavily relied on by the plaintiffs.

Another frequent criticism of charter schools has been their under enrollment of students with disabilities and ELLs, populations obviously posing greater challenges for educators. A January 2012 report by the U.S. Government Accountability Office, *Charter Schools: Additional Federal Attention Needed to Help Protect Access for Students with Disabilities*,<sup>44</sup> found these students underrepresented in charter schools. A similar report on ELLs was unable to draw any conclusions because of inadequate reporting by charter schools.<sup>45</sup> A 2015 CREDO report on charter schools in Boston and 40 other urban areas found that 30% of students in BPS were ELLs, compared with only 8% in Boston charters. *Urban Charter School Study – Report on 41 Regions* (CREDO, 2015). Charters in Boston also enrolled fewer students with disabilities than district public schools, the study found. *Id.*

No less problematic – and no less frequently criticized – is the high teacher turnover rate in charter schools and the resulting lack of consistency and stability in the professional workforce. Annual data published by DESE show that teacher turnover rate in the Commonwealth charter schools every year is nearly double the rate found in district public schools and the in-district Horace Mann charter schools.<sup>46</sup> Research suggests that “teacher turnover has a significant and negative impact on student achievement in both math and ELA. Moreover, teacher turnover

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<sup>44</sup> Accessed at <http://www.gao.gov/assets/600/591435.pdf>.

<sup>45</sup> U.S. GAO, *Education Needs to Further Examine Data Collection on English Language Learners in Charter Schools* (letter) (July 17, 2013), accessed at <http://www.gao.gov/assets/660/655930.pdf>.

<sup>46</sup> Accessed at [http://profiles.doe.mass.edu/state\\_report/staffingRetentionRates.aspx](http://profiles.doe.mass.edu/state_report/staffingRetentionRates.aspx)

is particularly harmful to the achievement of students in schools with large populations of low-performing and black students.”<sup>47</sup>

#### **4. The Plaintiffs’ Grandiose Claims of the Efficacy of Charter Schools Are Incorrect or Unwarranted.**

In ¶¶ 75-85 of their Complaint, plaintiffs make grandiose claims for charter schools but the research indicates that, at best, students at some charter schools perform better than their district school peers, while students at other charter schools perform worse. Left out of the comparison are the deleterious effects charters have on the district public schools by draining financial resources from the system, effects which, to date, remain unquantified.

In ¶ 75 of the Complaint, Plaintiffs boldly assert:

Public charter schools in Massachusetts have produced remarkable results for students in districts where many of the district schools regularly fail to provide students with an adequate education. Thus, what began as an experiment in the Commonwealth has evolved into a proven mechanism for providing educational opportunities.

As discussed below, no objective assessment of Massachusetts Commonwealth charter schools could support these claims. Paragraph 76 states:

As early as 1997, a preliminary Massachusetts Department of Education study of test results from the first students to attend public charter schools found that the students in every public charter school (for which there was sufficient test score data for analysis) were making noticeable academic gains relative to their peers. Robert Antonucci, the Commissioner of Education at the time of the 1997 study, remarked that it showed public charter schools to be "promising."<sup>2</sup>

Footnote 2 refers to *Test Results from Massachusetts Charter Schools: A Preliminary Study*, Massachusetts Department of Education (June 1997). What the report actually concluded was far more cautious:

Are students in charter schools making academic gains? Six out of eight schools, from which adequate test data is available, appear to be making academic gains. These schools (Benjamin Franklin, Boston Renaissance, City on a Hill, Commu-

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<sup>47</sup> <http://cepa.stanford.edu/sites/default/files/TchTrnStAch%20AERJ%20RR%20not%20blind.pdf>

nity Day, Lowell Middlesex Academy and SABIS International Charter Schools opened in 1995 and have administered at least two rounds of testing.

*Id.* at 4. Before MCAS testing, these test results were based on varying national tests. The study failed to address the well-known problems of comparing charter school students with all of those in sending schools. Even within these parameters, the plaintiffs' assertions are hyperbolic. Of the 22 charter schools in the survey, only eight had sufficient data to be able to answer the question, "Have the students in this charter school made academic gains?" Of those eight, six were assessed as making academic gains. Of those six, only two contained specific findings relative to students attending district public schools in their sending districts. The performance of the Benjamin Franklin Charter School students "appears to be about the same as those of the Franklin Public Schools." *Id.* at 16. "[S]tudents that entered the Cape Cod Lighthouse Charter School on average, performed higher than the students in the districts from which they came." *Id.* at 21. A more accurate statement would be that of the 22 charter schools surveyed, available data appeared to show that only six were making academic gains.

According to paragraph 77 of plaintiffs' Complaint:

A study of public charter school performance conducted by the Department of Education in 2001 found substantial academic improvement by students attending charter schools across the Commonwealth. The study found that 64% of classes at public charter schools made greater than average gains in math and that 58% of classes made greater than average gains in reading.<sup>3</sup>

Footnote 3 refers to *The Massachusetts Charter School Initiative: A Report of the Massachusetts Department of Education* (2001). Behind the glowing statistics of that report is the sobering "Caution to Readers":

Readers are cautioned to be careful in interpreting data on academic achievement. There are several reasons for this caution.

First, for virtually all schools, the scores reported here represent only one test,

usually over only one or two periods of time. A better picture of academic achievement comes from multiple assessments over several years.

Second, many charter schools have small classes and are therefore testing a small number of students. As a result, a large change in just one or two students' test scores can affect the average for an entire class, a situation which can be potentially misleading.

*Id.* at 80. The report contained data on 36 schools statewide, eight of which were in Boston.

Five of the Boston charter schools had testing data comparing them to BPS testing data. One of those five, the Boston Renaissance Charter School, had lower test scores at five different levels compared to BPS students; the sixth was even. City on a Hill, another Boston charter, had one level lower by two points, one higher by two points, and another higher by three points. All of the five Boston schools had significantly lower percentages of ELL, special education, and low income students than the BPS. Among the non-Boston charters, testing data indicated that about half of the charter schools were generating lower and half higher scores than their sending districts. The non-Boston schools also reported, on average, educating fewer ELL, special education, and lower income students than their sending districts. Generally, the greater these discrepancies, the better the charter schools performed on the tests.

Paragraphs 78-85 of plaintiffs' Complaint appear under the heading "*Independent research confirms the quality of Boston's public charter schools and the difference in quality between public charter schools and non-charter public schools.*" Plaintiffs base this misleading assertion on four academic papers, three of which were prepared for The Boston Foundation.<sup>48</sup>

None of these papers was originally published in a peer-reviewed journal, where the researchers' methods and claims would have been scrutinized by independent scholars before publication.

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<sup>48</sup> Angrist, Joshua, et al., *Charter Schools and the Road to College Readiness* (The Boston Foundation, 2013); Angrist, Joshua et al., *Student Achievement in Massachusetts' Charter Schools*, Center for Education Policy Research, Harvard University (2011); Cohodes, Sarah R. et al., *Charter School Demand and Effectiveness* (The Boston Foundation, 2011); and Abdulkadiroglu, Atila et al., *Informing the Debate: Comparing Boston's Charter, Pilot, and Traditional Schools* (The Boston Foundation, January 2009).

Interestingly, two of them were subsequently published in academic journals, where their conclusions were significantly dampened.

The first paper, *Informing the Debate*, was published by The Boston Foundation in January 2009. The plaintiffs characterize its findings as showing that “academic performance gains among Boston charter-school students were significantly greater than those of their peers who had applied to charter schools but were denied admission because of the lottery.” Compl. ¶ 80.

The same paragraph went on to proclaim:

The authors of that study found “large positive effects for Charter Schools, at both the middle school and high school levels” and that “(t]he estimated impact on math achievement for Charter middle schools is extraordinarily large.” They concluded that public charter schools in Boston “appear to have a consistently positive impact on student achievement in all MCAS subjects in both middle school and high school.”<sup>49</sup>

Footnote 5 refers to *Informing the Debate*, without page citation. The quotation comes from the paper’s “Summary of Findings” on page 9. The paper’s authors used data from MCAS testing for school years 2001-02 through 2006-07 in certain subjects as their exclusive metric.<sup>49</sup> Their stated purpose was “to investigate the causal effect” of pilot schools and charter schools. In 2011, the same study was published again, this time in a peer-reviewed journal. Retitled *Accountability and Flexibility in Public Schools: Evidence from Boston’s Charters and Pilots*, the paper appeared in the *Quarterly Journal of Economics* 126(2): 699-748 (2011) (hereinafter “*Accountability*”).<sup>50</sup>

The conclusions in the academic journal are hardly as sweeping as the plaintiffs claim.

The study attempted to overcome the “selection bias” problem of studying alternative school

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<sup>49</sup> *Informing the Debate* at 14. Curiously, the question whether MCAS scores correlate with the *McDuffy* court’s seven capabilities is never discussed either by plaintiffs or in any of the studies or papers. Cf. *McDuffy*, *infra*, at 618-619.

<sup>50</sup> The full text can be accessed at <http://qje.oxfordjournals.org/content/126/2/699.full.pdf+html?sid=b8d1546a-af36-4425-b508-623afa3c7d9a>.

models, according to which, “Students who attend charter and pilot schools differ in a number of ways from the general pool of public school students, a fact that may bias naïve comparisons.”

*Accountability* at 702. Their primary analytical tool was to look at oversubscribed schools whose students entered through a lottery. They then compared the MCAS scores of those who entered the charter schools through the lottery with those who went to other schools. *Id.* Closed charter schools were excluded. They recognized from the outset that limiting their data to currently open, oversubscribed charter schools with complete lottery records

may have consequences for the external validity of our results. The over-subscription conditions tilts our sample toward charter and pilot schools that parents find appealing, as does the requirement that schools still be open.

*Id.*<sup>51</sup> Consequently, the charter school study data is based on studying five of 12 middle schools, three of eight high schools, and no elementary schools. The authors recognize “that the charter schools in our lottery study are among the best in Boston.” *Accountability* at 745. The large MCAS score achievements of the charter and middle schools apply only to that minority of schools:

It is worth emphasizing that the large gains reported here are generated by charter schools with over-subscribed and well-documented admissions lotteries.

*Accountability* at 746. Thus, the plaintiffs’ attempts to universalize these limited results to all charter schools are completely unwarranted.

The plaintiffs also draw highly exaggerated conclusions from the 2011 DESE-funded<sup>52</sup> study, *Student Achievement in Charter Schools* (hereinafter “*Student Achievement*”), authored by

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<sup>51</sup> Another confounding factor buried in the *Informing the Debate/Accountability* report is the startling revelation that “53.0 percent of lottery winners never attend a Charter School at all.” *Informing the Debate* at 28.

<sup>52</sup> As proposed Intervenor have pointed out, the most prominent named defendants, including Education Secretary Peyser and BESE Chair Sagan, have publicly supported lifting the charter caps. All are appointed by Governor Baker, an outspoken supporter of raising the caps. Int. Memo at 18-19.

most of the same people who worked on the *Accountability* report.<sup>53</sup> Compl. at ¶ 81. The paper utilized the same oversubscribed lottery-based methodology as the 2009 study. *Student Achievement* at 1. Since the lottery analysis excludes most charter schools, the paper also used an “operational study” that attempted to compare MCAS scores of charter school students with their cohorts in public schools. *Id.* The study authors acknowledged that “oversubscribed charter schools may not be representative of all charters in the state.” They also recognize the selection bias of the observational study:

Although the observational study controls for observed differences between charter school attendees and their counterparts in traditional public schools, this approach does not account for unobserved differences that may influence test scores as well as charter school attendance.

*Id.* Plaintiffs correctly quote Commissioner Chester’s statement, “The findings are provocative. They suggest that students in Massachusetts’ charter middle and high schools often perform better academically than their peers in district public schools.” Compl. ¶ 81. Actually, reading the study, one could just as easily conclude that students in charter middle and high schools often perform **worse** than their peers in district schools. The charter lottery sample included only nine of 33 urban middle schools and six of 19 nonurban ones. Among high school charters, four of 23 urban and two of 11 nonurban high schools were included. *Id.* at 16. The paper’s actual “Conclusions” hardly merit the conclusions drawn by the plaintiffs or Commissioner Chester:

Comparisons of charter lottery winners and losers show mostly significant positive effects of charter attendance at oversubscribed middle schools and high schools. The middle school results reported here are moderately smaller than our earlier findings for Boston and Lynn, while the high school results are similar. A more nuanced analysis shows that positive estimates in the statewide sample come primarily from urban charters, which include the set of Boston schools and the KIPP middle school we previously analyzed. *On average, schools outside of urban areas are much less likely to have produced achievement gains; in fact, their students may be lagging their noncharter peers.*

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<sup>53</sup> It does not appear that anyone followed up this paper with an entry in a peer-reviewed journal.



*Id.* at 13 (emphasis added). From this data, one could conclude that eliminating the cap on charter schools, far from addressing educational deprivation, could actually make it worse for some students.

A follow-up 2013 Boston Foundation paper, *Charter School Demand and Effectiveness* (hereinafter “*Charter School Demand*”), is most noteworthy for its inclusion of extensive data on Boston school application and acceptance rates. The statistics belie the plaintiffs’ arguments that an unlimited number of charter schools are needed to meet the overwhelming demand. Compl. ¶ 20 (“Many thousands of children currently sit on waitlists to attend public charter schools in Boston.”). The Auditor’s Report has already concluded, and DESE has conceded, that the charter school waitlist information is not accurate. *The Department of Elementary and Secondary Education’s Oversight of Charter Schools, supra*, at pp. 17-23. What *Charter School Demand* shows is that for 6<sup>th</sup> grade entry to middle school, 55% of applicants are accepted, yet only 60% of those who are accepted actually attend. For high school (9<sup>th</sup> grade entry), the rate of attendance is an astounding 30.1% of the students accepted at charter schools; that is, nearly 70% of 9<sup>th</sup> graders accepted by a charter school decline the offer. *Id.* at 8. Despite the plaintiffs’ insistence that charter school placements are highly sought after and hard to come by, these statistics belie the myth that charter school seats are the educational equivalent of Super Bowl tickets. By comparison, the percentages of students who accept offers to attend district or pilot schools are 75% and 77% for middle and high schools, respectively. *Id.*

The final paper the plaintiffs rely on, *Charter Schools and the Road to College Readiness* (The Boston Foundation, 2013) (hereinafter “*Charter Schools and the Road*”), has an exceedingly interesting trajectory. The authors include most of the same authors of the previously cited studies, including MIT Professor Joshua Angrist. In addition to support from The Boston Foun-

dition, the paper was funded in part by a grant from the Institute of Education Sciences (IES), which is the statistics, research, and evaluation arm of the DOE.<sup>54</sup> The plaintiffs describe these researchers' conclusions in ¶ 85 of their Complaint:

Specifically, the researchers concluded that attendance at a Boston public charter school raises the probability that students pass exams required for high-school graduation, increases the likelihood that students qualify for an exam-based college scholarship, increases the frequency of Advanced Placement test-taking, substantially increases SAT scores, and increases the likelihood that students attend a four-year college.

The study's authors found their results so exciting that they titled a subsequent journal article, *Stand and Deliver: Effects of Boston's Charter High Schools on College Preparation, Entry, and Choice*, *Journal of Labor Economics*, vol. 34, no. 2, pt. 1 (2016) (hereinafter "*Stand and Deliver*").<sup>55</sup> Indeed, the papers "suggest that the gains from Boston's high-performing charter high schools extend well beyond high-stakes tests." After acknowledging the limitations of MCAS testing,<sup>56</sup> the study findings "suggest that achievement gains generated by Boston's high-performing charter high schools are remarkably consistent."<sup>57</sup>

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<sup>54</sup> According to the IES website, "We are independent and non-partisan. Our mission is to provide scientific evidence on which to ground education practice and policy and to share this information in formats that are useful and accessible to educators, parents, policymakers, researchers, and the public." <http://ies.ed.gov/aboutus/>. In their report, "the research team gratefully acknowledges financial support from the Institute of Education Sciences under Grant Number R30 5A120269." Angrist, Joshua, et al, *Charter Schools and the Road to College Readiness* (The Boston Foundation, 2013).

<sup>55</sup> *Stand and Deliver* is the name of a 1988 film about "a high school teacher who successfully inspired his dropout prone students to learn calculus." See <http://www.imdb.com/title/tt0094027/>.

<sup>56</sup> Regarding the limitations of using MCAS test scores to measure student achievement, the report states:

Although encouraging, gains on state-mandated standardized tests provide an inconclusive gauge of the benefits of charter attendance. Like other American public schools, charters are evaluated in part by the performance of their students on these tests. A growing literature suggests that educators respond strategically to the incentive to boost test scores (Neal and Schanzenbach 2010). In some cases, teachers have been found to cheat in order to avoid sanctions or to garner the rewards associated with high scores on tests used for accountability (Jacob and Levitt 2003). The potentially distortionary effect of test-based accountability may be especially large in the charter sector, where schools whose students do poorly on state assessments can be closed. In our Massachusetts setting, for example, 14 out of 96 charters granted through 2013 have been lost. Charter schools

The funding agency, however, was not impressed with report and rejected its results.<sup>58</sup>

In its single study review, the federal agency that funded the study found that it did not meet the group design standards of its What Works Clearinghouse (WWC). Its review stated:

The research described in this report does not meet WWC group design standards. The study design is based on randomized offers of admission to charter schools. Using specialized statistical techniques, the study authors estimated the effects of enrollment in a charter school among students who would enroll in a charter school if offered admission and would not enroll in a charter school if they were not offered admission. These types of students are referred to as compliers, and these types of estimates are known as complier average causal effects (CACE). This study has high attrition from the initial randomization to the analytic sample, so the WWC requires a demonstration of baseline equivalence in order for this study to meet WWC group design standards. However, CACE analyses cannot demonstrate baseline equivalence of compliers because compliers cannot be identified. Because the study cannot demonstrate baseline equivalence, the study does not meet WWC group design standards. Therefore, the findings from this study are not presented in this WWC report.

*Id.* (citation omitted). The plaintiffs therefore rely on a study rejected by the very federal agency under whose grant it was generated.

##### **5. The Plaintiffs Ignore Evidence Suggesting that the Boston Public Schools Achieved Substantial Success Despite the Loss of Funding to the Charter Sector.**

The plaintiffs' overstatement of charter school success is matched by their disregard for evidence demonstrating that, despite inadequate school funding and the draining of its budget to the charter sector, BPS has managed to provide educational services that match or better charter

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would appear to have a particularly strong incentive to teach to the test, at the expense, perhaps, of a focus on the development of skills with a longer-term payoff.

*Stand and Deliver* at 2. The similar section of The Boston Foundation version of the report omits the references to cheating. Compare *Stand and Deliver*, at 2, with *Charter Schools and the Road*, at 7.

<sup>57</sup> *Charter Schools and the Road*, at 8.

<sup>58</sup> Review of *Stand and Deliver: Effects of Boston's charter high schools on college preparation, entry, and choice* by What Works Clearinghouse, U.S. Department of Education, Institute of Education Sciences (March 2015). Accessed at <http://whatworks.ed.gov>.

services. In spite of the \$119 million transferred from its budget to Commonwealth charter schools, BPS points on its website<sup>59</sup> to areas where it has made progress:

- “We are proud to be one of the most diverse school districts in the nation. Nearly one in every two students speaks a language other than English at home, and our students come from 139 different countries.
- One in five BPS students has a disability, and half are economically disadvantaged.
- On the National Assessment of Educational Progress (NAEP) in Mathematics – also known as the “Nation’s Report Card” – Boston 4th and 8th grade students’ gains exceeded the national average for all public schools, including suburban schools. This is the first time since measurements began that *any* urban school district has met this mark.
- Since 2007, the BPS four year graduation rate has steadily increased, reaching its highest rate ever in 2015 despite more demanding standards required by the state for graduation; and the percentage of ninth graders who dropped out before graduation decreased to its lowest point ever for the Class of 2014.
- Since 2009, BPS has increased the number of schools with extended learning time from four to 24. Today, one in five students attends a school with a longer school day; and one in five students attends one of our award winning summer learning initiatives named the best in the nation in 2013.
- Our 2015 graduation rate of 66.7 percent was the highest it has ever been—up nine points since 2007.
- Graduation rates for African American students have risen from 54.2 percent in 2007 to 64.5 percent today.
- Graduation rates for English language learners increased 7.4 percent just this year and are at an all-time high of 59.3 percent.
- BPS offers pathways to graduation to students who may have dropped out through our ReEngagement Center and our summer graduation programs. We have cut the dropout rate by 32 percent since 2006.
- Thirty percent more students take AP exams today than three years ago, with Black and Hispanic students seeing the greatest growth in performance.

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<sup>59</sup> *Boston Public Schools Facts and Figures*, accessed at <http://www.bostonpublicschools.org/domain/238>.

- Nine out of 10 elementary and middle school students are receiving weekly arts education, up from 67% in 2009; and the number of high school students accessing arts education has doubled in three years.
- In 2008, just four percent of 8th grade students who were not in an exam school were enrolled in Algebra I. Today, 34 percent of 8th grade students take this advanced mathematics course.
- The percent of 10th grade students who pass all MCAS tests has risen from 44 percent in 2009 to 53 percent today.
- We offer full day prekindergarten education for 2,400 four year olds, up from 700 seats in 2005.”

While fond of citing The Boston Foundation’s research, the plaintiffs ignore a recent study of Boston’s schools showing that 50% of BPS high school students in the class of 2007 completed college by 2013, i.e., within six years of high school graduation, while only 42% of the 2007 class of charter school completed college in the same time frame. The 2015 report was issued by a consortium of public entities and private foundations that included the Boston Foundation.<sup>60</sup> Yet the studies commissioned by The Boston Foundation - and, indeed, the plaintiffs’ Complaint – fail to draw attention to this metric, on which the charter students are clearly trailing those in district schools.

**B. THE PLAINTIFFS’ SOLE RELIANCE ON LIFTING THE CHARTER CAPS TO ACHIEVE COMPLIANCE WITH THE EDUCATION CLAUSE IGNORES THE PRIMARY NEED FOR ADEQUATE FUNDING FOR ALL SCHOOLS, FORCES THE COURT TO DETERMINE LEGISLATIVE POLICY, AND WILL LEAD TO WORSENING EDUCATIONAL OPPORTUNITIES FOR THE REST OF THE PUBLIC SCHOOL STUDENTS.**

**1. The Plaintiffs Ignore the SJC’s Finding that Adequate Funding Is the Key to Educational Opportunity and Impermissibly Seek Through Litigation to Effectuate Educational Policy on Distributing Limited Resources.**

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<sup>60</sup> *The Boston Opportunity Agenda, Fourth Annual Report Card*, accessed at <https://www.tbf.org/~media/TBFOrg/Images/BOA/BOA%202014%20Report%20Card.pdf>.

A fundamental premise of the plaintiffs' Complaint is that the Commonwealth is violating its constitutional obligation to provide "an education for *all* its children, rich and poor, in every city and town of the commonwealth at the public school level." *McDuffy v. Secretary of Executive Office of Educ.*, 415 Mass. 545, 606 (1993) (emphasis in original); Part II, C. 5 § 2, of the Massachusetts Constitution.<sup>61</sup> Even if one accepts this deeply flawed premise<sup>62</sup> for purposes of a motion to dismiss under Mass. R. Civ. P. 12(b)(6), neither law nor logic compels the plaintiffs' next conclusion: that lifting the restrictions on the number and funding of charter schools will remedy the constitutional violation. In a motion to dismiss, courts should not "accept legal conclusions cast in the form of factual allegations." *Schaer v. Brandeis Univ.*, 432 Mass. 472, 477 (2000) (in defense of Rule 12(b)(6) motion, plaintiff may not rely on "subjective characterizations" or "conclusory descriptions of a general scenario which could be dominated by unpleaded facts" [quotation omitted]). The Complaint is rife with legal conclusions masquerading as facts. The lack of a reasonable causal link between the end to be achieved and the means employed to achieve that end constitutes a fatal flaw in plaintiffs' Complaint. Due to this glaring gap, the plaintiffs cannot prove a set of facts in support of their claim that would entitle them to relief. See *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 (2004).

Legislation permitting the existence of a limited number of charter schools in the Commonwealth came about as part of sweeping educational reform legislation in 1993, following the SJC's pronouncement in *McDuffy v. Secretary of Executive Office of Education*, 415 Mass. 545

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<sup>61</sup> Plaintiffs allege only that Boston Public Schools are underperforming at a constitutional level, while *McDuffy* makes it clear that the Commonwealth's obligation is statewide.

<sup>62</sup> One example of the problems inherent in determining whether a school district is underperforming at a constitutionally-deficient level is that plaintiffs' allegation that the BPS are not providing a constitutionally-sufficient education appears to be based on students' scores on the MCAS examinations. There is, however, no available data or case law indicating that low MCAS scores equate to a constitutional violation. Notably, MCAS only tests English and mathematics skills, while the seven capabilities outlined in *McDuffy* cover a much broader range. 415 Mass. at 618 (listing seven capabilities). Conversely, there is no data or jurisprudence to suggest that high MCAS scores are determinative of an education system that passes constitutional muster.

(1993) that: (1) the Commonwealth has a constitutional obligation to provide all children with the opportunity for an education, see *id.* at 606; and (2) the Commonwealth was not currently fulfilling its constitutional duty, see *id.* at 616-617. In *McDuffy* and the subsequent decision in *Hancock v Commissioner of Education*, 443 Mass. 428 (2005), the Court made it clear (despite the plaintiffs' statements to the contrary) that funding is a key factor that distinguishes performing schools from underperforming ones. "It is ... clear ... that fiscal support, or the lack of it, has a significant impact on the quality of education each child may receive." *McDuffy*, 415 Mass. at 614. In particular, the Court noted that relying on property taxes to fund schools created inherent inequalities between students in affluent and poor communities. See *id.* at 621 (duty to provide education for children "whether they be rich or poor and without regard to the fiscal capacity of the community or district"). Twelve years later, the state's highest court reaffirmed its view that the central cause of underperforming schools is inadequate funding. See *Hancock*, 443 Mass. at 461 (Marshall, J., concurring) ("the question is not 'if' money is needed, but how much").

After setting out certain parameters and highlighting the importance of funding to resolving deficiencies in education, the SJC instructed the legislative and executive branches to implement this revitalized constitutional duty. "[W]e are confident that the executive and legislative branches of government will respond appropriately to meet their constitutional responsibilities." *McDuffy*, 415 Mass. at 551. "[W]e leave it to the [Governor] and the Legislature[ ] to define the precise nature of the task which they face in fulfilling their constitutional duty to educate our children today, and in the future." *Hancock*, 443 Mass. at 460, quoting *McDuffy*, *supra*, at 620. Given the SJC's emphasis on school funding, it is not surprising that the Education Reform Act of 1993 included significant changes in the financing of public education. Instead of relying so

heavily on local property taxes, the Legislature directed the Commonwealth to raise funds and distribute funding among school districts with less regard to the wealth of the community and more to demonstrated educational need. See St.1993, c. 71; see generally G.L. cc. 69-71.

The *McDuffy* Court's emphasis on adequate funding of school districts and a goal of reducing inherent disparities in education due to the wealth or lack thereof of a particular community dovetails well with its conclusion that the duty imposed by the Constitution to "cherish" education applies universally. "[T]he Commonwealth has a duty to provide an education for *all* its children, rich or poor, in every city and town of the Commonwealth at the public school level." 415 Mass. at 548 (emphasis in original). See also *Cushing v. Newburyport*, 52 Mass. (10 Met.) 508, 513 (1846) (public schools are "designed for general education of all the people"). But the Commonwealth's ability to meet its obligation to provide adequate funding so that all the children may receive an education is threatened by attempts to expand the limited reach of charter schools, as discussed below.

## **2. Because of the Mechanism for Funding Charter Schools, Lifting the Caps Would Have Disastrous Consequences for District Schools.**

Taken together, the Constitution, *McDuffy*, *Hancock*, and the Education Reform Act of 1993 (as amended) can fairly be said to emphasize two key points: (1) the Commonwealth has a duty to provide an education (or at least the opportunity for same) to all its children; and (2) one of the most important factors in meeting this obligation is the existence of adequate funding. Conversely, a lack of funds is a significant factor in finding a constitutional violation.

Given this emphasis on funding and universality, a neutral observer might find the provision for charter schools in the 1993 educational reform legislation somewhat puzzling, as it directs money out of instead of into the district public schools. See c. 71, § 89. Nevertheless, the Legislature agreed to include a very limited charter school program in education reform primari-



ly in order to “encourage innovative educational practices” and “provide greater options and opportunities for innovative learning.” *School Comm. of Hudson v. Board of Educ.*, 448 Mass. 565, 567, 583 (2007).<sup>63</sup> In order to fund these purported laboratories of innovation, the Legislature adopted a funding mechanism by which each student who enrolls in a charter causes the removal and diversion of public funds from the student’s district school in order to fund the charter school. In return for allowing funds to flow out of the district schools and into charters, the Legislature anticipated that the district schools would reap the benefits of innovative practices flowing back from the charter schools. But there is no evidence that this planned *quid pro quo* ever came to fruition. On the contrary, the State Auditor has documented the complete failure of this feature of the 1993 Act. The funds flowed from the districts to the charters, but no meaningful benefits flowed in the other direction.<sup>64</sup>

As numerous commentators have noticed, the notion that the cost of a child’s education is a fungible, transferable sum – an assumption made by the original charter school funding mechanism - fails to recognize the many aspects of education that are not equally divided among students. “Many expenses associated with public education are either fixed or inelastic, declining very little with the departure of small numbers of students.” Program on Human Rights and the

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<sup>63</sup> See, also, G.L. c. 71, § 89 (b) (charter schools must “provide models for replication in other public schools”); § 89(e) (charter applications must include “plans for disseminating... innovations of the charter school to other non-charter public schools”); § 89(r) (education commissioner must “facilitate dissemination of successful innovation programs of charter schools”); § 89(dd) (“a commonwealth charter shall not be renewed unless the board of trustees of the charter school has documented... [it] has provided models for replication and best practices to the commissioner and to other public schools in the district where the charter school is located.”)

<sup>64</sup> Auditor’s Report at 23-31. It is astonishing that, in responding to the State Auditor’s criticism that DESE had failed to ensure the sharing of any innovative ideas or practices, DESE pointed to evidence that “[t]en charter schools have replicated their practices by opening one or more additional schools.” *Id.* at 30. This is the opposite of the legislative intent. The charter “experiment” was not intended to be self-replicating or for the benefit of the charter schools themselves. DESE’s few other examples of “dissemination and replication of best practices” are not any more persuasive. *Id.* at 29-30.

Global Economy, *At What Cost? The Charter School Model and the Human Right to Education* 33 (Northeastern Univ. Sch. of Law, November 2014).<sup>65</sup>

The claims of charter school supporters that the funding mechanism results in no financial loss to district schools cannot withstand scrutiny. District public schools in districts with charter schools have identified significant losses as the result of the siphoning of funding out of their schools and into the charters. Because certain fixed expenses, such as building maintenance and repair, cannot be forgone, the schools suffer the loss of extracurricular activities, arts programs and other so-called peripherals, or face the challenge of closing schools in order to make up for the lost funding. The result is that the charters' gain is the district public schools' loss.

The purported panacea for the lost school district funding is the reimbursement mechanism in G.L. c. 71, § 89(gg). In apparent recognition of problems with the original funding model, the Legislature amended the charter school financing mechanism in 1997 to create partial reimbursements for district public schools that lose students to charters. See St. 1997, c. 46, § 2, as amended by St. 2010, c. 12. There are two problems with the reimbursement program, however. First, reimbursement is only temporary and partial, i.e., after a student leaves the district, the district is reimbursed 100% of the increase in its total charter school tuition amount for one year; immediately thereafter this is reduced to 25%; and the reimbursement eventually disappears.<sup>66</sup> See G.L. c. 71, § 89(gg). Second, because the promise of reimbursement is explicitly made “subject to appropriation, the Legislature in times of fiscal stress can reduce or eliminate reim-

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<sup>65</sup> Note that, as state budgets are cut, school districts with some financial capacity, such as Boston, are being asked to bear more of the load, with constitutional implications. See Program on Human Rights and the Global Economy, *At What Cost? The Charter School Model and the Human Right to Education* (Northeastern Univ. Sch. of Law, November 2014). According to the study's authors, “Boston is gradually returning to the property-tax based system of funding traditional schools that was struck down by the *McDuffy* decision.” *Id.* at p. 30.

<sup>66</sup> Although the full per-pupil cost is transferred from district to charter in every year of a student's charter enrollment, the state's partial reimbursement to the district for this loss lasts only six years. Over a six-year period, the reimbursement is 37.% of the total money transferred from district to charter school. After six years, the district's obligation to pay for the student continues, but without state reimbursement.

bursement payments altogether, leaving Chapter 46 an empty promise. Indeed, this is not a speculative concern. “In at least four separate years since the program began, including 2014, the Legislature failed to approve the full reimbursement appropriation.” Program on Human Rights and the Global Economy, *At What Cost? The Charter School Model and the Human Right to Education* 34 (Northeastern Univ. Sch. of Law, November 2014). In the years following the *At What Cost?* study, the shortfall increased. In 2015, district schools only received 69% of promised reimbursements. In 2016, that number dropped to 63%. DESE, *Summary of Historical Commonwealth Charter School FTE, Tuition and Reimbursements* (2016).<sup>67</sup>

As noted by the Proposed Defendant-Intervenors, the funding mechanism for charter schools is a zero sum game in which the district students are the losers. While the plaintiffs – students on waiting lists who claim to be waiting for placement in charter schools<sup>68</sup> - claim that they do not need to show that charter schools are the best remedy, but only one possible remedy, they cannot ignore the constitutional mandate to educate “all the children” and not just those on charter school waiting lists. Just as the SJC in *McDuffy* recognized that reallocating funds would improve education in underperforming communities, so too must it be recognized that transferring funds away from district schools toward charter schools would have the effect of impoverishing education for the children in the sending districts. An increase in the number or size of charter schools could directly worsen the condition of education for students who are not in the plaintiff class. Assuming, as alleged in the Complaint, that some Boston public schools are un-

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<sup>67</sup> Excel spreadsheet accessed at <http://www.doe.mass.edu/charter/finance/tuition/>.

<sup>68</sup> According to the 2014 report by the State Auditor, the way in which the students on waiting lists are counted is deeply flawed in a way that inflates the numbers. Those compiling lists count many individuals who are no longer interested in a slot as well as those going into the 10<sup>th</sup>, 11<sup>th</sup> or 12<sup>th</sup> grades, which do not accept new students. Also, those students who have applied to multiple schools may be counted more than once. Office of the State Auditor, *The Department of Elementary and Secondary Education’s Oversight of Charter Schools* (Dec. 18, 2014). Even though reforms occurred after the Auditor’s Report, problems remain.

derperforming at the level of a constitutional violation, uncapping the charter schools could cause new constitutional harm in the district public schools.

When the Legislature chose to experiment with charter schools, it did so cautiously, with limits on both the numbers of schools and the percentage of funding that they could drain from the district public school system. While the Legislature has seen fit to gradually increase those numbers and percentages over the 23 years since the passage of education reform, charter schools remain a fraction of the total number of schools in any district. Even so, the impact of the funding mechanism is being felt all over the Commonwealth.<sup>69</sup> Pending legislation and a ballot initiative would allow a significant increase in charter schools that in time could be devastating. But the plaintiffs' lawsuit dispenses with any semblance of incremental change. One possible outcome of such a strategy would be the eventual inability of an increasingly underfunded traditional school system to perform adequately, providing the charter schools with self-ratifying arguments for more charter schools. Even without following the trend to its extreme, lifting the caps would potentially transform charter schools from a small percentage of institutions intended to be laboratories for innovative new practices they must share with the district public schools to become instead a parallel system of publicly funded, privately run schools with proprietary interests in their innovations and claims of success.<sup>70</sup>

The plaintiffs' solution to the perceived constitutional problem is no solution at all, not as a policy matter or as a matter of constitutional redress. It would merely perpetuate and worsen

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<sup>69</sup> Attached as Appendix A is a chart prepared by the amicus showing DESE estimates of how much money each of the listed school districts will lose to Commonwealth charter schools in FY 16. On the chart, the "net district payment" is the total amount of Chapter 70 aid diverted from the district to the charter schools. The "reimbursement shortfall" represents the diverted Chapter 70 money minus the underfunded state reimbursement appropriated by the Legislature.

<sup>70</sup> "We firmly believe that setting up a separate system is destructive to the notion of providing the best education for all students." Juan Cofield, President of the New England Area Conference of the NAACP, quoted at <https://www.boston.com/news/education/2016/01/28/citing-harm-that-charter-schools-cause-naacp-and-mass-lawyers-committee-will-intervene-in-charter-cap-lawsuit>.

the educational conditions of which they complain and jeopardize the constitutional rights of students who remain – many of whom choose to remain – in the district public schools in Boston and throughout the Commonwealth. The constitutional rights of one group cannot be the payment to redress the asserted constitutional rights of another.

**C. LIFTING THE CAPS ON CHARTER SCHOOLS WOULD CREATE AN UNFUNDED LOCAL MANDATE.**

As discussed above, lifting the cap on charter schools will cause the transfer of education funds out of municipal school budgets throughout the Commonwealth. Requiring municipal school districts to transfer public funds to schools outside municipal control creates, in effect, an unfunded local mandate. See G.L. c. 29, § 27C. See *City of Worcester v. The Governor*, 416 Mass. 751 (1994). Although an outside section to the Education Reform Act of 1993 (St. 1993, c. 71, § 67) appears to exempt the charter school funding mechanism from the statutory prohibition against unfunded local mandates, an increase in local cost obligations to charter schools might not be an *illegal* mandate, but it would nonetheless create the same problems as one.

G.L. c. 29, § 27C, which was passed as part of Proposition 2½ in 1981, prohibits any post-1981 law that imposes a cost obligation on a municipality unless: (a) the city or town votes to accept the law or appropriate funding or (b) the Commonwealth agrees to assume the costs. *City of Worcester* made it clear that the unfunded local mandate law does not prohibit the continuation or increases in pre-1981 expenses or local administrative costs for state programs. 416 Mass. at 758-759. In addition *City of Worcester* made it clear that the remedy for a violation is not reimbursement for the costs incurred, but exempting the municipality from the law. *Id.* at 761-762.

Here, the combined effect of the charter school legislation and the constitution's educa-

tion provision is that district public schools must continue to provide educational opportunities for students without sufficient funds being provided by the Commonwealth. The funding gap between the amounts provided to the district public schools (Chapter 70 funds plus local revenues), on the one hand, and the amount necessary to operate the district public schools so as to provide educational opportunities for “all the children” is, in effect, an unfunded local mandate.

That the Constitution’s obligation to provide educational opportunities falls directly on the “legislatures and magistrates” and not on school districts does not argue against the conclusion that the law creates (or, with the caps removed, will create) an unfunded local mandate. The combined effect of the education reform legislation of 1993, which heeded *McDuffy*’s mandate to move the primary funding source from local districts to the Commonwealth, the charter school funding mechanism, and the Constitutional mandate is to force local school districts to meet their (and the Commonwealth’s) obligations with ever-dwindling funds. The only ways to avoid an unfunded mandate are: (1) the school district votes to accept the financial burden imposed by the charter schools and raises revenues accordingly; or (2) the Commonwealth agrees to provide additional funds to overcome the losses. G.L. c. 29, § 27C. The first option introduces the return to the property tax system struck down in *McDuffy*, while the second option (which is partially addressed by limited reimbursements<sup>71</sup> per the 1997 amendments) would require amending the charter school laws. Therefore, the lifting of the caps on charter schools would create a new (or exacerbate an existing) unfunded local mandate. The waiver exempting the Education Reform Act of 1993 from the operation of G.L. c. 29, § 27C does not exempt school districts from the dire fiscal consequences of the charter school funding mechanism.

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<sup>71</sup> As noted, *supra*, the Legislature has not always paid school districts the reimbursements required by the 1997 amendments.

**D. PLAINTIFFS IMPERMISSIBLY ASK THE COURT TO EXERCISE LEGISLATIVE POWERS TO MAKE EDUCATIONAL POLICY.**

A fundamental flaw in the plaintiffs' litigation strategy is that it asks the Court to upset the careful balance of powers established in the Massachusetts Constitution and elaborated upon in more than two centuries of jurisprudence.

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.

Article 30, Declaration of Rights, quoted in *Opinion of the Justices*, 365 Mass. 639, 641 (1974).

After finding a constitutional mandate to educate “all the children”, the *McDuffy* Court explicitly held that the role of educational policymaking pursuant was given to the legislative and executive branches, not the judiciary. 415 Mass. at 551, 620. The two concurrences in the *Hancock* case affirmed this concept, with Justice Cowin's concurrence strongly emphasizing the separation of powers argument. *Hancock*, 443 Mass. at 466-468. The result has been a series of steps by the Legislature, starting with the 1993 Education Reform Act, to change the educational system in the Commonwealth. Charter schools have been a piece of this puzzle since 1993, and the Legislature has shown by numerous amendments, particularly the reimbursement amendment (Chapter 46) in 1997, that it is paying close attention to the role of charter schools in the system.

The plaintiffs ignore these considerations when they ask the Court to immerse itself in the details of educational policymaking. Taking the matter of charter schools out of the Legislature's hands and placing it in the judicial branch of government – particularly now when both the Legislature and the electorate have the opportunity to address the matter in the legislative and electoral processes – not only violates separation of powers but makes no sense. See *Bates v. Director of Office of Campaign and Political Finance*, 436 Mass. 144, 175-176 (2002) (“the

court cannot “interfere with the process of legislation ... before it is completed”) quoting from *Bowe v. Secretary of the Commonwealth*, 320 Mass. 230, 247 (1946).

**E. DECLARING THE CAP ON EXISTING CHARTER SCHOOLS UNCONSTITUTIONAL WILL RAISE AN UNANSWERED CONSTITUTIONAL QUESTION WHETHER THE CHARTER SCHOOL STATUTE, EITHER ON ITS FACE OR AS APPLIED, VIOLATES THE ANTI-AID AMENDMENT IN THE MASSACHUSETTS CONSTITUTION.**

Article 46, § 2 of the Amendments to the Massachusetts Constitution imposes two requirements on each school in the Commonwealth that seeks or uses public money, property, or credit loans: the school must be publicly owned and it must be under exclusive public control, order, and supervision.<sup>72</sup> This language, it has been noted, is “clear and peremptory,” *Commonwealth v. School Comm. of Springfield*, 382 Mass. 665, 673 (1981), citing *Opinion of the Justices*, 357 Mass. 836, 842-843 (1970), and includes among its core purposes the goal of “protect[ing] State and municipal treasuries from the growing pressure of interest groups in search of private appropriations.”

Massachusetts appellate courts have not had occasion to address Art. 46’s “public ownership” provision, i.e., to address whether the existing Massachusetts charter school statute, G.L. c. 71, § 89, violates Art. 46’s proscription against the use of public monies for “the purpose of founding, maintaining or aiding any... school which is not publicly owned.” To declare in the present case that the plaintiff-students (and, by extension, some untold number of other students in the Commonwealth) have a constitutional right to attend a charter school is to ignore constitu-

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<sup>72</sup> Commonly known as the “anti-aid amendment,” Art. 46, § 2, as further amended in 1974 by art. 103 of the Amendments, provides in relevant part:

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 ... primary or secondary school ... which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth...



tional impairments under Article 46 that could potentially arise and, indeed, that may already exist in light of the growth of the charter movement. On its face, G.L. c. 71, § 89 presents an untested question of “public ownership.” It explicitly authorizes private non-profit corporations to apply for and receive public charters (G.L. c. 71, §§ 89(1)(d) and (1)(i)(1)); it grants to the charter holder the powers available to business corporations formed under G.L. c. 156B (G.L. c. 71, § 89(k)(8)); it authorizes charter schools to acquire and own real property by lease, purchase, or gifts from private or public sources (G.L. c. 71, § 89(k)(2)); it authorizes charter schools to incur debt the repayment of which may (with state approval) exceed the duration of the charter; and it allows a non-profit charter holder to procure substantially all educational services under a contract with other persons or business entities, provided such persons or entities are not private schools or parochial schools (G.L. c. 71, § 89(k)(5)).

The statute’s facial validity under Art. 46’s “public ownership” mandate must be addressed before or as part of any judicial or legislative expansion of the statute’s reach. This is especially true in light of the expressed concern of the framers of the Amendment with the “growing pressure of interest groups in search of private appropriations.” *Id.* That concern was prescient, and it is no less applicable to the controversies of today – and no less applicable to the current charter school movement, as discussed above – as it was when Art. 46 was enacted.

Unlike “public ownership,” Art. 46’s second mandate of public “control, order, and supervision” has been addressed by the appellate courts. See *Fifty-One Hispanic Residents of Chelsea v. School Comm. of Chelsea*, 421 Mass. 598 (1996); *Commonwealth v. School Comm. of Springfield*, 382 Mass. 665, 674-75 (1981). However, neither *Chelsea* nor *Springfield* involved the expenditure of public money on charter schools and, while illuminating on the meaning and scope of Art. 46, neither decision provides insight into whether G.L. c. 71, § 89, stripped

of its strict charter school caps, would run afoul of the “control, order and supervision” mandate. *Chelsea* addressed the adequacy of a single school committee’s continued supervisory role after turning day-to-day school operations over to a private entity. *Springfield* concerned a school committee’s disbursement of public funds to non-public entities in order to provide specialized educational services to special needs children that the district itself could not provide. Whether the charter school statute provides adequate public control and supervision requires a vastly different analysis where it presently authorizes no less than 72 independent Commonwealth charter schools, a limitation that the plaintiffs seek to uncap. Unlike the earlier cases, the supervision and control of public expenditures under G.L. c. 71, § 89 is provided not by a local school committee overseeing local educational costs and activities but by a state agency located in Malden overseeing independent charter schools across the entire Commonwealth.

Absent case law on the “public ownership” or “public control” questions in a landscape of unrestrained charters, this Court should be loath to indulge an examination of the plaintiffs’ spurious claims which, rather than solve a purported constitutional problem, would exacerbate other problems or create new ones.

#### **IV. CONCLUSION**

As shown above, not only are the limits on charter schools constitutional, but lifting those limits is much more likely to create or exacerbate problems in the public schools – both constitutional and otherwise - than solve them. The claims made for the benefits of charter schools as a panacea for the troubles in our educational system are wildly exaggerated and in some cases demonstrably false. Furthermore, granting the relief plaintiffs seek would not remedy the constitutional violation they claim to suffer from, but would have the consequence of depriving thousands of children in district public schools of their constitutionally-guaranteed right to education.

For foregoing reasons, the Massachusetts Teachers Association urges the Court to reject plaintiffs' bid to lift the caps on charter schools and dismiss plaintiffs' Complaint pursuant to Mass. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

Respectfully submitted,

Massachusetts Teachers Association  
Amicus Curiae,

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