COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12275

JANE DOE NO. 1 and others,
Plaintiffs-Appellants,

v.

JAMES A. PEYSER and others,
Defendants-Appellees.

On Direct Appellate Review from a Judgment of
the Superior Court of Suffolk County

BRIEF OF AMICI CURIAE PIONEER INSTITUTE, INC., CHERYL BROWN HENDERSON, and THE BLACK ALLIANCE FOR EDUCATIONAL OPTIONS

BRIAN C. BRODERICK
bbroderick@hembar.com
BBO #549099
RYAN P. MCMANUS
rmcmanus@hembar.com
BBO #673219
HEMENWAY & BARNES LLP
75 State Street
Boston, MA 02109
(617) 227-7940

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

State Constitutional Provisions

Statutes & Regulations

Other Authorities

INTERESTS OF THE AMICI

The amici are two nonprofit organizations and one individual devoted to ensuring that public school students are afforded an equal opportunity for success. They include prominent subject matter experts in education policy, as follows:

Pioneer Institute, Inc. The Pioneer Institute, Inc. ("Pioneer") is an independent, nonpartisan, privately funded research organization that seeks to improve the quality of life in Massachusetts through civic discourse and intellectually rigorous, data-driven public policy solutions based on free market principles, individual liberty and responsibility, and the ideal of effective, limited and accountable government. Pioneer focuses on achieving policy goals in four issue areas: increasing access to high-performing schools and affordable, high-quality health care; ensuring that government services are efficient, accountable and transparent; expanding prosperity; and economic opportunity. PioneerLegal is the public-interest law initiative of Pioneer, which utilizes a legal-based approach to work to change policies that adversely affect the public interest in Pioneer's core policy areas.

Pioneer has authored numerous studies and white papers on education policy and charter schools in particular.[1]

Cheryl Brown Henderson. As the daughter of Rev. Oliver L. Brown, the lead plaintiff in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), Ms. Henderson is an advocate for and supporter of policies and practices that provide educational options for African American families. At its core, Brown was about access to educational opportunities without arbitrary restrictions. Ms. Henderson's work is to ensure that a world-class education is possible for children of color by empowering low-income and working-class African American families.

The Black Alliance for Educational Options. The Black Alliance for Educational Options ("BAEO") is a national, nonprofit education advocacy organization founded in 2000 by prominent Black educators, elected officials, and civil rights activists. BAEO's mission is to increase access to

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[1] See, e.g., Cara Stillings Candal, Putting Children First: The History of Charter Public Schools in Massachusetts (Pioneer White Paper No. 48, Nov. 2009); Katherine Apfelbaum & Ken Ardon, Meeting the Commonwealth's Demand: Lifting the Cap on Charter Public Schools in Massachusetts (Pioneer White Paper No. 117, July 2014); Ardon, Ken & Cara Stilling Candal, Assessing Charter School Funding in 2016 (Pioneer White Paper No. 148, Apr. 2016); Cara Stillings Candal, Massachusetts Charter Public Schools: Best Practices In Charter Education (Pioneer White Paper No. 149, June 2016). These studies and others are available at http://pioneerinstitute.org/school-choice-and-competition/#toggle-id-2.

high-quality educational options for Black children by actively supporting transformational education reform initiatives that empower low-income and working-class Black families.

INTRODUCTION

Each year, thousands of Boston students who seek to be educated at a charter school are denied that opportunity by G.L. c. 71, § 89, which caps the number of charter schools in the City by limiting the amount that can be spent on charter schools. Instead, those students are directed to certain district schools. As measured by the Commonwealth's own standardized tests and grading system, the district schools fail to provide a constitutionally adequate education to a majority of their students. Charter schools in Boston, by contrast, have demonstrated some of the nation's best outcomes for urban public schools. The only fair way to allocate limited – and highly sought – charter school seats in this flawed system is via lottery. A lottery, of course, is arbitrary by design: each child has an equal chance at success or failure, and the difference between the two is measured only in luck.

Under the Massachusetts constitution, however, a student's right to educational opportunity must not be a matter of luck. This Court already has so held, concluding

that Mass. Const. Part II, c. 5, § 2 - the "Education Clause" - affords children throughout the Commonwealth a right to an education that may not be denied by the lottery of birth (i.e., the zip code of a student's parent or guardian). See McDuffy v. Sec'y of the Exec. Office of Educ., 415 Mass. 545 (1993). Surely that very same constitutional provision bars state law from creating a disparate system wherein the number of seats in constitutionally adequate schools is arbitrarily limited, and eligibility for those seats is conditioned on the bouncing ball of an actual lottery.

In this case, five plaintiff students have brought straightforward and cognizable claims under the Education Clause and the equal protection provisions of the Declaration of Rights. They were prematurely dismissed by the Superior Court without any discovery whatsoever. As set forth in greater detail herein, the Superior Court's dismissal: (i) misconstrued both the gravity and plausibility of plaintiffs' claims; and (ii) failed to adhere to this Court's holdings establishing an enforceable constitutional right to education.

In two seminal cases, this Court has explained that the Massachusetts constitution provides an enforceable right to education that "'can never be less than such is sufficient to qualify each citizen for the civil and social duties he will

be called to discharge.'" McDuffy, 415 Mass. at 619 (quoting Horace Mann, The Massachusetts System of Common Schools: Tenth Annual Report of the Massachusetts Board of Education 17 (1849)); Hancock v. Comm'r of Educ., 443 Mass. 428, 431 (2005) (Marshall, C.J. concurring) ("reaffirm[ing] that constitutional imperative").[2] Though state policymakers have significant discretion in carrying out that responsibility, they may not "act[] in an arbitrary, nonresponsive, or irrational way to meet the constitutional mandate." Hancock, 443 Mass. at 435.

The plaintiff students have more than adequately alleged that the Commonwealth has disregarded its constitutional responsibility. Their allegations have three fundamental components: (i) the Boston district schools to which they have been assigned fail to provide them with a constitutionally required education; (ii) the past twenty years of education policy in the Commonwealth have demonstrated that charter schools, particularly those in Boston, produce exceptional results and unquestionably provide a constitutionally adequate education; and (iii) the status quo, in which the Commonwealth arbitrarily limits access to a

[2] Chief Justice Marshall's concurrence in Hancock provides the controlling Education Clause analysis. Citations to Hancock herein are to the Marshall concurrence, unless otherwise noted.

proven prescription for inadequate schools, is neither responsive nor rational.

If, twenty-five years after McDuffy, the Education Clause is to remain a meaningful constitutional guarantee, the plaintiffs – at the very least – have brought an action that entitles them to discovery. Moreover, both the Education Clause and the equal protection provisions of the Declaration of Rights require the Commonwealth to come forward with at least some concrete, supportable reason why it has chosen to limit the number of successful charter schools and leave students like the plaintiffs behind. The Commonwealth has not done so, and plaintiff's claims must be permitted to proceed to discovery.

BACKGROUND

To contextualize the claims of the plaintiff students, it is important to understand the backdrop against which they have been brought, including: (i) the current state of the Commonwealth's public school system, in light of reforms adopted since 1993, and the recent stasis in the Commonwealth's commitment to continued reform; (ii) the persistent underperformance of district schools in the City of Boston; and (iii) the remarkable success of charter schools in the City, operating under the rigorous

requirements of the Board of Elementary and Secondary Education.

A. The Stalled Promise of Education Reform.

In 1993 and in the immediate wake of the McDuffy litigation, the Commonwealth enacted the landmark Massachusetts Educational Reform Act ("MERA"). See St. 1993, c. 71 (signed June 18, 1993); McDuffy, 415 Mass. at 545 (argued February 2, 1993, and decided June 15, 1993). The implementation of MERA, further legislative action in 2010 (in the form of the Achievement Gap Act, St. 2010, c. 12), and the current inertia in the Commonwealth's approach to lagging district schools in Boston form the backdrop for this lawsuit.

1. MERA.

Though the work of extending educational opportunity to each child in the Commonwealth is markedly incomplete, MERA was a significant step forward. MERA was landmark, remedial legislation with numerous parts. Four are most relevant here: the foundation budget; oversight of underperforming school districts; comprehensive examination-based student assessment and data collection to evaluate MERA and influence future reform efforts; and the creation of charter schools.

The Foundation Budget. As the Department of Elementary and Secondary Education ("DESE") has explained, the

cornerstone of MERA was the establishment of "a foundation budget for each school district that represented [in the eyes of the Legislature] the amount of money necessary to provide an adequate education to all students in the district," together with a state-level commitment to provide funding to meet that budget (after a seven-year phase in). Commissioner Mitchell D. Chester, Dep't of Elementary & Secondary Educ., Building on 20 Years of Education Reform 5 (Nov. 2014), available at http://www.doe.mass.edu/commissioner/BuildingOnReform.pdf.[3]

Initial Steps Towards Oversight. In addition, MERA imbued the Commissioner of the Board of Elementary and Secondary Education (the "Board") and the Board itself with certain statutory responsibilities. St. 1993, c. 71, §§ 28-29 (codified at G.L. c. 69, §§ 1A through 1K); see Hancock Report, 2004 WL 877984, *6. Primary among those responsibilities was the establishment of standards to

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[3] As explained by then-Judge Botsford in her Report in Hancock, the foundation budget formula includes "'factors' or weights for different categories of students – low income students, students in bilingual education programs, [and] special education students. These factors are converted into a per pupil amount. The budget is constructed by calculating per pupil amounts for all the component categories and factors, and multiplying these per pupil amounts by the district's 'foundation enrolment' as measured in October before the budget year." See Hancock v. Driscoll, Docket No. 02-2978, 2004 WL 877984, * 5 (Mass. Super. Ct. Apr. 26, 2004) (hereinafter "Hancock Report").

"evaluate annually the performance of both school districts and individual schools." Hancock Report, 2004 WL 877984, *6. The goal of the evaluations was set forth in MERA and remains codified in the General Laws today: to measure outcomes and to indicate where improvement is needed. St. 1993, c. 71, § 29; see G.L. c. 69, § 1L.

On the basis of these assessments, the Board was given the responsibility to designate and work to improve underperforming schools and school districts. St. 1993, c. 71, § 29 (codified at G.L. c. 69, §§ 1J-1K). Underperforming schools and school districts were required to submit a remedial plan for the approval of the Board; if the remedial plan did not yield improvement, the Board was empowered to designate a district as chronically underperforming and appoint a receiver. Hancock Report, 2004 WL 877984, *6.

Examination-Based Assessments and Data Collection. To inform the Commonwealth's oversight of underperforming districts and to provide data to inform future avenues for progress, MERA mandated that "a system of student assessments be created." G.L. c. 69, § 1D; Hancock Report, 2004 WL 877984, *8. As explained by MERA, the assessments were to be "designed both to measure outcomes and results regarding

student performance, and to improve the effectiveness of curriculum and instruction." St. 1993, c. 71, § 28.

To meet that mandate, the Board directed the development of the Massachusetts Comprehensive Assessment System ("MCAS") exams. Id. Initially, MCAS exams assessed competency in mathematics and English language arts ("ELA"), but, over time, MCAS exams were developed and administered for a range of subjects. Id.

MCAS exams allowed the collection and analysis of data on the "performance of individual students, schools, and districts." Chester, supra, at 10. According to DESE, "[a]t its most basic level, MCAS data constitutes an independent, annual academic assessment of the schools and districts that educate the Commonwealth's children." Id. at 11.[4]

Charter Schools. MERA also authorized the creation of 25 Commonwealth charter schools, and established demanding oversight of their formation and operation (the core of which remains in place today). Cara Stillings Candal, Putting Children First: The History of Charter Public Schools in Massachusetts 5-10(Pioneer White Paper No. 48, Nov. 2009).

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[4] In 2014, the Board began transitioning the Commonwealth's assessment system from MCAS to PARCC. Chester, supra, at 12. That transition was redirected in November 2015, when the Board voted to adopt a "hybrid" MCAS-PARCC test. Jeremy C. Fox, "Education Board Votes to Adopt Hybrid MCAS-PARCC Test," Boston Globe, Nov. 17, 2015.

2. The Growth of Commonwealth Charter Schools.

The early years of charter schools in the Commonwealth were marked by success thanks, in part, to extensive Board scrutiny of entities applying to open charter schools and subsequent scrutiny of their operation. These years were also marked by the persistence of state law imposing a cap on the number of charter schools at a level below what the demand in underperforming districts otherwise would have supported. See JA 46-51; Compl. ¶¶ 68-85.

The success of charter schools in Boston was – and remains – exceptional. See, infra, Background § B; see, e.g., Sarah Cohodes and Susan M. Dynarksi, "Massachusetts Charter Cap Holds Back Disadvantaged Students," 2 Brookings Evidence Speaks Reports No. 1, 2 (Sept. 15, 2016), available at https://www.brookings.edu/wp-content/uploads/2016/09/es_20160916_dynarskis_evidence_speaks.pdf ("How big [were the] effects? The test-score gains produced by Boston charters are some of the largest that ever have been documented for an at-scale educational intervention.").

The Board's oversight was – and remains – demanding. See G.L. c. 71, § 89; 603 Code Mass. Regs. § 1.00, et seq. Only the Board may approve a charter school, and an applicant seeking to open one must submit a comprehensive proposal that the Board will evaluate under twenty-one detailed criteria.

G.L. c. 71, § 89(d), (e), (h); 603 Code Mass. Regs. § 1.04(3). Additionally, "[f]or profit businesses or corporate entities [are] prohibited from applying for a charter." G.L. c. 71, § 89(d). Once a charter is granted, the school faces recruitment, enrollment, and retention obligations — and must report annually to the Board on its compliance with those obligations. 603 Code Mass. Regs. §§ 1.05, 1.08. A charter is valid only for 5 years; to renew it, a school must demonstrate "progress made in student academic achievement" and compliance with its recruitment and retention plan. G.L. c. 71, § 89(dd); 603 Code Mass. Regs. § 1.11. This "robust system of accountability in Massachusetts underpins the strong performance of its charter sector." Cohodes & Dynarski, supra, at 2. And it favorably distinguishes Massachusetts from other jurisdictions.[5]

MERA set the initial charter school cap at 25 schools, a number borne of arbitrary legislative compromise. Candal, supra, at 8. Thereafter, the cap had two components: a

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[5] "By committing to strong accountability from the very beginning, Massachusetts ensured only stellar charter schools opened and thrived. Michigan[, for example,] went in the opposite direction on accountability, and . . . learned a hard lesson." See The Education Trust-Midwest, Accountability for All: The Broken Promise of Michigan's Charter Sector 5 (Feb. 2016), available at http://midwest.edtrust.org/wp-content/uploads/sites/ 2/2013/10/The-Education-Trust-Midwest_Accountability-for-All-2016_February-11-2016.pdf

statewide numerical limit; and a district-specific revenue limit. In 1997, the initial statewide numerical cap was raised to 50, though 13 of those were set aside for so-called Horace Mann Charter Schools (which are distinct from the Commonwealth charter schools created by MERA in a number of ways, the most prominent of which is that they may not be created without the affirmative consent of the local school district). St. 1997, c. 46, § 2.[6] In addition, the 1997 legislation provided that no more than 6% of a specific district's funding could be allocated to charter schools. St. 1997, c. 46, § 2. Each cap was raised again in 2000. The statewide numerical cap was set at 120 (though 48 of those were set aside for Horace Mann Charters), and the percentage of a specific district's funding that could be allocated to Commonwealth charter schools was raised to 9%. See St. 2000, c. 277, § 2.

3. The 2010 Achievement Gap Act.

By 2010, MERA had been implemented to great effect in certain districts, though other districts – including Boston

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[6] There are now three types of Horace Mann Schools, as set forth in the Commonwealth's brief. Commonwealth Br. at 8. They share one central trait: no Horace Mann School can be created without the assent of the local school committee. See G.L. c. 71, § 89(c).

– persistently underperformed. The 2010 Achievement Gap Act (the "2010 Act") attempted to address that disparity.

The 2010 Act codified the classification of specific schools and overall districts. See G.L. c. 69, §§ 1J, 1K. Following the directives of the 2010 Act, and building upon its prior practice, DESE developed a five-level classification system. In general, high-performing schools are classified as Level 1 schools, and Level 2 is the most common classification. See Dep't of Elementary & Secondary Educ., "Glossary of 2017 Accountability Reporting Terms," available at http://www.mass.gov/edu/docs/ese/accountability/annual-reports/glossary-reporting-terms.pdf. As measured by MCAS results, among other metrics, Level 3 schools perform among the lowest 20% as compared to their peer schools. Id.

Level 4 and Level 5 classifications trigger state-level remedial powers, though for a very limited number of schools: "Not more than 4% of the total number of public schools may be in Levels 4 and 5, taken together, at any given time." 603 Code Mass. Regs. § 2.05(2)(a).[7] Accordingly, the most useful shorthand is that Level 4 schools are among the worst 4% of statewide public schools at any level. Id. Those schools must

[7] An entire school district may be designated a Level 4 school district if "any of its schools has been placed in Level 4." 603 Code Mass. Regs. § 2.05(1)(a). Boston is a Level 4 district.

develop a turnaround plan for DESE's approval. G.L. c. 69, § 1J(a); 603 Code Mass. Regs. § 2.05(5). If the school does not improve within the "timetable of the turnaround plan," it may be classified as Level 5, and DESE is empowered to appoint a receiver to run it. 603 Code Mass. Regs. § 2.05(2), (5); see G.L. c. 69, § 1J.[8]

In addition, the 2010 Act recognized the efficacy of charter schools in achieving successful outcomes in underperforming districts. In districts like Boston, i.e., those with student performance in the lowest 10% statewide, the funding cap was raised to 18%. St. 2010, c. 12, § 7; G.L. c. 71, §89 (i)(3). In the Commonwealth's own words, "[t]his explicit and targeted use of available charters to serve students in low-performing districts reflect[ed] a growing recognition that many charters were having particular success in serving minority and low-income students who were performing at low levels on state assessments." Chester, supra, at 14; id. (the Act "recognize[d] the charter school

[8] A school district also may be classified as Level 5, but only if it "scores in the lowest 10% statewide of districts," and DESE considers its test scores in the context of a composite performance index (that takes into account students' economic status, past performance, and affiliation with "major racial and ethnic groups"). 603 Code Mass. Regs. § 2.06(1); see id. § 2.02 (defining "Composite Performance Index" and "subgroup").

sector as an important element in the Commonwealth's overall effort to support and improve student achievement").

4. Stalled Reform.

In the wake of the 2010 Act, further education reform efforts by the elected branches have stalled. Meanwhile, underperforming schools and school districts stubbornly remain underperforming.[9] Boston, for example, was designated a Level 4 district in 2010, and has remained in Level 4 each year since. See Dep't of Elementary & Secondary Educ., "Level 4 Schools in Massachusetts," available at http://www.mass.gov/edu/docs/ese/accountability/turnaround/level-4-schools-list.pdf. The City of Boston is the Commonwealth's largest

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[9] In the face of this persistent underperformance, certain registered voters resorted to the initiative process established by Mass. Const. Arts. of Amend. art. 48, to attempt to expand the availability of charter schools throughout the Commonwealth. See Secretary of the Commonwealth William F. Galvin, "Information for Voters: 2016 Ballot Questions." In 2016, that effort failed.

The Commonwealth cites that initiative on the very first page of its brief, as though its fate dictates that of the plaintiff students here. Commonwealth Br. at 1, 12. Not so. Just as the citizens who brought an initiative in 2016 were exercising the power constitutionally afforded them by art. 48, the plaintiffs here are exercising the power constitutionally afforded them by the Education Clause and the equal protection provisions of the Massachusetts constitution.

school district – and its largest underperforming district. It serves more than 56,000 students each year.[10]

B. The Persistently Inadequate Performance of Boston District Schools.

The five plaintiff students allege that they have been assigned to "a district school that fails to provide the adequate education that is mandated by the Massachusetts constitution." JA 34, Compl. ¶ 11.

Their Complaint sets forth particularized allegations supporting that claim, including the following:

- John Doe 1 attends a district grade school that, over the past five years, has failed to teach more than 35% of its students to be proficient in any one subject, as measured by the Commonwealth's own MCAS examination. It has been designated by the Commonwealth as a Level 3 school. JA 43, Compl. ¶¶ 49-51.

- Jane Doe 1 and John Doe 3 each attend a different district grade school that, over the last five years, has failed to teach even one third of its students to be proficient in any one subject. Both schools are Level 4. JA 44, Compl. ¶¶ 52-55, 60-63.

- John Doe 2 attends a district grade school that, over the last five years, has failed to teach even half of its students to be proficient in any one subject. In 2014, only 20% of those in his grade (third) were proficient in reading. The school has been designated Level 3. JA 44, Compl. ¶¶ 56-59.

- Jane Doe 2 attends a district high school that, over the last five years, has failed to teach even

[10] See Boston Public Schools, "Facts and Figures," available at https://www.bostonpublicschools.org/domain/238.

> half of its students to be proficient in any one subject. In 2014, only 6% of the students at the school were proficient or higher in science as measured by the MCAS examination. JA 45, Compl. ¶¶ 64-67.

These are serious and troubling allegations. At best, the five plaintiff students were assigned to attend schools incapable of educating half of their students to baseline proficiency. In inadequate schools, these deficiencies compound – rather than improve – from year to year. See generally Flavio Cunha, et al., "Estimating the Technology of Cognitive and Noncognitive Skill Formation," 79 Econometrica 883 (May. 2010).[11] As the plaintiff students allege, their experiences are consistent with those faced by other students assigned to Boston's district schools over the past two decades. The City of Boston is in the bottom decile of all school districts statewide. JA 52, Compl. ¶ 91.

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[11] The problem is particularly acute for low-income children, who "enter kindergarten at a large academic disadvantage relative to their affluent peers, and when they encounter inequality in the public schools, it often serves to reinforce large gaps in school readiness among children from different income brackets. As a whole, these gaps grow slightly during the next 8 years of public schooling, rather than narrowing." Meredith Phillips & Robert D. Putnam, "Increasing Equality of Opportunity In and Out of School, Grades K-12," Harvard Kennedy School Saguaro Seminar: Closing the Opportunity Gap 36 (2016), available at http://theopportunitygap.com/wp-content/uploads/2016/04/april25.pdf.

These allegations are backed by the Commonwealth's own data. The performance of Boston district school students on the MCAS exam (i.e., the examination specifically designed to evaluate the performance of the Commonwealth's schools) reveals that, averaged across all grades for the five-year period from 2010 through 2014,[12] Boston district schools have never achieved even 50% student proficiency in any subject. A summary of that data compiled from the Commonwealth's own database is included in the Addendum. See ADD001 (summarizing data available at DESE, School and District Profiles, http://profiles.doe.mass.edu/state_report/ mcas.aspx.). Boston district schools have consistently lagged behind the statewide average by approximately 20-30 percentage points. Id. Moreover, the scores are remarkably consistent year over year, showing a prolonged period without measurable progress. Id. For example, during those five years the percentage of Boston district school students who were proficient in English language arts went from 46% to 49%. Id. At that rate of progress, it will take another 30 years for Boston to achieve the current statewide level of proficiency.

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[12] As noted supra n. 4, beginning in 2015, the Commonwealth began transitioning away from the traditional MCAS assessment (first to the PARCC test, and then to a hybrid MCAS-PARCC test). As a result, there is insufficient data to evaluate performance during 2015 and 2016, or compare it with MCAS results from prior years.

The disparity between the performance of Boston district schools and the "comparison" districts analyzed in McDuffy and Hancock is even more alarming. Student proficiency rates at Boston district schools have consistently lagged behind rates at those comparison districts by approximately 40-50%. Id. Most significantly, when compared to the Boston district schools from which they enlist students, Boston Commonwealth charter schools have consistently outperformed those district schools (based on the percentage of students proficient) by approximately 20 to 30 percentage points. ADD002.

Recent academic studies confirm the Commonwealth's data. One study, for example, found that "SAT scores are much lower in Boston than in the rest of the state, with fewer than 10% of noncharter students in our applicant sample scoring above the state median on the composite test . . . . About three-quarters of noncharter students score in the lowest quartile of the state distribution or do not take the SAT." Joshua D. Angrist, et al., "Stand and Deliver: Effects of Boston's Charter High Schools on College Preparation, Entry, and Choice," 43 J. of Labor Economics 275 (2016).[13]

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[13] Notably, the Journal of Labor Economics study compared educational outcomes only for charter school applicants – those who won the lottery and those who did not – so as to control for arguments (like those submitted by the Massachusetts Teacher's Association (MTA), see MTA Amicus Br.

C. The Demonstrable Success of Charter Schools in Boston.

Each of the plaintiff students sought enrollment in Boston charter schools, but luck broke against each child. JA 35-36, Compl. ¶¶ 14-19. Had the lottery balls bounced differently, each child would have been admitted to demonstrably better – and constitutionally sufficient – schools. JA 45-52, Compl. ¶¶ 69-85. Moreover, plaintiff students have alleged that, but for the artificial cap on the number of charter schools, more charter schools would be established in Boston and they would have access to a constitutional education.

Plaintiffs' allegations regarding the quality of Boston's charter schools are not only plausible, they are also buttressed by substantial empirical support. Stanford University's Center for Research on Education Outcomes ("CREDO") has concluded that the "average math and reading growth found in Boston's charter schools is the largest state or city level impact CREDO has identified" in its analysis of twenty-seven states. CREDO, Charter School Performance in Massachusetts 16 (Feb. 28, 2013), available at https://credo.stanford.edu/documents/MAReportFinal_000.pdf; Cohodes &

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at 34) that students who apply to a charter are self-selected higher performers.

Dynarski, supra, at 4 ("Charter schools in the urban areas in Massachusetts have large, positive effects on educational outcomes, far better than those of the traditional public schools that charter students would otherwise attend. The effects are particularly large and positive for disadvantaged students."). Notably, "students in poverty who are enrolled in charter schools perform significantly better in both reading and math compared to students in poverty in [district schools]." CREDO, supra, at 24. Charters likewise excel where outcomes are measured by improved student performance (i.e., learning gains by students with lower prior scores). Id. at 28-29.

Referencing this (and other) data, former U.S. Secretary of Education Arne Duncan described the evidence regarding the success of Boston charter schools as "'unequivocal'" and labeled the schools "'arguably the very best in the nation.'" Michael Jonas, "Arne Duncan Calls Charter Schools Part of the Mass. Solution," Commonwealth Magazine (Oct. 27, 2016) (emphasis added). As noted by one distinguished researcher, studies indicate that the "oversubscribed charter schools in the Boston area are closing one half of the Black-White achievement gap in math and roughly one fifth of the Black-White achievement gap in English—in a single school year." Thomas J. Kane, Harvard Center for Education Policy Research,

Let the Numbers Have Their Say: Evidence on Massachusetts' Charter Schools, 7, available at https://cepr.harvard.edu/files/cepr/files/evidence-ma-charter-schools.pdf (last visited September 17, 2017).

These remarkable results demonstrate the efficacy of charter schools in achieving the goals of education reform. A defendant in this case has expressly acknowledged as much:

> Imagine you live in a city with a set of open-enrollment public schools, serving predominately low-income children of color, where students learn at twice the rate of their peers in neighboring schools. And what if those high-performing schools were ready, willing, and able to enroll more students, maybe even double or triple in size? Sounds too good to be true, huh? Well, that city actually exists, and its Boston. But, remarkably, the powers that be are blocking the city's best schools from growing for the simple reason that they are charter schools.

James A. Peyser, "Boston and the Charter School Cap," 14 Education Next 1 (Winter 2014), available at http://educationnext.org/boston-and-the-charter-school-cap/.

Boston families are well aware of charter school performance and are voting with their feet. "[T]he proportion of Boston sixth-grade students applying to at least one charter school had essentially doubled from 2009-10 to 2012-13, from 15% of all Boston sixth graders to 33%." Kane, supra, at 7. In fact, Boston charter school applications

"more than doubled" for the 2017-18 school year, "shattering previous records." James Vaznis, "For Boston Charters, A Record Spike In Applicants," Boston Globe, Mar. 6, 2017, at A1. For the current school year, Boston charter schools received 35,000 applications for 2,100 available seats. Id.

ARGUMENT

The Education Clause places a weighty responsibility on the shoulders of the Commonwealth: to ensure that each child is afforded access to meaningful education. As McDuffy instructs, the Clause ensures a modicum of equal opportunity for the Commonwealth's schoolchildren because education is the keystone of our democratic form of government. See McDuffy v. Sec'y of the Exec. Office of Educ., 415 Mass 545, 561 (1993) ("[A]n educated people is viewed [by the constitution] as essential to the preservation of the entire constitutional plan: a free, sovereign, constitutional democratic state."); id. at 566 ("Education ... [is] a prerequisite for the existence and survival of the Commonwealth.").

Plaintiffs have plausibly alleged that the Commonwealth has fallen short of its responsibility in the state's largest City. See supra Background § B. They, like impact litigants before them, seek a declaration that the education that they

(and others similarly situated) are receiving is constitutionally inadequate.

In the twenty-five years following McDuffy and the enactment of MERA, the Commonwealth has ample evidence of a school model that would provide a constitutionally sufficient education for plaintiffs, i.e., the Commonwealth charter school. The Education Clause renders the status quo – where thousands of Boston schoolchildren do not receive the education demanded by the constitution, while state law bars access to a proven solution – untenable and unconstitutional.

Nor does the status quo satisfy the equal protection provisions of the state constitution, as the Commonwealth cannot demonstrate that existing state law serves a public purpose that transcends the serious harm to schoolchildren relegated to persistently substandard district schools.

Whether plaintiff students ultimately can prove their claims is a matter to be considered upon the conclusion of discovery. They have the weight of the academic literature and the Commonwealth's own metrics on their side. See supra Background §§ B-C. But those evidentiary matters should play out during the course of the litigation. The only question before the Court at the pleadings stage is whether plaintiffs have adequately alleged actionable claims. The answer is yes.

The Superior Court's contrary conclusion was error, and rested upon its recasting of plaintiffs' Education Clause claim as one for a "particular flavor of education." JA 135. But that is not at all what the plaintiff students claim. They plausibly have alleged the gravely serious matter that the Commonwealth is failing thousands of schoolchildren in its largest City each and every year by allowing them to languish in district schools that fail to provide the education the constitution demands. When the trivializing gloss placed upon those allegations by the Superior Court is removed, they are more than sufficient for this case to proceed.

I. The Education Clause Remains A Vibrant And Enforceable Constitutional Guarantee, Under Which Plaintiffs Have Pled An Actionable Claim.

The profound importance of public education for a society and its civic institutions is recognized in the Massachusetts constitution, which grants schoolchildren in the Commonwealth an enforceable right to a public education. Mass. Const. Pt. II, c. 5, § 2; see McDuffy, 415 Mass. at 585 ("The framers created a Constitution which by its words and its structure states plainly that providing for the education of the people is both duty of and prerequisite for a republican government . . . ."). As our economy grows ever more digitized and skills-based, the importance of that right

(and of vindicating the wisdom of the Massachusetts constitution of 1780) is greater than ever.

A. At Minimum, the Constitution Demands Continued Progress by the Elected Branches Towards the Provision of a Meaningful Education.

This Court's decisions in McDuffy and Hancock establish a demanding benchmark against which to measure whether the state is meeting its obligation to provide a meaningful public education. Both decisions place an affirmative obligation on the elected branches to make continued progress towards a meaningful education for all of the Commonwealth's children.

A meaningful education "'can never be less than such as is sufficient to qualify each citizen for the civil and social duties he will be called to discharge.'" McDuffy, 415 Mass. at 619-20 (quoting Horace Mann, The Massachusetts System of Common Schools, Tenth Annual Report of the Massachusetts Board of Education 17 (1849)); see Hancock v. Comm'r of Educ., 443 Mass. 428, 453 (2005) ("The constitutional imperative to 'cherish the interests' of public school education requires the elected branches of government to assume actual, and not merely titular, control over public education."). The McDuffy Court recognized, at a minimum, seven components of a meaningful education:

> An educated child must possess at least the seven following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historic heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

McDuffy, 415 Mass. at 618 (quoting Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)).

That benchmark is difficult to attain, as the Hancock plurality expressly acknowledged, 443 Mass. at 455 n.29, and its exact nature continues to evolve with time. See McDuffy, 415 Mass. at 620 ("Our constitution, and its [E]ducation [C]lause, must be interpreted 'in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning.'" (quoting Seattle Sch. Dist. No. 1 v. State, 90 Wash. 2d 476, 516 (1978))). But it remains binding. The

Commonwealth does not argue otherwise, and DESE's own publications acknowledge the continued efficacy of McDuffy. See, e.g., Rhoda E. Schneider, General Counsel, Dep't of Elementary & Secondary Educ., "The State Constitutional Mandate for Education: The McDuffy & Hancock Decisions," available at http://www.doe.mass.edu/lawsregs/litigation /mcduffy_hancock.html.[14]

The high bar set by the Education Clause reflects the profound importance of public education to the functioning of the Commonwealth and the protection of every other right set forth in its constitution. McDuffy, 415 Mass. at 561 ("[A]n educated people is viewed as essential to the preservation of the entire constitutional plan: a free, sovereign, constitutional democratic State."). The standard in McDuffy remains the standard to which the Legislature and Executive Branch are held – and the standard to which both must strive until a meaningful education is available to all. See Hancock, 443 Mass. at 454 ("The [E]ducation [C]lause mandates that the Governor and the Legislature have a plan to educate

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[14] The Commonwealth's multiple citations to Justice Cowin's concurrence in Hancock – which concurred only in the result, and advocated overturning McDuffy and rendering the Education Clause merely hortatory, see, e.g., Commonwealth Br. at 26-27 – are curious. Neither the Commonwealth nor any of its amici before this Court appear to advocate the drastic step favored by Justice Cowin in Hancock.

all public schoolchildren and provide the resources to establish and maintain that plan.").

Where, as in Boston, inadequate schools persist for generations of students, continued inaction is simply not an option. See McDuffy, 415 Mass. at 621 ("[I]t is the responsibility of the Commonwealth to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate."). The controlling plurality in Hancock concluded that judicial intervention was not needed at that time because of continued legislative and administrative action towards the constitutional benchmark. See Hancock, 443 Mass. at 462. Indeed, throughout Hancock, the controlling plurality stressed that the Court had not been faced with "legislative or departmental inaction."[15]

The facts established in Hancock, however, are a far cry from the facts alleged here.

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[15] See Hancock, 443 Mass. at 457-58 ("The delay in full implementation of the provisions of [MERA] does not derive from legislative or departmental inaction."); id. at 458 (despite state budget difficulties, "the Commonwealth continued to appropriate 'substantial sums' toward education reform"); id. at 461 ("The Governor, the Legislature, and the department are well aware that the process of education reform can and must be improved. The board, for example, recently enacted rules to streamline and accelerate the process for intervening in schools identified to be 'chronically underperforming.'").

B. Plaintiffs Plausibly Have Alleged that the Commonwealth Has Not Met Its Constitutional Responsibility.

Here, plaintiffs have alleged that, at best, they have been assigned to schools that fail to educate proficiently more half of their students – and, in most cases, much more than half of their students. See, supra, Background § B. These are serious allegations – an education deficiency in one academic year compounds in the next, and once-bright futures become trying ones. If the plaintiff students can prove their allegations, they are entitled at minimum, to one of the declarations they seek, i.e., that "the Commonwealth has violated the Education Clause, Part II, Chapter 5, § 2, of the Massachusetts Constitution by failing to provide an adequate public education to the plaintiffs." JA 59, Compl. Prayer for Relief ¶ 1.

The Superior Court and the Commonwealth attempt to elide the foregoing allegations by concluding that woeful test scores and Level 3 and Level 4 classifications – i.e., the state's own classifications, which acknowledge plaintiffs' schools are among the lowest performing statewide – do not, by themselves, conclusively establish a constitutionally inadequate education. JA 134-35; Commonwealth Br. at 29. At this stage, though, the question is not whether plaintiffs have proven their claims; it is whether the "factual

allegations plausibly suggest an entitlement to relief." Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011); see Goodwin v. Lee Pub. Sch., 475 Mass. 280, 284 (2016). Understandably, the plaintiff students focused on data that the Hancock Court itself found instructive when evaluating an Education Clause claim. See 443 Mass. at 450 (evaluating trends in MCAS scores). Where the Commonwealth's own publicly available data supports plaintiffs' claims, the next step is discovery – not dismissal.

Even more curiously, the Commonwealth and the Superior Court attempt to cast aside the substance of the state's school classification (i.e., the state's own acknowledgement that plaintiffs' schools are woefully underperforming), while relying on the remedial powers triggered by low classifications to suggest that the Commonwealth has been responsive to inadequate Boston schools. JA 134-36; see Commonwealth Br. at 31 ("This Court should not allow plaintiffs to exploit the Commonwealth's accountability tools – in place to stimulate improvement of underperforming schools – as evidence of systemic failure").[16] Whether the

[16] Amici leave to the Court to conclude whether it is appropriate for the Attorney General to suggest that plaintiff students are "exploit[ing]" state data by citing it for the proposition it demonstrates, i.e., that their schools are failing.

Commonwealth has been responsive to the plaintiff students' underperforming schools is a factual matter not ripe for resolution at the pleading stage – particularly given plaintiffs' contrary allegations. See JA 13, Compl. ¶¶ 42-43 ("Of the 12 Boston schools that were first designated Level 4 in 2010, half have shown little or no improvement."). This year's record shattering rush for charter school seats indicates that those with the most at stake have found the Commonwealth's remedial efforts underwhelming. See, supra, Background § B.

Moreover, to the extent the Superior Court's decision expresses doubt whether students hailing only from Boston may plead an actionable Education Claim, that doubt should have been conclusively resolved by McDuffy. 415 Mass. at 606 (holding that "the Commonwealth has a duty to provide an education for all its children, rich and poor, in every city and town of the Commonwealth, at the public school level") (emphasis added); see also Hancock, 443 Mass. at 662 (Marshall, C.J., concurring) (same).[17] If the Commonwealth

[17] The phrase "statewide abandonment" on which the Superior Court so heavily relied, is used once in the controlling Hancock plurality. See 443 Mass. at 433. It constituted neither a limitation on McDuffy nor a sly rewrite of this Court's Education Clause jurisprudence. When the phrase is read in context, "statewide abandonment" clearly references abdication by the state's elected branches – and does not create a mandate that future Education Clause claimants must

abdicates its constitutional responsibility in any city — and, especially, in its largest city — the Education Clause provides a remedy. See McDuffy, 415 Mass. at 606 ("the words are not merely aspirational or hortatory, but obligatory").

C. The Constitutional Duty Recognized in McDuffy Is as Important as Ever.

Providing the Commonwealth's schoolchildren with the opportunity for a meaningful education is as important as ever. As the lengthy historical analysis set forth in McDuffy demonstrates, the Clause was meant to be enforceable, and it must remain so today. 415 Mass. at 558-602; see Care & Protection of Charles, 399 Mass. 324, 335 (1987) ("We have made clear that, from the beginning of its history, the Commonwealth has emphasized the crucial importance in the education of children.").

In its proudest moment, the Supreme Court of the United States recognized that:

> [E]ducation is perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship . . . . In these days, it is doubtful that any child may reasonably be

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be geographically diverse. Id.; see id. at 433, n.2 ("[O]ne of the key findings informing [McDuffy] . . . was evidence that . . . many of the Commonwealth's children, notably poor children, urban children, children of color, and children of special needs were in essence systematically discarded educationally, with no obligation recognized by the Commonwealth to intervene on their behalf." (emphasis added)).

> expected to succeed in life if he is denied the opportunity of an education.

Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954). Those words are all the more true today, where an education is essential to meet the demands of our ever modernizing economy. In DESE's own words: "Given the ever-increasing demands of the global economy, it's never been more important for students to reach high levels of achievement." Schneider, supra.

II. The Superior Court Erred In Reframing Plaintiffs' Complaint As A Claim For A Particular "Flavor" Of Education.

The lynchpin of the Superior Court's decision is its recasting of the plaintiff students' claim as a "right to choose a particular flavor of education." JA 135. Indeed, the Superior Court went so far as to equate the plaintiff students' plea for a constitutionally required education with a desire to attend a "trade school, a sports academy, [or] an arts school." JA 135. So cast, the Superior Court dismissed the Complaint, as the constitution does not protect whimsical preferences of taste. See id. But at the pleadings stage, a trial court is obligated to "accept as true the allegations in the complaint," not reframe them as something different than plaintiffs have pled. Curtis, 458 Mass. at 676; see also Wentworth Precious Metals, LLC v. City of Everett, No. Civ.

A. 11-10909-DPW, 2013 WL 441094, at *5 (D. Mass. Feb. 4, 2013) (observing that "[p]laintiff is indisputably the master of its own complaint," and its claims may not be "recast . . . as predicated on entirely different conduct"). Indeed, at the pleadings stage, "every reasonable inference" must be drawn in the plaintiff's favor. Curtis, 458 Mass. at 676; see Barbuto v. Advantage Sales & Mktg., LLC, 477 Mass. 456, 457-58 (2017). Under any fair reading of plaintiffs' Complaint, they have not alleged a right to "more of one flavor of education than another," JA 135; they have alleged their right to the meaningful education demanded by the constitution.

More problematically, the Superior Court's recasting of plaintiffs' allegations as matters of preference — a recasting adopted by the Commonwealth here, see, e.g., Commonwealth Br. at 1, 25 — wades deeply into the factual merits. The plaintiff students have claimed that their schools are persistently (and constitutionally) inadequate; these are plausible claims supported by the Commonwealth's own data. Supra, Background § B. They also have claimed that Boston's charter schools have achieved remarkable results (and provide the educational opportunity promised them by McDuffy); these are plausible claims supported by extensive academic literature. Supra, Background § C. The Superior

Court's recasting assumes that plaintiffs' schools and charter schools provide education differing in type, but not adequacy. Plaintiffs have claimed precisely the opposite. See Plaintiffs' Br. at 27 ("The Students do not claim a constitutional right to attend a Commonwealth charter school. Rather, they seek to vindicate their right to an adequate education"). These are not matters of taste.

This Court should evaluate the complaint as it was written. See Iannochino v. Ford Motor Co., 451 Mass. 623, 636 n.7 (2008) ("In considering [a motion to dismiss], 'the allegations of the complaint, as well as such inferences that may be drawn therefrom in the plaintiff's favor, are to be taken as true.'" (internal citation omitted)). Plaintiffs have not alleged a constitutional right to attend a particular trade or vocational school or to be taught a specialized curriculum. They have alleged, instead, that they arbitrarily have been denied the opportunity to attend public schools with a proven track record of providing a constitutional education, and have been relegated to persistently underperforming and constitutionally insufficient district schools. Those allegations, i.e., that the elected branches are not "embracing and acting on their constitutional dut[ies] to educate all public school

students," are actionable under the Education Clause. See Hancock, 443 Mass. at 457.

The Commonwealth's present focus on Horace Mann Charter Schools (i.e., schools that are not implicated by this case) is just as inexplicable as the Superior Court's focus on particular "flavors" of education that plaintiffs have not sought. See Commonwealth's Br. at 16-20 (contending that the plaintiff students lack standing because the City of Boston, if it wished, could create numerous Horace Mann Charter Schools). Using the Commonwealth's own data — which MERA mandated it to collect, so as to provide a factual basis on which to identify and remediate underperforming schools — the plaintiff students have alleged that their district schools are markedly inadequate. See, supra, Background § B. That the City of Boston may agree[18] to create (at some indefinite time in the future) additional Horace Mann Charter Schools does not address those claims; nor does it present any jurisdictional issue.

The Commonwealth faces two insurmountable hurdles if it means to suggest that in the twenty years since Horace Mann Charter Schools were created, see St. 1997, c. 46, § 2, they have proven an effective remedy for underperforming school

[18] As set forth supra note 6, no Horace Mann Charter School may be created without the assent of the school district.

districts. First, that suggestion is a factual assertion, demonstrating the need for discovery (rather than dismissal).[19] Second, unsurprisingly, school districts have been reluctant to create Horace Mann charter schools. Rennie Center for Education Research & Policy, The Road Not Taken: Horace Mann Charter Schools in Massachusetts 5 (Spring 2006), available at http://www.renniecenter.org/sites/default/files/2017-01/HoraceMannCharters.pdf ("Horace Mann charters require the very constituents who have the most reason to oppose charters – unions and district leaders – to support charterization of their own schools."). The demands of the Education Clause cannot be met by a theoretical option for a type of charter school that, by operation of state law, is unlikely to be exercised. McDuffy, 415 Mass. at 621 ("[W]hile local governments may be required, in part, to support public schools, it is the responsibility of the Commonwealth to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate." (emphasis added)).

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[19] Unlike the numerous public pronouncements regarding the efficacy of Commonwealth charter schools from the Executive Branch policymakers who are defendants in this lawsuit, the public record reflects a paucity of praise for efficacy of the Horace Mann model.

III. The Equal Protection Mandates Of The State Constitution Do Not Countenance A System Whereby Educational Opportunity That Is Routine In Advantaged Areas Is Allocated By Chance In Disadvantaged Areas.

The plaintiff students have pled facts demonstrating that students in affluent districts are uniformly afforded an adequate education, whereas their access to such an education is a matter of luck. In response to those allegations, the Equal Protection provisions of the Massachusetts Constitution demand more than the Commonwealth's vague and unsupported assertions of rationality.

A. The Declaration of Rights Mandates an Exacting Review, Which the Commonwealth Cannot Meet at this Stage.

The principal of equal protection courses through numerous articles of the Declaration of Rights, and is articulated most plainly in arts. 1 and 10 (set forth in the margin below). Mass. Const. Part I, art. 1, as amended by art. 106 (hereafter "art. 1"); art. 10; see generally Finch v. Commonwealth Health Ins. Connector Auth., 459 Mass. 655, 662 (2011); Commonwealth v. Lora, 451 Mass. 425, 436 (2008).[20]

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[20] Art. 1 provides, in full:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or

Education is a vital component of each right identified in art. 1 and art. 10: education is essential to the enjoyment and defense of liberty, to the acquisition of property, and to the opportunity for happiness. See McDuffy, 415 Mass. at 561 ("The duty [to provide for educational opportunity] is established so that the rights and liberties of the people will be preserved.").

The plain language of arts. 1 and 10 alone casts significant doubt on a state system of public education that conditions access to educational opportunity in underserved municipalities on a lottery. See G.L. c. 71, § 89(n) (allocating seats in oversubscribed charter schools via lottery). That plain constitutional language has been given life by this Court's jurisprudence, which establishes that where significant rights are at stake, the Court will apply an exacting rational basis review to determine whether the Commonwealth can identify and support a "constitutionally adequate reason" for the disparate treatment. Goodridge v.

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abridged because of sex, race, color, creed or national origin.

Mass. Const. Part I, art. 1, as amended by art. 106. In pertinent part, art. 10 provides that "[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws." Id., art. 10.

Dep't of Pub. Health, 440 Mass. 309, 312 (2003).[21] The Court's review probes justifications asserted by the Commonwealth to determine whether the law "serve[s] a legitimate public purpose that transcends the harm to the members of the disadvantaged class." Id. (internal citation and quotation marks omitted).

Here the Commonwealth has articulated – but has not supported – five purported justifications for capping the number of charter schools in underperforming districts. Commonwealth Br. at 35. Two relate to DESE: its supposedly strained capability to "evaluate[] and replicate[]," and its limited "resources" to supervise charter schools. Id. DESE, however, does not feel so constrained – as plaintiffs have alleged. JA 53, Compl. ¶¶ 92-96. Secretary of Education James

[21] In Goodridge, the Court evaluated the Commonwealth's purported bases on which to exclude same sex couples from marriage, noting that two lacked evidence. See, e.g., 440 Mass. at 334 ("The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children." (emphasis added)). Placing the burden on the Commonwealth to come forward with support for its policy making – rather than just a conceivable rationale – is a more exacting form of rational basis review. Id. at 334; cf. id. 385 n.21 (Cordy, J., dissenting) (noting the heightened review).

Peyser, a named defendant, has declared: "We have the resources to do the job well."[22]

The Commonwealth also suggests that limiting the number of charter schools is necessary to mitigate the risk of unsuccessful charter schools — but fails to grapple with the comprehensive provisions of state law already in place to address that issue. See G.L. c. 71, § 89(f), (dd) (requiring rigorous annual oversight of performance, recruitment, and retention and comprehensive renewal process every five years). Why is an arbitrary cap needed to supplement those provisions, which are the most rigorous in the country? The Commonwealth does not say. Instead, the Commonwealth stresses the need for local control. But when it comes to providing educational opportunity, local control is a means and not the end itself. McDuffy expressly so held. 415 Mass. at 621 ("[W]hile local governments may be required, in part, to support public schools, it is the responsibility of the Commonwealth . . . to meet the constitutional mandate"). An exclusive focus on local control irrespective of the educational outcomes resulting from that control (as documented by years of assessment data) capriciously elevates form over substance.

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[22] See WGBH News, "State Education Secretary James Peyser: 'We Have the Resources to Do the Job Well" (Apr. 1, 2015).

Finally, the state stresses its desire to preserve a "baseline level of funding" for district schools. Commonwealth Br. at 35-36. But a fixed, baseline level of funding (i.e., committing by statute a minimum of 82% of an underperforming district's total funding to district schools) is inherently arbitrary, particularly where it persists irrespective of school performance or student enrollment.

B. Arbitrary Limitation of Eligibility for a Successful Policy Development Is Unequal.

The equal protection analysis in the context of education is uncommon, because there are limited circumstances in which the Commonwealth is constitutionally obligated to provide public services. But other examples exist. Two other circumstances involve the provision of medical care to individuals in state custody – be they children (in foster care) or prisoners (incarcerated).[23]

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[23] See G.L. c. 119, § 23(a)(3) (imbuing state with the responsibility for the medical care of foster children); see Connor B. v. Patrick, 774 F.3d 45, 53 (1st Cir. 2014) (assuming, without dispute from the state defendants, that "the special relationship of foster care entails a [constitutional] duty on the state to provide" for the children in its care, including "services necessary for the children's physical and psychological wellbeing" and "treatment and care consistent with the purpose of their entry into the foster care system"); Johnson v. Summers, 411 Mass. 82, 86 (1991) (health care must be provided to pretrial detainees and convicted prisoners).

An analogy to those settings demonstrates the flaw in the Commonwealth's approach here. Imagine if the state, via policy experimentation, developed a successful method of treatment that addressed previously untreatable acute mental health needs of children in foster care, but left the majority of foster children in underprivileged areas in an older system that did not meet those needs, even though both approaches cost roughly the same. Would the court accept from the Commonwealth vague assertions of rationality – at the pleadings stage, without discovery – to support that decision? Or imagine if the state, again via policy experimentation, developed a comprehensive and effective treatment for addiction for those in its custody, but left the majority of incarcerated individuals in an older treatment program that had persistently failed to achieve success. If both programs were of equivalent cost, would the Court accept from the Commonwealth vague assertions of rationality to support that decision?

Underperforming schools are not an incurable ailment, and the Commonwealth should not be permitted to treat them as such in the face of at least one proven cure. Through policy experimentation triggered by MERA, the Commonwealth has developed an education policy that has proven successful in overcoming the persistent underperformance of certain

district schools, but has relegated the vast majority of Boston students to a perpetual control group. Moreover, the cost of a charter school education cannot by law exceed the cost of a district school education, after a transition period. G.L. c. 71, § 89(ff); see generally Ken Ardon and Cara Stillings Candal, Assessing Charter School Funding in 2016 (Pioneer White Paper No. 148, Apr. 2016). Accordingly, if the Commonwealth's approach of limiting access to charter schools is to be considered rational, the Commonwealth bears at least some burden to demonstrate how so. See Goodridge, 440 Mass. at 330, 334.

IV. This Litigation Is A Natural Successor To The Seminal Education Clause Cases.

By this action, the plaintiff students seek nothing more than the path made available to them by McDuffy and Hancock.

As enunciated in McDuffy, "it is the responsibility of the Commonwealth to take such steps as may be required . . . effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate" of the Education Clause, such that an educational opportunity is provided for the state's children "whether they be rich or poor and without regard to the fiscal capacity of the community or district in which [they may] live." 415 Mass. at 621. Although the details of that plan and its "implementation … are best left,

at least initially, to the executive and to the legislative branches of government," the constitutional obligation is nonetheless mandatory. Id. at 610.

A quarter-century later, the "initial" period has passed, and the time is ripe to evaluate the Executive and Legislative Branches' progress. As the Hancock plurality recognized twelve years ago, the pace of educational reform has been "slow, sometimes painfully slow," and that for the students who receive an inadequate education "the prospect of 'better things to come' [at some indefinite time] in public education comes too late." 443 Mass. at 456. The Hancock Court nevertheless determined that judicial intervention was not yet required for two reasons: (i) the implementation of MERA had been "deliberately phased in," such that it was too early to ascertain its effectiveness; and (ii) the remedy sought by the plaintiffs — including a judicially-commissioned study of the most effective policies for further reform and, potentially, court-ordered appropriations to effectuate those policies — involved decisions "best left to our elected representatives." Id. at 459.

Neither basis for judicial reticence is present here. MERA has been implemented; so, too, has the 2010 Achievement Gap Act. Entire generations of students have come and gone. But the deficiencies in Boston's district schools persist,

and plaintiffs' educational opportunity remains a game of chance. As a remedy, plaintiffs do not seek a statewide study of the public education system nor appropriations to bring about its recommendations. Rather, they seek a declaration that the schools to which they have been assigned are inadequate. JA 59, Compl. Prayer for Relief ¶ 1. They further seek a declaration that, for the period of time Boston district schools remain inadequate, the number of public charter schools in the City may not be limited arbitrarily by statute. Id. ¶ 2.[24] Following those declarations, "[t]he presumption exists that the Commonwealth will honor its obligations," i.e., that the Commonwealth will take the action required to address persistently underperforming schools in Boston. Bromfield v. Treasurer & Receiver Gen., 390 Mass. 665, 669 (1983).

Finally, the mere process of discovery and a trial on the claims brought by the plaintiff students has significant value. As the amicus briefs submitted to this Court demonstrate, there is an ongoing public debate regarding the adequacy of Boston district schools, and the efficacy of

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[24] During this period of time, of course, the other substantive limitations on charter schools set forth in G.L. c. 71, § 89 (e.g., close Board oversight of student performance, recruitment and retention; and limits on the entities that may seek to form charter schools), would remain.

charter schools in addressing inadequacies. In amici's view – and even in the view of certain of the defendants, see, e.g., Peyser, supra, at 1 – the evidence is clear, obscured only by overheated public rhetoric. Even in the unlikely circumstances that the plaintiff students fall short of establishing their constitutional case, the factual findings of the trial court will be instructive. Indeed, the Hancock Court extensively praised the detailed findings of then-Judge Botsford, noting that: "[t]he amply supported findings of the judge reflect much that remains to be corrected before all children in our Commonwealth are educated," and suggested that future reformers would have much to learn from her findings. 443 Mass. at 461. Similarly, a federal court's lengthy analysis of the state's foster care system – in which a flawed (and barely constitutional) system was exposed, has proved important in spurring its reform. Connor B. v. Patrick, 985 F. Supp. 2d 129 (D. Mass. 2013), aff'd 774 F.3d 45 (1st Cir. 2014).[25]

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[25] At the close of its decision, the federal district court summarized its bleak findings regarding the failings of the state foster care system and asked a question of voters and policymakers:

> [T]his is not a case about statistics but about children – our children – and this much is clear, the flaws noted herein are more about budgetary shortfalls than management myopia. We are all

The Superior Court referenced the "substantial discovery" that would attend this litigation in its decision granting the Commonwealth's motion to dismiss. JA 135. The burdens of discovery should never play a factor in dismissing an actionable claim, least of all where the discovery itself could spur meaningful progress towards meeting the Commonwealth's "duty . . . to cherish the . . . public schools and grammar schools" that educate the plaintiff students. See Mass. Const. Part II, c. 5, § 2.

CONCLUSION

For the foregoing reasons, the Superior Court's dismissal of this action should be vacated, and the case should be remanded to the Superior Court for further proceedings.

> complicit in this financial failure . . . . Do you care?

See Connor B., 985 F. Supp. 2d at 166. It turns out the answer is yes, and the active work of reform by the elected branches continues. See, e.g., Matt Murphy, "In Signing Budget, Baker Vetoes $320 Million," State House News Service (Jul. 17, 2017) (noting that most recent budget provided for the hiring of 450 new social workers).

Respectfully Submitted,

PIONEER INSTITUTE, INC.,
CHERYL BROWN HENDERSON, and
THE BLACK ALLIANCE FOR
EDUCATIONAL OPTIONS,

By their Attorneys,

Brian C. Broderick
BBO No. 549099
Ryan P. McManus
BBO No. 673219
HEMENWAY & BARNES LLP
75 State Street
Boston, MA 02109
(617) 227-7940
rmcmanus@hembar.com
bbroderick@hembar.com

Dated: September 18, 2017

CERTIFICATE OF COMPLIANCE WITH MASS. R. APP. P. 16(k)

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel hereby certifies that the foregoing brief complies with all applicable appellate rules.

Ryan P. McManus

CERTIFICATE OF SERVICE

I certify under the pains and penalties of perjury that on September 18, 2017, I caused a true and correct copy of the foregoing to be served by first class mail and electronic mail on counsel of record for the parties in this matter.

Ryan P. McManus

ADDENDUM

MCAS Examination Results - 2010 through 2014[1]

	2010			2011			2012			2013			2014		
	ELA	MTH	SCI	ELA	MTH	SCI	ELA	MTH	SCI	ELA	MTH	SCI	ELA	MTH	SCI
% Proficient in Boston District Schools - All Grades	46%	40%	22%	47%	40%	22%	46%	41%	26%	47%	42%	26%	49%	44%	27%
% Proficient Statewide - All Grades	68%	59%	52%	69%	58%	52%	69%	59%	54%	69%	61%	53%	69%	60%	55%
Delta	**22%**	**19%**	**30%**	**22%**	**18%**	**30%**	**23%**	**18%**	**28%**	**22%**	**19%**	**27%**	**20%**	**16%**	**28%**

ADD001

	2010			2011			2012			2013			2014		
	ELA	MTH	SCI	ELA	MTH	SCI	ELA	MTH	SCI	ELA	MTH	SCI	ELA	MTH	SCI
% Proficient in Boston District Schools - All Grades	46%	40%	22%	47%	40%	22%	46%	41%	26%	47%	42%	26%	49%	44%	27%
% Proficient in "Comparison"[2] Districts - All Grades	87%	79%	70%	87%	80%	67%	88%	81%	74%	87%	83%	70%	87%	82%	75%
Delta	**41%**	**39%**	**48%**	**40%**	**40%**	**45%**	**42%**	**40%**	**48%**	**40%**	**41%**	**44%**	**38%**	**38%**	**48%**

1. All data was compiled from Massachusetts Department of Elementary and Secondary Education, School and District Profiles, http://profiles.doe.mass.edu/state_report/mcas.aspx. The MCAS examination tests students in three subjects: Engish languae arts ("ELA"), math, and science. Beginning in 2015, Massachusetts began transitioning away from the traditional MCAS assessment (first to the PARCC test, and then to a hybrid MCAS-PARCC test). As a result, there is inssuficient data to evaluate performance during 2015 and 2016, or compare it with MCAS results from prior years.

2. The comparison districts are those analyzed by the Court in McDuffy and Hancock, namely: Brookline, Carlisle, Concord, and Wellesley.

Boston Charter School Performance Compared to Sending District Schools

	2010			2011			2012			2013			2014		
	ELA	MTH	SCI	ELA	MTH	SCI	ELA	MTH	SCI	ELA	MTH	SCI	ELA	MTH	SCI
Delta Between Percent Proficient at Boston Charter Schools and Sending District Schools[1]	20	23	19	25	30	24	23	22	22	23	27	33	24	24	27

1. Calculated using a weighted average for Sending District Schools based on number of students sent by each district school to respective Boston charter schools, using state's data available at Massachusetts Department of Elementary and Secondary Education, School and District Profiles, http://profiles.doe.mass.edu/state_report/mcas.aspx.