COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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.

Civil Action No. 15-2788-F

Leave to File in Excess of 20 Pages Granted on November 13, 2015

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Massachusetts has the strongest elementary and secondary school system in the nation.[1] This is due in part to the high value placed on education by the citizenry, the hard work and commitment of educators throughout the Commonwealth, and the education reforms enacted by the Legislature immediately following the Supreme Judicial Court's ruling in *McDuffy v. Secretary of Executive Office of Education*, 415 Mass. 545 (1993). More remains to be done, however, and a vigorous debate continues among voters, legislators, and policymakers (including the ones sued as defendants in this case) about how the Commonwealth can most effectively provide a high-quality education to all of its children. This debate encompasses a broad range of issues, including the content of uniform curriculum standards, methods for assessing student achievement, recruitment and retention of teachers, funding and accountability for the lowest-performing school districts, and the education of English language learners and children with special needs. It also includes the belief that Horace Mann and Commonwealth charter schools – public schools created by Massachusetts law, approved and reviewed by the Board and the Department of Elementary and Secondary Education, and granted a higher degree of autonomy and independence than other public schools – will stimulate the development of innovative programs within public education and advance the other purposes stated in the charter school statute. Over the last 22 years, the Legislature has repeatedly expanded the availability of charter schools by adjusting the numerical and net school funding caps set forth in G.L. c. 71, § 89(i), and there is now even greater availability in the Commonwealth's lowest performing districts.

[1] 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. Jeremy C. Fox, *Mass. Students Are Again Tops in National Testing*, Bos. Globe, Oct. 28, 2015, at A1. Even when NAEP scores are adjusted for differences in student demographics across the states, Massachusetts remains the best performing state. Matthew M. Chingos, *Breaking the Curve: Promises and Pitfalls of Using NAEP Data to Assess the State Role in Student Achievement* (Urban Inst. Oct. 2015).

The Legislature continues to debate proposals to adjust the cap, and the Attorney General has certified a proposed question for the 2016 ballot that would do so also.

In this action, plaintiffs attempt to circumvent this debate by obtaining a judicial order striking down the charter school cap altogether. Their complaint is fundamentally defective and should be dismissed pursuant to Mass. R. Civ. P. 12(b)(1) and (6). There is no actual controversy warranting declaratory judgment because Boston, the district whose students plaintiffs seek to represent as a class, is not now at the charter school cap. Plaintiffs lack standing for the same reason, because they have not applied to many charter schools available to them, and because their theory of causation is illogical, speculative, and remote. Plaintiffs' claim under the Education Clause of the Massachusetts Constitution fails because their conclusory allegations regarding the systemic failure of Boston public schools do not state a claim, they do not plausibly allege that the charter school cap caused an Education Clause violation, and that clause commits decisions about the details of education policymaking to the legislative and executive branches, not the judiciary. Plaintiffs' claim for violation of constitutional provisions involving equal protection and due process fails because they do not allege differential treatment based on a classification, they do not allege a protected liberty or property interest, and Section 89(i) is rationally related to legitimate state interests. Because there is no legal basis for the courts to interfere with the complex legislative judgment involved in determining the scope of Massachusetts's charter school experiment, this lawsuit should be dismissed.

STATUTORY AND REGULATORY BACKGROUND

A. History of Education Reform in the Commonwealth

In 1993, the Supreme Judicial Court held that the Massachusetts Constitution imposes an enforceable duty on the Commonwealth to provide education in the public schools for the children there enrolled. *McDuffy v. Sec'y of the Exec. Office of Educ.*, 415 Mass. 545 (1993).

The Court took no action beyond making this declaration, expressly declining to strike down any specific legislative enactment and remanding to the single justice with the discretion to retain jurisdiction to consider whether appropriate legislative action was taken within a reasonable time. *Id.* at 621; *see also Hancock v. Comm'r of Educ.*, 443 Mass. 428, 454 (2005) (reaffirming that the Education Clause "leaves the details of education policy making to the governor and the Legislature").

Immediately following the release of the *McDuffy* decision, the Legislature enacted the Education Reform Act. *See* St. 1993, c. 71. The Act clearly stated its intent and purpose:

> It is hereby declared to be a paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children . . . the opportunity to reach their full potential and to lead lives as participants in the political and social life of the commonwealth and as contributors to its economy. It is therefore the intent of this title to ensure: (1) that each public school classroom provides the conditions for all pupils to engage fully in learning as an inherently meaningful and enjoyable activity without threats to their sense of security or self-esteem, (2) a consistent commitment of resources sufficient to provide a high quality public education to every child, (3) a deliberate process for establishing and achieving specific educational performance goals for every child, and (4) an effective mechanism for monitoring progress toward those goals and for holding educators accountable for their achievement.

G.L. c. 69, § 1. In addition to "radically restructur[ing]" the funding of public education and "dramatically increas[ing]" state financial assistance to public schools, the Act established "uniform, objective performance and accountability measures for every public school student, teacher, administrator, school, and district in Massachusetts." *Hancock*, 443 Mass. at 432.

The Act eliminated the earlier system of funding education primarily from local property taxes, which had resulted in disparate spending levels across wealthy and poorer school districts. *Id.* at 437. The Act set a minimum "foundation budget" based on student needs, adjusted for poverty, and combined state funding with required local contributions, adjusted for district wealth, to ensure expenditures at objectively derived levels. *Id.* at 437-38 & n.8. It required the

adoption of academic standards in mathematics, science and technology, history and social science, English, foreign languages, and the arts, as well as implementation of curriculum frameworks to "present broad pedagogical approaches and strategies for assisting students in the development of the skills, competencies and knowledge called for by these standards." *Student No. 9 v. Bd. of Educ.*, 440 Mass. 752, 755-56 (2004). For the first time, students were required to demonstrate a specified level of academic achievement in order to graduate from high school and, if unable to do so, were provided with "extensive remedial opportunities." *Hancock*, 443 Mass. at 439; *see also Student No. 9*, 440 Mass. at 757-58 (describing Massachusetts Comprehensive Assessment System (MCAS) graduation requirement). The Legislature reformed the process of training and certifying teachers by abolishing lifetime teacher licensure and imposing "stringent," objectively measured initial and renewal certification requirements designed to dovetail with the substantive academic requirements of the curriculum frameworks. *Hancock*, 443 Mass. at 441.

Included in these reforms was a centralized system of school and district accountability. *Hancock*, 443 Mass. at 438. The Legislature supplemented these accountability measures with the Achievement Gap Act of 2010 by, in part, enhancing the tools for classifying and turning around underperforming schools and districts, up to and including state receivership where necessary. *See* St. 2010, c. 12; G.L. c. 69, §§ 1J, 1K. In accordance with this authority and on the basis of student performance on standardized tests, the Commissioner of the Department of Elementary and Secondary Education (Commissioner) categorizes the lowest-performing 20% of local schools as Level 3 schools. *See* G.L. c. 69, § 1J(a).[2] Considering data such as student

[2] *See also* Mass. Dep't of Elementary & Secondary Education, Framework for District Accountability & Assistance (Aug. 2012), available at http://www.mass.gov/edu/docs/ese/accountability/framework.pdf. All facts set forth herein may be considered in connection with the Commonwealth defendants' motion to dismiss under Mass. R. Civ. P. 12(b)(1) without converting it into a motion for summary judgment.

attendance and rates of dismissal, exclusion, promotion, and graduation, the Commissioner may classify some number of Level 3 schools as "underperforming" or Level 4 schools. *See id.*; 603 C.M.R. § 2.05(2). The superintendent of a district with a Level 4 school must prepare a "turnaround plan" for that school with input of local stakeholders and state agencies and the approval of the Commissioner. *See* G.L. c. 69, § 1J(b), (c); 603 C.M.R. § 2.05(5). Such turnaround plans may include changes in curriculum, funding, length of school day or year, personnel, and collective bargaining agreements. *See* G.L. c. 69, § 1J(d). The Department of Elementary and Secondary Education (Department) provides assistance to Level 4 schools in their self-assessment efforts as well as professional development opportunities and accountability monitoring. 603 C.M.R. §§ 2.03(6), 2.05(4). Level 4 schools have access to additional partnering and supports through the Department's District and School Assistance Centers.[3]

A Level 4 school that fails to show significant improvement after implementation of the superintendent's turnaround plan may be designated a "chronically underperforming" or Level 5 school. G.L. c. 69, § 1J(a); 603 C.M.R. § 2.06(2)(a). In that event, the Commissioner prepares a turnaround plan that may include changes to the collective bargaining agreement and also may appoint an external receiver. G.L. c. 69, § 1J(m), (o), (r).[4] In addition to the assistance previously discussed, the Department may send targeted assistance teams into the schools. *Id.*

Watros v. Greater Lynn Mental Health & Retardation Ass'n, 421 Mass. 106, 109 (1995); *see also Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000) (court may take into account matters of public record in connection with motion to dismiss under Mass. R. Civ. P. 12(b)(6)) (citations omitted).

[3] *See* Mass. Dep't of Elementary & Secondary Education, District & School Assistance Center (DSAC) Foundational Services, Summary of Targeted Assistance Options, available at http://www.mass.gov/edu/docs/ese/accountability/dsac/foundational-services.pdf.

[4] The first legal challenges to the Commissioner's turnaround plans for Level 5 schools are pending in Superior Court. *See New Bedford Educators Ass'n v. Chair, Mass. Bd. of Elementary & Secondary Educ.*, Middlesex Sup. Ct., Civil Action No. 2014-06523-H (and consolidated cases).

§ 1J(r); 603 C.M.R. § 2.03(6).[5]

B. Charter Schools

As part of the Education Reform Act, the Legislature authorized the creation of charter schools to encourage innovative educational practices, among other purposes. *See* St. 1993, c. 71, § 55; G.L. c. 71, § 89(b), (i). All charter schools are public schools. *See* G.L. c. 71, § 89(c). Charter schools may be proposed by teachers, school leaders, parents, or non-profit entities. *Id.* § 89(d). Charter schools operate under five-year charters granted by the Board of Elementary and Secondary Education (Board). *Id.* § 89(dd). To renew a charter for an additional five years, a school must affirmatively demonstrate faithfulness to its charter, academic program success, and organizational viability. *Id.*; 603 C.M.R. § 1.11. The Board may place charter schools on probation; impose conditions on their operation; or suspend or revoke charters for violations of law or failure to make progress in student achievement, comply with their charters, or remain viable. G.L. c. 71, § 89(ee); 603 C.M.R. § 1.12.

There are two types of charter schools: Horace Mann charter schools and Commonwealth charter schools. G.L. c. 71, § 89(a), (c); 603 C.M.R. § 1.02 (Definitions). Each type is managed by a board of trustees and functions independently of the local school committee for the district in which the school is geographically located. G.L. c. 71, § 89(c); *see* 603 C.M.R. § 1.02. Employees of either type of school may organize for collective bargaining. G.L. c. 71, § 89(y).

Charters for Horace Mann schools must be approved by local school committees and, in some cases, by local collective bargaining units. *Id.* § 89(c); *see* 603 C.M.R. § 1.04(1)(a). There are three types of Horace Mann charter schools. A Horace Mann I is a new school that must be approved by the local school committee and the local collective bargaining unit. G.L. c. 71,

[5] Similar procedures are available for underperforming school districts. *See* G.L. c. 69, § 1K; 603 C.M.R. §§ 2.05(1), 2.06(1).

§ 89(c); 603 C.M.R. § 1.04(1)(a). A Horace Mann II is a conversion of an existing public school and must be approved by the local school committee and a majority of the school faculty, but not the local collective bargaining unit. *Id.* A Horace Mann III is a new school that must be approved by the local school committee but not the local collective bargaining unit. *Id.* Commonwealth charter schools are not subject to existing local collective bargaining agreements. Horace Mann charter schools are not subject to existing local collective bargaining agreements except to the extent specified in their charters and to the extent that all employees continue as collective bargaining unit members and maintain seniority, salary, and benefits. G.L. c. 71, § 89(c), (t).

Both Commonwealth and Horace Mann charter schools are funded by the school districts from which they draw students or in which they are located. 603 C.M.R. § 1.07. Horace Mann charter schools receive funding directly in a lump sum appropriated by the school committee. G.L. c. 71, § 89(w). For Commonwealth charter schools, the Department calculates tuition payments for each district sending students representing the actual amount the district would spend to educate the students. *Id.* § 89(ff). The State Treasurer pays these amounts to the schools and then reduces education and other aid payments to the sending districts by the same amounts. *Id.*; 603 C.M.R. § 1.07. The Commonwealth reimburses districts for annual increases in total charter school tuition, subject to appropriation. G.L. c. 71, § 89(gg).

Generally, under the current law, no more than 120 charter schools may be in operation in the Commonwealth at a given time. *Id.* § 89(i)(1). Of these, up to 48 may be Horace Mann I or III charter schools and up to 72 may be Commonwealth charter schools. *Id.* There is no limit on the number of public schools that may be converted to Horace Mann II charter schools. *Id.* § 89(c). Additionally, Commonwealth charters do not count toward the cap of 72 if they are

awarded to "proven providers" to establish schools in districts in the lowest 10% of student performance where enrollment would cause tuition payments to exceed 9% of the district's net school spending. *See id.* § 89(i)(1), (i)(3).

In addition to the numerical cap, the statute limits funding that may be allocated from school districts to Commonwealth charter schools. In general, no more than 9% of a district's net school spending may be directed towards Commonwealth charter schools in the form of tuition payments but, in districts with student performance in the lowest 10%, that limit has been increased over recent years such that it will reach 18% in FY 2017. *See* St. 2010, c. 12, § 7; G.L. c. 71, § 89(i)(2), (3). This funding cap does not apply to Horace Mann charter schools. *See* G.L. c. 71, § 89(i)(2); 603 C.M.R. § 1.07(1).

There are no academic requirements for admission to a charter school. G.L. c. 71, § 89(m). Students may not be charged an application fee, *id.*, and there is no limit on the number of charter schools to which students may apply. Preference for enrollment in Commonwealth charter schools is given to residents of the municipality in which the school is located and to siblings of current students. *Id.* § 89(n). Preference for enrollment in Horace Mann charter schools is given to students at the school before its conversion to a charter and to their siblings, then to students in other public schools within the district, then to other students in the district. *Id.*; 603 C.M.R. § 1.05(6), (7). If the number of applicants to a charter school exceeds the number of available spots, an admissions lottery is held. *Id.*

C. Legislative Amendments to the Charter-School Statute: 1993-present

The Legislature has amended the charter-school statute 13 times since 1993.[6] As initially

[6] St. 1995, c. 38, § 102; St. 1996, c. 72; St. 1996, c. 151, §§ 223-225; St. 1997, c. 46, §§ 2-12; St. 1997, c. 176; St. 1998, c. 99, § 5; St. 2000, c. 227, §§ 1-6; St. 2002, c. 218, § 14; St. 2004, c. 352, § 31; St. 2010, c. 12, § 7; St. 2010, c. 131, § 51; St. 2011, c. 199, § 3; St. 2014, c. 283, § 4.

enacted in 1993, the statute envisioned only one type of charter school and limited the number of such schools to 25. *See* St. 1993, c. 71, § 55. In 1997, Commonwealth charter schools and Horace Mann charter schools were defined as separate types and the numerical cap was raised to 50: 37 Commonwealth and 13 Horace Mann. St. 1997, c. 46, § 2. Also, a 6% limit on district funding allocable to charter schools was enacted. *Id.*[7] In 2000, the total number of charter schools was raised to its current level of 120 (72 Commonwealth and 48 Horace Mann). St. 2000, c. 227, § 2. At that time, the funding cap was increased to 9%. *Id.* In 2010, the funding cap was raised over seven years to 18% for charter schools in districts with student performance in the lowest 10% statewide. St. 2010, c. 12, § 7. Moreover, the Legislature required that at least four of any new Horace Mann III charters to be granted be awarded in municipalities with populations in excess of 500,000 (*i.e.*, only Boston). *Id.*[8]

Now pending is a bill filed by Governor Baker that would allow the Board to award an additional 12 Commonwealth charters each year in districts in the lowest quarter of student performance.[9] Such schools would not be subject to the funding cap, but the number of students authorized to be enrolled in them could not exceed 1% of the Commonwealth's total public school enrollment for the previous year. Moreover, the Attorney General has certified a proposed question for the 2016 ballot under Amend. Art. XLVIII of the Massachusetts Constitution that would do the same thing.[10]

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[7] The net school spending cap for any district that transferred 5% or more of its net school spending in fiscal year 1997 was the actual percent of net school spending transferred plus an additional 3%. St. 1997, c. 46, § 6.

[8] *See* http://www.massbenchmarks.org/statedata/news.htm, Appendix A.

[9] *See* https://malegislature.gov/Bills/189/House/H3804.

[10] *See* http://www.mass.gov/ago/government-resources/initiatives-and-other-ballot-questions/current-petitions-filed.html, Petition No. 15-31.

D. Current Charter School Operations

At present, 71 Commonwealth charter schools and 9 Horace Mann charter schools are operating in the Commonwealth. *Massachusetts Department of Elementary and Secondary Education, Charter Schools Fact Sheet.*[11] Twenty-five of these charter schools are in Boston: 20 Commonwealth charter schools and 5 Horace Mann charter schools. *Id.* Only 56 of the 71 Commonwealth charter schools count toward the numerical cap of 72, so 15 additional Commonwealth charters are available statewide. *Massachusetts Department of Elementary and Secondary Education, Questions and Answers About Charter Schools.*[12] And, 38 additional Horace Mann I and III charters are available statewide (with a minimum of 4 Horace Mann IIIs slated for Boston), as well as an unlimited number of charters for Horace Mann II conversion schools statewide. *Id.*; St. 2010, c. 12, § 7; G.L. c. 71, § 89(c).

Similarly, the funding cap for Commonwealth charter schools has not been reached in Boston.[13] Presently, an estimated 668 additional charter-school seats are available under the funding cap in Boston.[14]

Since 1994, the Board has received 253 charter applications and has granted 106. *Massachusetts Department of Elementary and Secondary Education, Charter Schools Fact Sheet.* Of the 106 charters granted, 24 schools are not in operation: 4 schools never opened, 9

[11] *See* Mass. Dep't of Elementary and Secondary Educ., Mass. Charter School Fact Sheet, available at http://www.doe.mass.edu/charter/factsheet.pdf. One additional Horace Mann charter has been granted but the school is not yet operational. *Id.*

[12] *See* Mass. Dep't of Elementary and Secondary Educ., Questions and Answers About Charter Schools, at 5 (May 2015), available at http://www.doe.mass.edu/charter/new/2015-2016QandA.pdf.

[13] *See* Mass. Dep't of Elementary and Secondary Educ., Office of School Finance, FTE Remaining Under Net School Spending (NSS) Cap at Charter Maximum Enrollment as of April 2015, available at http://www.doe.mass.edu/charter/app/NSS-Projections.xlsx.

[14] *See id.*; Mass. Dep't of Elementary and Secondary Educ., Districts Subject to Increases in the Charter School Cap, available at http://www.doe.mass.edu/charter/enrollment/capincrease.html.

schools opened then closed, 4 charters were revoked, 2 charters were not renewed, and 5 charters were given up due to consolidations. *Id.* Of the 80 charter schools now in operation, 24 are less than 5 years old and 14 have been operating for 20 years. *Id.* In school year 1995-96, 2,613 students attended charter schools; in school year 2015-16, the expected number is 41,802. *Id.* Of the 80 charter schools currently in operation, 13 (or 16%) are either on probation or subject to conditions imposed by the Board. *Id.* Of the 25 charter schools currently in operation in Boston, 3 (or 12%) are either on probation or subject to conditions. *Id.*

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS.

The plaintiffs seek a judgment declaring that Section 89(i), the charter school cap, violates the Massachusetts Constitution. Before this Court can address the substance of plaintiffs' claims under the Education Clause or other provisions of the Massachusetts Constitution, plaintiffs must show (i) the existence of an actual controversy warranting a declaratory judgment and (ii) "the requisite legal standing to secure its resolution." *Entergy Nuclear Generation Co. v. Dep't of Envtl. Prot.*, 459 Mass. 319, 326 (2011) (citation omitted). Because they can show neither, their complaint must be dismissed under Mass. R. Civ. P. 12(b)(1).

A. There Is No Actual Controversy for Resolution Because Boston Is Not at the Charter School Cap.

1. No declaratory judgment may issue in the absence of a controversy that immediately impacts plaintiffs' rights.

Declaratory judgment is a vehicle for resolving "real, not hypothetical, controversies; the declaration issued is intended to have an immediate impact on the rights of the parties." *Penal Insts. Comm'r for Suffolk Co. v. Comm'r of Corr.*, 382 Mass. 527, 530-31 (1981) (quoting *Mass. Ass'n of Indep. Ins. Agents & Brokers v. Comm'r of Ins.*, 373 Mass. 290, 292 (1977)).

Controversy in the abstract is insufficient. *See, e.g.*, *Supreme Council of the Royal Arcanum v. State Tax Comm'n*, 358 Mass. 111, 113 (1970) (holding that plaintiff seeking ruling on tax exemption lacked "definite interest" required to establish "actual controversy" where it had not and was not about to be assessed such taxes); *see also Mass. Ass'n of Afro-Am. Police, Inc. v. Boston Police Dep't*, 973 F.2d 18, 20 (1st Cir. 1992). This prohibition against abstract legal opinions "applies with special force where judgment is sought on the constitutionality of a statute." *Quincy City Hosp. v. Rate Setting Comm'n*, 406 Mass. 431, 439 (1990) (citation omitted).

Here, the five plaintiffs are residents of Boston, *see* Compl. ¶¶ 14-19, and they seek to represent thousands of other children who attend school in that city, *see id.* ¶¶ 1, 28-29. This Court should dismiss the complaint because the statute plaintiffs seek to invalidate, Section 89(i), does not have an "immediate impact" on any rights they may have. Specifically, the statute does not now limit authorization of new charter schools or charter school expansions in Boston.

2. Massachusetts is not at the numerical cap.

First, Massachusetts is not even close to the numerical cap for Horace Mann charter schools. There is no limit on the number of public schools that may be converted to Horace Mann II charter schools. G.L. c. 71, § 89(c). In addition, of the 120 charter schools that may be in operation in the Commonwealth at a given time, up to 48 of them may be Horace Mann I or III charter schools. *Id.* § 89(i)(1). Only 10 Horace Mann charter schools now operate in Massachusetts. Therefore, 38 additional Horace Mann I or III charter schools, and an unlimited number of Horace Mann II conversions, can be established in Massachusetts generally or in Boston specifically. In fact, at least 4 of the 14 Horace Mann III charter schools authorized by the Legislature in 2010 *must* be located in Boston.

Remarkably, even though the statute they seek to strike down governs both Horace Mann and Commonwealth charter schools, plaintiffs never even mention Horace Mann schools in their complaint. Instead, they refer throughout to "public charter schools" – a term not used in Section 89 or anywhere else to mean just Commonwealth charter schools. Nor do they ever identify any reason to distinguish between Horace Mann and Commonwealth charter schools for purposes of their lawsuit. The qualities that they ascribe to so-called "public charter schools" – independence from district school committees and management by a board of trustees, *see* Compl. ¶ 71; heightened review and accountability by the Department, *see id.* ¶ 72; and greater autonomy in their operations, *see id.* ¶ 73 – are shared by Horace Mann schools. Plaintiffs cannot manufacture a controversy by omitting key (and judicially noticeable) facts about the statute and program they are challenging.

Plaintiffs also give the misimpression that Massachusetts is at or near the numerical cap for Commonwealth charter schools. Specifically, they allege that there are "currently 71 public charter schools in the Commonwealth," Compl. ¶ 74, and that Section 89(i)(1) caps "the total number of Commonwealth public charter schools at 72," *id.* ¶ 87. But although it is true that 71 Commonwealth charter schools now operate in Massachusetts, *only 56* of those count toward the numerical cap of 72, leaving an additional 15 Commonwealth charters available statewide. For all these reasons, the numerical cap in Section 89(i) presents no actual controversy that would allow plaintiffs to proceed with this lawsuit.

3. Boston is not at the net school funding cap.

Nor does the net school funding cap have any immediate impact on plaintiffs' rights. *See* G.L. c. 71, § 89(i)(2), (3). The net school funding cap does not apply at all to Horace Mann I, II, or III charter schools. *See id.*, §89(i)(2); 603 C.M.R. § 1.07(1). Again, that means that, if a

sufficient number of applications are filed and all the other application and opening requirements are satisfied, 38 additional Horace Mann I or III charter schools and an unlimited number of Horace Mann II conversions could open in Boston.

At the same time, Boston is not at the net school funding cap for Commonwealth charter schools. Section 89(i) limits the funding that may be allocated from local school districts to Commonwealth charter schools but, in districts like Boston with student performance in the lowest 10% in Massachusetts, that limit has gradually increased to 18%, effective in FY 2017. *See* G.L. c. 71, § 89(i)(2), (3). Plaintiffs dance around the applicable facts in their complaint. They allege, "By early 2013, virtually all of the new charter seats permitted under the 2010 amendment already had been allocated to public charter schools and Boston had effectively reached its cap." *See* Compl. ¶ 92. But tucked away in a footnote, in small type, plaintiffs obliquely acknowledge that right now – *i.e.*, 2015 through 2017 – Boston is *not* at its funding cap, even for Commonwealth charter school seats. *See id.* ¶ 94 n.11 (referring to announcement "this year" that Massachusetts "was authorizing an additional 668 seats in Boston public charter schools"). In fact, the Department did not "authorize" an additional 668 seats, but rather applied the net school funding cap to determine that 668 more seats are available in Boston, announcing this determination in May 2015.

Because Section 89(i) does not currently limit new charter school authorizations in Boston, either through the numerical or net school funding cap, this case does not present an actual controversy and should be dismissed.

B. Plaintiffs Do Not Have Standing Because Section 89(i) Has Not Caused Them Legally Cognizable Injury.

1. Standing is required for subject-matter jurisdiction.

The complaint should also be dismissed for lack of standing. "To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury." *Slama v. Attorney Gen.*, 384 Mass. 620, 624 (1981). The "complained of injury must be a direct consequence of the complained of action." *Ginther v. Comm'r of Ins.*, 427 Mass. 319, 323 (1998) (citing *Boston Edison Co. v. Boston Redev. Auth.*, 374 Mass. 37, 44 (1977)). Far from a technicality, "[t]he question of standing is one of critical significance." *Id.* at 322 (quoting *Tax Equity Alliance v. Comm'r of Rev.*, 423 Mass. 708, 715 (1996)). That is because "[r]espect for the separation of powers has led [the Supreme Judicial Court] . . . to be extremely wary of entering into controversies where we would find ourselves telling a coequal branch of government how to conduct its business." *Alliance, AFSCME/SEIU, AFL-CIO v. Commonwealth*, 427 Mass. 546, 548 (1998). Here, plaintiffs' "complained of action" is the continued existence of Section 89(i). The elimination of the charter school cap is "[a]ll" that they ask for. *See* Compl. ¶ 13, Prayer for Relief. But plaintiffs do not have standing to proceed with their constitutional challenges because they cannot show that the cap causes them a legally cognizable injury. This is true for several independently sufficient reasons.

2. Additional charter school seats are available in Boston.

First, as explained in Section I.A, *supra*, Section 89(i) does not limit authorization of new charter schools and expansions in Boston, where plaintiffs reside. Because Section 89(i) does not currently operate to limit plaintiffs' claimed rights, they do not have standing to challenge it as unconstitutional. *Mass. Comm'n Against Discrimination v. Colangelo*, 344 Mass. 387, 390 (1962) ("Only one whose rights are impaired by a statute can raise the question of its

constitutionality, and he can object to the statute only as applied to him.") (citation omitted).

3. Plaintiffs have not applied to many charter schools available to them.

Second, even if Boston were at the cap, the complaint makes clear that plaintiffs have not taken full advantage of the charter school application opportunities available to them. Plaintiffs allege that, "[f]aced with the prospect of attending a constitutionally inadequate school, each of the plaintiffs applied to attend *a* public charter school in the hopes of obtaining at least an adequate education." Compl. ¶ 68 (emphasis added). John Does No. 1 and 2 and Jane Doe No. 1 each applied to only a single charter school. *Id.* ¶¶ 15-17. John Doe No. 3 and Jane Doe No. 2 allege that they applied to "multiple public charter schools," but do not specify the number or identify any of those schools. *Id.* ¶¶ 18-19.[15] There is no rule that a child may apply to only one or a few charter schools. To the contrary, there are 5 Horace Mann and 20 Commonwealth charter schools located in Boston, and as residents plaintiffs are entitled to apply to *every one* that serves their respective grade levels. They can also apply to charter schools located outside of Boston, although they would not receive enrollment preferences set forth in G.L. c. 71, § 89(n).

Plaintiffs cannot proceed with a lawsuit based on the idea that they were denied access to a government program or benefit they did not fully apply for. Nor may plaintiffs proceed on the theory that they are subjected to "reduced," "diminished," or "depressed" chances at gaining admission to charter schools, *see* Compl. ¶¶ 1, 7, 108, where they themselves reduced those odds by not applying to all charter schools available to them. They have not plausibly alleged that Section 89(i) has caused their claimed injury of not being admitted to a charter school. *See*

[15] Nor is there any indication that plaintiffs have pursued any other alternative available to them under state law, such as enrolling in another district under the Inter-District School Choice program or applying to the METCO program. *See* Mass. Dep't of Elementary and Secondary Educ., Choosing a School: A Parent's Guide to Educational Choices in Massachusetts, available at http://www.doe.mass.edu/finance/schoolchoice/choice_guide.html.

Ginther, 427 Mass. at 323 (claimed injury must be "direct consequence" of challenged action).

4. Plaintiffs' theory of causation is illogical, speculative, and remote.

Third, even if Boston were at the cap for both Horace Mann and Commonwealth charter schools and plaintiffs had applied to all available schools, they would still lack standing to proceed because the causal link between the existence of the charter school cap and the "constitutionally inadequate education" that plaintiffs allegedly receive (or would receive, if they attended their assigned public school), *see, e.g.*, Compl. ¶ 14, is illogical, highly speculative, and remote. Plaintiffs allege in conclusory fashion that the harm they have suffered is "caused by the arbitrary cap on public charter schools," *see, e.g., id.* ¶ 21, but they never explain how the cap caused their public schools to be constitutionally inadequate. Nor can they plausibly do so. Simply put, the conditions at one school are not caused by the existence or absence of other schools. Numerous other factors, unaddressed in plaintiffs' complaint, are responsible for underperforming schools. Because plaintiffs' "complained of injury" is not a "direct consequence of the complained of action," *Ginther*, 427 Mass. at 323, their complaint must be dismissed. *See also New England Div. of Am. Cancer Soc'y v. Comm'r of Admin.*, 437 Mass. 172, 177 (2002) (standing requires plaintiffs to show that harm they suffer is "fairly traceable" to action they are challenging).

In addition, any theory of causation that plaintiffs might articulate is "speculative, remote, and indirect" and "insufficient to confer standing." *Ginther*, 427 Mass. at 323. For example, they allege that, "[b]ut for the charter school cap, more high-quality public charter schools could open in Boston, allowing many more children to attend these schools." Compl. ¶ 93. That allegation does not establish the requisite causal link between violation and injury. Furthermore, it is purely speculative to assume that eliminating the cap would result in more

high-quality charter schools in Massachusetts. An extended chain of contingencies would have to occur for that assumption to come true. Potential charter school operators would have to apply. They would have to satisfy the demanding application and review process. Even if approved, the prospective operators would have to draft bylaws for the Board of Trustees; secure financing and an appropriate facility; hire teachers and other employees and conduct background checks; develop a budget; formalize a broad range of policies and procedures; obtain insurance coverage; and implement enrollment and admission policies. It is purely speculative to claim that a significant number of new charter schools would satisfy all these required steps. Furthermore, there is no guarantee that, once a new charter school opened, it would be a "high-quality" charter school as plaintiffs allege. *See id.* Not all charter schools in Massachusetts are high-performing. In fact, it is not unusual for the Department or the Board to impose conditions on existing charter schools, or close them because they do not perform as required.[16]

The Supreme Judicial Court has repeatedly rejected claims of standing based on such hypothetical or attenuated reasoning. *See Pugsley v. Police Dep't of Boston*, 472 Mass. 367, 371-72 (2015) (rejecting standing that rested on "an allegation that an injury *might* have occurred if a series of events transpired in a certain way"); *Arbella Mut. Ins. Co. v. Comm'r of Ins.*, 456 Mass. 66, 84 (2010) (rejecting standing where plaintiff "alleged only speculative harm"); *Barbara F. v. Bristol Div. of Juvenile Court Dep't*, 432 Mass. 1024, 1025 (2000) (rescript) (rejecting standing where plaintiff feared that she might engage in insufficient prenatal care and thereby be subjected to prosecution by same district attorney who prosecuted another pregnant woman); *Slama*, 384 Mass. at 625 (finding "the city's allegation of injury is insufficient" where it assumed that initiative petition would be approved if it appeared on ballot). Because plaintiffs

[16] Thirteen of the 80 charter schools currently in operation in Massachusetts are either on probation or operating under conditions imposed by the Board. Twenty-four charter schools have closed since 1997.

cannot show that the charter school cap has caused them injury and because their theories of causation are illogical and hopelessly attenuated, their complaint should be dismissed for lack of jurisdiction.

II. PLAINTIFFS' EDUCATION CLAUSE CLAIM MUST BE DISMISSED.

Plaintiffs' claim that the Commonwealth has forsaken its duty under the Education Clause to provide an education to children in the Boston public schools must be dismissed as legally deficient. *See* Compl. ¶¶ 107-10. Plaintiffs allege only one, exceptionally narrow, theory as to how the Commonwealth has failed to fulfill its duty: They contend that the Commonwealth has violated the Education Clause by limiting the number of Commonwealth charter schools. *Id.* ¶¶ 108-09. To fix that purported violation, plaintiffs request only one, exceptionally narrow, remedy: They ask this Court to invalidate Section 89(i), and thereby permit the creation of an unlimited number of Commonwealth charter schools. *Id.* ¶¶ 13, 110, Prayer for Relief.

This theory of liability and proposed remedy fail for three reasons. First, plaintiffs' allegations regarding the systemic failure of Boston public schools are so conclusory that they fail to state a claim. Second, plaintiffs' only theory of causation – that the Commonwealth has caused Boston schools to be constitutionally inadequate by limiting the number of Commonwealth charter schools – is so implausible that it fails to allege the causation element of the claim. Finally, even if plaintiffs could establish that the Commonwealth is failing to provide them with an education, this Court would lack authority to order the fine-grained remedy plaintiffs desire. Both the text of the Education Clause and the separation-of-powers principles codified in Article XXX of the Declaration of Rights commit decisions about the nuances of education policy to the legislative and executive branches, not the judiciary.

A. Plaintiffs Fail to Allege the Essential Elements of an Education Clause Claim.

To state an Education Clause claim, plaintiffs must allege the "abandonment of the constitutional duty" to *generally* provide the Commonwealth's students with an education. *Hancock*, 443 Mass. at 433, 454 n.27. They must also identify some state action or omission that has plausibly caused public schools to be constitutionally deficient. *See McDuffy*, 415 Mass. at 611. Furthermore, to survive a motion to dismiss under Rule 12(b)(6), plaintiffs' "[f]actual allegations must be enough to raise a right to relief above the speculative level" and "plausibly suggest[] . . . an entitlement to relief." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (citation and internal quotation marks omitted). "[W]holly conclusory statement[s]" and "bare assertion[s]" that the Commonwealth has violated the Education Clause are insufficient to state a claim. *Id.* at 632, 636.

1. Plaintiffs do not plausibly allege general deprivation of the right to education.

Plaintiffs fail to state a claim under the Education Clause because they have not plausibly alleged the systemic deprivation of the right to an education. It is well established that the "enjoyment of [the] benefit of education" secured by the Education Clause "is [a] common right and not an exclusive personal one." *Doe v. Superintendent of Schs. of Worcester*, 421 Mass. 117, 132 (1995) (citing *Sherman v. Inhabitants of Charlestown*, 62 Mass. 160, 8 Cush. 160, 163-64 (1851)); *see also id.* at 129 (while "the Commonwealth *generally* has an obligation to educate its children," the Education Clause does not "guarante[e] each individual student the fundamental right to an education"); *Hancock*, 443 Mass. at 454 n.27. Thus, in order to state an Education Clause claim, plaintiffs must allege the systemic deprivation of the right to an education.

Plaintiffs fail to meet this basic pleading burden. Nearly all of their specific allegations

bear on individual educational circumstances, rather than on the general provision of public education. Plaintiffs allege that they, personally, attend inadequate public schools, although they do not identify the schools they attend. *See* Compl. ¶¶ 49, 52, 56, 60, 64. They allege that the MCAS passage rates in their schools are low, *see id.* ¶¶ 50, 53, 57, 61-62, 65, and that their schools are Level 3 or Level 4 schools, *see id.* ¶¶ 51, 55, 59, 63, 66. They also allege that their schools "fail[] to teach children many of the skills . . . identified in *McDuffy* . . . as the hallmarks of a minimally adequate education." *Id.* ¶ 67. These allegations do not support an Education Clause claim. Because the "benefit of public education is [a] common, not exclusive personal, right," a plaintiff cannot make out a constitutional claim by alleging that his or her particular school is inadequate. *See Hancock*, 443 Mass. at 454 n. 27; Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 Cal. L. Rev. (forthcoming 2016), at 37 ("No court has ever recognized a claim against the state based on isolated inadequacies or inequalities.").

Elsewhere, plaintiffs allege that students in Boston "attend constitutionally inadequate schools" or "attend district schools that do not provide a constitutionally adequate education." Compl. ¶¶ 5, 41; *see also id.* ¶¶ 1, 6, 9, 11-12, 14-21, 28, 30, 36, 40, 42, 48, 68, 102. Although these allegations bear on the general provision of public education, they are wholly conclusory, and therefore must be disregarded in determining whether plaintiffs have adequately pleaded an Education Clause violation. *See Iannacchino*, 451 Mass. at 636 ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions."); *Schaer*, 432 Mass. at 477 (this Court may "not accept legal conclusions cast in the form of factual allegations").

What remains of the complaint are three allegations that indict local public schools in general. Plaintiffs allege that 17 schools in Boston have been designated Level 4 schools since

2010, and that of the 12 that were designated Level 4 schools in 2010, half have shown little to no improvement. Compl. ¶¶ 42-43. In addition, plaintiffs allege that 59 schools across the Commonwealth have been designated Level 4 schools since 2010. *Id.* ¶ 44.

These allegations do not give rise to a plausible Education Clause claim. As an initial matter, the classification of schools as Level 3 or Level 4 is not a proxy for constitutional inadequacy. The Department classifies schools by level in order to identify those schools most in need of state engagement and accountability measures. By designating a school as Level 4, the Commissioner enables the school to receive a turnaround plan, benefit from more extensive intervention from the Commonwealth, and reopen collective bargaining. *See* 603 C.M.R. § 2.05(5). But the Level 4 designation is not an admission that the school or school district has "abandon[ed] . . . the constitutional duty" to provide an education to its pupils. *Hancock*, 443 Mass. at 433. Nor, of course, is the Level 3 designation, as some schools will always fall into the bottom 20% of local public schools statewide. This Court should not allow plaintiffs to exploit the Department's accountability tools, such as classification of schools, to subject the Commonwealth to burdensome discovery and litigation on thinly-pled Education Clause claims.

In any event, the allegation that 17 public schools in Boston have been classified as Level 4 since 2010 says little about the state of Boston public schools in general, which, in 2013-14, comprised 128 local public schools. As plaintiffs admit, "excellent district schools exist in Boston." Compl. ¶ 42. Similarly, the allegation that 59 schools statewide have been classified as Level 4 says little about the state of the 1,860 public schools statewide. Indeed, the 6.25%[17] of public schools in Boston currently designated Level 4 is lower than the 12% of charter schools

[17] There are currently eight Level 4 schools in Boston, out of 128 total. *See* Level 4 Schools in Massachusetts (Sept. 2014), available at http://www.mass.gov/edu/docs/ese/accountability/turnaround/level-4-schools-list.pdf.

in Boston (and 16% of charter schools statewide) currently on probation or operating under conditions imposed by the Board. Thus, at most, plaintiffs' allegations indicate that the Department has identified some local public schools in need of significant improvement and state support. But they do not allege the kind of "egregious, Statewide abandonment of the constitutional duty" to provide an education that gave rise to the Education Clause claim in *McDuffy*. *Hancock*, 443 Mass. at 433. And far from abandonment, under the 2010 Achievement Gap Act, St. 2010, c. 12, the Commonwealth now has a robust, mandatory program to "turn around" these schools. Accordingly, plaintiffs have failed to state a claim under the Education Clause, and Count I must be dismissed

2. Plaintiffs fail to plausibly allege state action that has caused a violation of the Education Clause.

Plaintiffs also fail to plausibly allege that the Commonwealth has *caused* a constitutional injury. To state a viable Education Clause claim, plaintiffs must identify some state action – a policy or "'law and the actions undertaken pursuant to that [policy or] law'" – that plausibly "'conflict[s] with [or falls short of]'" constitutional requirements. *McDuffy*, 415 Mass. at 611 (quoting *Colo v. Treasurer & Receiver Gen.*, 378 Mass. 550, 55 (1979)); *see also* Black, *The Constitutional Challenge to Teacher Tenure*, *supra*, at 39 ("[P]laintiffs must pinpoint a state policy that has causal effects at the local level. It is not enough to simply allege an education deficiency."); *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 631 (2004) ("[I]t is one thing for plaintiffs to demonstrate that a large number of . . . students are failing to obtain a sound, basic public education. It is quite another for plaintiffs to show that such a failure is primarily the result of action and/or inaction of the State."). Thus, in *McDuffy*, the plaintiffs alleged, and the Supreme Judicial Court ultimately concluded, that the state laws governing school financing effected the constitutional deprivation. *See* 415 Mass. at 556-57; *id.* at 614 ("[F]iscal support, or

the lack of it, has a significant impact on the quality of education each child may receive.").

Plaintiffs here identify only one state law – Section 89(i) – that, they allege, has caused the deprivation of a right to an education. *See* Compl. ¶¶ 103-05, 108-10. But the notion that, by restricting the number of charter schools, the Commonwealth has caused local public schools to be constitutionally inadequate, is too facially implausible to state a claim. Plaintiffs advance no theory as to how the statute has any negative impact whatsoever on local public schools. Section 89(i) is the obstacle to plaintiffs' desired policy (*i.e.*, more charter schools); it is not a credible cause of the alleged constitutional deficiencies in Boston public schools. Because plaintiffs have failed to pinpoint any plausible state action that has caused the alleged inadequacy of Boston public schools, Count I must be dismissed.

B. This Court Lacks Authority Under the Education Clause to Order the Specific Remedy That Plaintiffs Request.

Count I must also be dismissed because this Court cannot order the sole remedy plaintiffs request. The role of the judiciary in reviewing an Education Clause claim is circumscribed: It must only determine whether "'a law and the actions undertaken pursuant to that law conflict with [or fall short of]'" constitutional requirements. *McDuffy*, 415 Mass. at 611 (quoting *Colo*, 378 Mass. at 553). Thus, in *McDuffy*, the Supreme Judicial Court "declared . . . the nature of the Commonwealth's duty to educate its children" and then "concluded the current state of affairs [fell] short of the constitutional mandate." 415 Mass. at 619 n.92. But once the court determined that the Commonwealth had not discharged its duty, it refrained from ordering a specific remedy. Instead, it presumed "that the Commonwealth will fulfil its responsibility with respect to defining the specifics and the appropriate means to provide the constitutionally-required education," and "le[ft] it to the magistrates and Legislatures to define the precise nature of the task which they face in fulfilling their constitutional duty." *Id.* at 619 n.92, 620; *see also*

id. at 610-11 ("[I]t is generally within the domain of the 'legislatures and magistrates' to determine how they will fulfil their duty under [the Education Clause].").

Twelve years later, in *Hancock*, the Supreme Judicial Court declared more emphatically the limits on the judiciary's authority to order specific Education Clause remedies. The Education Clause, the court confirmed, "leaves the details of education policymaking to the governor and the Legislature." *Hancock*, 443 Mass. at 454; *accord id.* at 466-69 (Cowin, J., concurring). The judiciary may not order specific policy remedies like preschool for at-risk children, nutritional and drug counseling programs, or programs that involve parents in school affairs. *Id.* at 460. Such remedies are "fundamentally political," the court explained, and are "policy decision[s] for the Legislature." *Id.*; *see also McDuffy*, 415 Mass. at 610-11, 619-20 & n. 92; *Bates v. Dir. of Office of Campaign & Political Fin.*, 436 Mass. 144, 168-69 (2002) ("While "[i]t is the 'imperative duty' of the judicial branch of government to say what the Constitution requires, . . . [n]ot every violation of a legal right gives rise to a judicial remedy.").

Hancock identified two reasons for its conclusion that the Education Clause prohibits the judiciary from ordering specific remedies. First, the text of the Education Clause commits decisions about education policymaking to the legislative and executive branches. *See Hancock*, 443 Mass. at 456 n.30; *id.* at 466 (Cowin, J., concurring). The Clause makes it "the duty of legislatures and magistrates" – not the judiciary – to provide an education to the Commonwealth's children. Mass. Const. Part II, c. 5, § 2. By "conspicuously omitting any reference to the judicial branch," the drafters of the Education Clause "explicitly conferred authority on only two of the branches of government" to "determin[e] the form and scope of [the Education Clause's] obligations." *Hancock*, 443 Mass. at 466 (Cowin, J., concurring).

Second, the doctrine of separation of powers, codified in Article XXX of the

Massachusetts Declaration of Rights, "prohibits judicial intervention in otherwise discretionary functions of the executive and legislative branches." *Id.* at 466 (Cowin, J., concurring). "[I]n separating judicial functions from legislative and vice versa," the Massachusetts Constitution "restricts policymaking to its intended branch." *Id.* at 472. The judiciary therefore may not order Education Clause remedies grounded in "policy choices that are properly the Legislature's domain." *Id.* at 460; *see also Care & Protection of Isaac*, 419 Mass. 602, 606-07 (1995) ("Where the means of fulfilling [an] obligation is within the discretion of a public agency, the courts normally have no right to tell that agency how to fulfil its obligation.") (citation omitted).

There is good reason for this rule: Courts are ill-suited to make judgments about what types of schools best boost student achievement and prepare students to become engaged citizens. As Justice Cowin explained:

> Unlike State legislators and their staffs, judges have no special training in educational policy or budgets, no funds with which to hire experts in the field of education, no resources with which to conduct inquiries or experiments, no regular exposure to our school system, no contact with the rank and file who have the task of implementing our lofty pronouncements, and no direct accountability to the communities that house our schools.

Hancock, 443 Mass. at 472 (Cowin, J., concurring). Furthermore, if the judiciary could order specific remedies, elected officials, who "ought to bear the ultimate burden of resolving our current educational debate," would be improperly "insulated from public accountability." *Id.*

Because the Education Clause "leaves the details of education policymaking to the governor and the Legislature," *Hancock*, 443 Mass. at 454, this Court lacks the authority to order the specific remedy plaintiffs request, even if they could prove that the Commonwealth is failing to provide an education to Boston public school students. Plaintiffs' Education Clause claim is premised entirely on one particular policy – invalidating the limitations on Commonwealth charter schools – that, plaintiffs contend, will remedy the alleged constitutional inadequacy of

Boston's public schools. *See* Compl. ¶¶ 107-10. Under *Hancock* and *McDuffy*, however, that is precisely the type of remedy that the Education Clause commits exclusively to the Legislature and Governor. Like an order requiring universal preschool, an order requiring the Legislature to authorize more charter schools would "embod[y] a value judgment" that is "fundamentally political." *Hancock*, 443 Mass. at 460; *cf. Hoke Cnty. Bd. of Educ.*, 358 N.C. at 645 (reversing order requiring state to provide pre-kindergarten because of the court's "limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain").

This Court need look no further than the day's top headlines to conclude that the question whether the Legislature should authorize more charter schools is a specific, "fundamentally political," policy question, outside the remedial scope of an Education Clause claim. *Hancock*, 443 Mass. at 460. Currently pending before the Legislature are 34 bills related to charter schools, including a measure proposed by Governor Baker that would allow the Board to license up to 12 new Commonwealth charter schools each year in districts that perform in the lowest 25% of districts statewide.[18] And the Attorney General recently certified an initiative petition that would likewise authorize additional charter schools in Massachusetts. Indeed, if this lawsuit is not dismissed, any number of lawsuits premised on obtaining desired education policies could be filed. Opponents of charter schools could allege that Section 89(i) violates the Education Clause by *allowing* up to 120 charter schools that draw resources from local public schools. Other advocates could seek an order requiring universal preschool, higher teacher salaries, or longer school days. The framers of the Education Clause recognized that these policy proposals

[18] *See* Jeremy C. Fox, *Baker Eyes New Charter Schools*, Bos. Globe, Oct. 9, 2015, at A1; Katie Lannan & Andy Metzger, *Charter Debate Punctuated with Study, Poll Results*, State House News Serv., Oct. 13, 2015.

are best evaluated through democratic processes, not through the courts. *See Hancock*, 443 Mass. at 460; *id.* at 466-69 (Cowin, J., concurring).

For these reasons, this Court lacks authority under the Education Clause to invalidate the charter school growth strategy adopted by Section 89(i), even if plaintiffs could establish that the Commonwealth is not fulfilling is duty to provide them with an education. And because plaintiffs' entire Education Clause claim is premised on obtaining that one predetermined remedy, the claim fails as a matter of law and must be dismissed.

III. PLAINTIFFS' CLAIM FOR VIOLATION OF EQUAL PROTECTION OR DUE PROCESS MUST BE DISMISSED.

In Count II of their Complaint, plaintiffs claim that the charter school cap infringes their rights under various provisions of the Massachusetts Constitution involving equal protection of the laws and due process. *See* Compl. ¶ 116 (referring to "the Massachusetts Declaration of Rights, Arts. I, VI, VII, X, and XII, and Part II, Chapter 1, § 1, Art. 4 of the Massachusetts Constitution");[19] *see also id.* ¶ 12 (referring to "the Equal Protection, Due Process, and Liberty Clauses . . . of the Massachusetts Constitution"). Plaintiffs do not say whether they rely on an equal protection theory, a due process theory, or some combination of the two. Although the legal tests are closely related, *see Gillespie v. City of Northampton*, 460 Mass. 148, 153 (2011), in the interest of clarity, defendants address the defects underlying each theory separately.

A. Plaintiffs Have No Claim for Violation of Equal Protection of the Laws.

1. Plaintiffs fail to allege differential treatment based on a classification.

"Classification, and differing treatment based on a classification, are essential components of any equal protection claim, Federal or State." *Doe v. Acton-Boxborough Reg'l*

[19] Article I of the Massachusetts Constitution has been annulled and replaced with Amendment Article CVI. *See Finch v. Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655, 662 (2011).

Sch. Dist., 468 Mass. 64, 75 (2014) (citations omitted); *see also Matter of Corliss*, 424 Mass. 1005, 1006 (1997) (rescript) ("One indispensable element of a valid equal protection claim is that individuals who are similarly situated have been treated differently.") (citations omitted). Plaintiffs fail to allege these essential components here.

First, the amorphous classifications employed by plaintiffs – children in "more affluent" and "less affluent" communities or school districts, *see, e.g.*, Compl. ¶¶ 113-14 – "cannot be identified or defined in customary equal protection terms." *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19 (1973); *accord Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (holding that Equal Protection claim requires that state legislature selected course of action because of "its adverse effects upon an identifiable group"). Plaintiffs have pleaded no substantive characteristics that would allow this Court to separate children into discrete groupings or clearly identify those children who have suffered the alleged discrimination and those who have not.

Second, even if plaintiffs were members of an identifiable group subject to Equal Protection analysis, they fail to show that the charter school cap in Section 89(i) treats that group worse than any other. In their complaint, plaintiffs assert that the charter school cap "arbitrarily subjects similarly situated children in the Commonwealth to disparate treatment" by "forcing children in less affluent communities into a lottery for an adequate education that children in more affluent communities need not confront," *see* Compl. ¶¶ 112, 115, but such conclusory allegations are insufficient to establish a plausible entitlement for relief, *see Iannacchino*, 451 Mass. at 636. In reality, Section 89(i) does not "force" anyone to do anything. Nor does it discriminate against "children in less affluent communities" in any manner. Under Section 89, charter schools are open to all Massachusetts students, with enrollment preference given to

students in the district or region where the school is located. Charter schools may be established in any community in the Commonwealth, regardless of its affluence. The law does not provide any preference to "more affluent communities" or communities with what plaintiffs term "adequate public schools," and there is no allegation that defendants or any other state officials have applied the law in such a manner.

In fact, the only preference set forth in Section 89(i) favors the lowest performing school districts in the Commonwealth. As plaintiffs acknowledge elsewhere in their Complaint, *see* Compl. ¶¶ 88-89, in 2010 the Legislature amended this provision to increase the cap on district net school funding: starting at 6% and increasing in incremental steps to a maximum of 18%. This cap lift applies only to districts where academic performance is in the lowest 10% of the state. G.L. c. 71, § 89(i)(3). Thus, to the extent plaintiffs equate "less affluent communities" with the prevalence of "constitutionally inadequate" schools," *see, e.g.*, Compl. ¶ 114, Section 89(i)'s preference in favor of the Commonwealth's lowest performing school districts demonstrates that there is no basis for their claim that the statute unconstitutionally discriminates against "children in less affluent communities."

Plaintiffs allege that the funding increases allowed under Section 89(i) for Massachusetts's lowest performing school districts have not met "demand for public charter school admissions in Boston," *see* Compl. ¶ 91, but that allegation does not establish a claim for differential treatment. First, plaintiffs do not make any allegation regarding whether the availability of charter schools is sufficient to meet the demand in other communities. Second, and more fundamentally, equal protection does not require government to distribute programs or services commensurate to the alleged demand in different communities. "The guarantee of equal protection . . . is not a source of substantive rights or liberties, but rather a right to be free from

invidious discrimination in statutory classifications and other governmental activity." *Acton-Boxborough Regional Sch. Dist.*, 468 Mass. at 82 (quoting *Harris v. McRae*, 448 U.S. 297, 322 (1980)); *see also Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (no equal protection claim where regulation allegedly "results in some disparity in grants of welfare payments to the largest AFDC families"). Because Section 89(i) does not discriminate against plaintiffs or their communities in any manner – but, rather, provides for greater charter school resources to districts with the lowest performing schools – plaintiffs have no claim for denial of equal protection.

2. Section 89(i) is rationally related to legitimate state interests.

Even if plaintiffs had properly alleged that Section 89(i) subjects them to differential treatment, their claim would be subject to dismissal because the statute is rationally related to legitimate state interests. The standard for reviewing equal protection claims is well established: statutes that "neither burden a fundamental right nor discriminate on the basis of a suspect classification . . . are subject to a rational basis level of judicial scrutiny." *Finch v. Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655, 669 (2011) (citations omitted); *accord Commonwealth v. Freeman*, 472 Mass. 503, 505-06 (2015) (citations omitted). Here, there is no fundamental right or suspect classification. In Count II, plaintiffs assert that the Commonwealth "has ultimate responsibility for the education of all children" under the Education Clause, *see* Compl. ¶ 112, but the Supreme Judicial Court has specifically ruled that children do not have a fundamental right to an education under that provision. *Superintendent of Schs. of Worcester*, 421 Mass. at 129-30. Nor do plaintiffs allege discrimination based on a suspect classification. As discussed, the classification in which plaintiffs claim ownership – children in "less affluent" communities – resists equal protection analysis altogether because it does not allow for the ready identification of other class members. *See* Section III.A.1, *supra*.

Even if it did, it is not one of the classifications enumerated in Amendment Article CVI (sex, race, color, creed, or national origin) for which strict scrutiny is required, *see Finch*, 459 Mass. at 662; and neither federal nor Massachusetts courts have found that the relative affluence of a community is a suspect classification for purposes of equal protection, *cf. San Antonio Indep. Sch. Dist.*, 411 U.S. at 28-29. Rational basis review therefore applies.

"Those who challenge the constitutionality of a statute that burdens neither a suspect group nor a fundamental constitutional right bear a heavy burden in overcoming the presumption of constitutionality in favor of the statute's validity." *Commonwealth v. Caetano*, 470 Mass. 774, 781 (2015) (*citing English v. New England Med. Ctr., Inc.*, 405 Mass. 423, 427 (1990)). The statute "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Gillespie*, 460 Mass. at 158 (citations and internal quotation marks omitted). The legislature need not actually articulate the purpose or rationale supporting its classification, *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation omitted), and "it is irrelevant for constitutional analysis whether a reason now advanced in support of a statutory classification is one that actually motivated the Legislature," *Prudential Ins. Co. of Am. v. Comm'r of Revenue*, 429 Mass. 560, 568 (1999) (citation omitted).

Here, the charter school cap is unquestionably related to legitimate state interests. Charter schools are a creation of the Legislature, and the Legislature has a rational interest in delineating the institutions it creates. This is particularly true given that one of the many purposes of charter schools is to develop and encourage innovation in public education. It is rational for the growth of charter schools to be controlled by statute, so that any innovative methods that are developed by these schools can be properly assessed, managed, and directed for effective reproduction in local public schools. It is similarly rational for the Legislature to limit

the extent to which some types of charter schools may depart from longstanding practices involving collective bargaining and the exercise of control over elementary and secondary education by local school committees. Section 89(i) rationally allocates funding across school types, balancing the goal of innovation in education and the desire for greater alternatives in low-performing districts with the need to maintain adequate resources for schools that have traditionally educated children in the district. The statute also allocates the Department's resources in a manner that limits the intensive work involved in evaluating charter applications and monitoring charter schools' performance, including those on probation or operating subject to conditions.

Plaintiffs allege that the charter school cap "imposes an arbitrary limit on the growth of public charter schools which bears no relation to any legitimate educational goal." *See* Compl. ¶ 103; *see also id.* ("The charter cap dispenses with any legitimate education-related criteria in favor of a flat cap on public charter school growth that is unrelated and extrinsic to any educational purpose."). But that is the wrong question: rational basis review requires a relationship to any legitimate state interest, including interests involving the allocation of public funds and administrative convenience. *See, e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 599 (1987) ("The challenged amendment unquestionably serves Congress' goal of decreasing federal expenditures."); *Dandridge*, 397 U.S. at 487 (distribution of limited public funds is legitimate state interest in case challenging allocation of welfare payments); *Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Bd. of Educ.*, 436 Mass. 763, 778 (2002) ("Distinctions between individuals made in the interests of practicality and administrative convenience are permissible and rational purposes for legislation.") (citation omitted). To proceed with their challenge, plaintiffs must "negative every conceivable basis which might support [the cap]," including

bases unrelated to education policy. *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2082 (2012) (citations omitted). Plaintiffs cannot do this for the myriad state interests served by the charter school cap.

Indeed, the legislative line-drawing involved in enacting and amending Section 89(i) makes it particularly resistant to a constitutional challenge premised on an allegation of arbitrariness. "Legislators may enact complex compromises when addressing novel social and economic issues, and it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 214 (1st Cir. 2002) (citation and internal quotation marks omitted). The fact that the line might have been drawn differently – or, indeed, might be drawn differently in the future – "is a matter for legislative, rather than judicial, consideration." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993) (need for line-drawing "renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally"); *Harlfinger v. Martin*, 435 Mass. 38, 48 (2001) (legislative line drawing "does not violate equal protection principles simply because it is not made with mathematical nicety or because in practice it results in some inequality") (citations and internal quotation marks omitted). The principle includes the fact that a legislature may deal with social problems "one step at a time," addressing first those aspects "most urgently requiring remedial action." *Opinion of the Justices*, 423 Mass. 1201, 1233 (1996) (citations and internal quotation marks omitted); *see also Mass. Fed'n of Teachers*, 436 Mass. at 778, and cases cited therein. For all of these reasons, plaintiffs' equal protection claim should be dismissed.

B. Plaintiffs Have No Claim for Violation of Substantive Due Process.

For similar reasons, any claim that plaintiffs may assert for violation of substantive due process must also be dismissed. "Substantive due process prohibits the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *Meyer v. Town of Nantucket*, 78 Mass. App. Ct. 385, 392 (2010) (citations omitted). When a statute impinges on the exercise of a fundamental right, courts apply strict judicial scrutiny. *Gillespie*, 460 Mass. at 153. All other statutes are subject to a "rational basis" standard of judicial review. *Id.* (citation omitted). "Under the rational basis standard, a statute is constitutionally sound if it is reasonably related to the furtherance of a valid State interest." *Id.* (citation omitted); *see also Doe v. Sex Offender Registry Bd.*, 447 Mass. 750, 759-61 (2006) (finding no substantive due process violation where statute and regulation had "a reasonable relation to a permissible legislative objective"). The Supreme Judicial Court has ruled that because children do not have a fundamental right to an education under the Education Clause, courts must "apply the lowest level of scrutiny, the rational basis test," to substantive due process claims alleging intrusions on educational activity. *Superintendent of Schs. of Worcester*, 421 Mass. at 129-32.

The charter school cap in Section 89(i) is reasonably related to valid state interests. The statute reasonably balances the goal of fostering innovation in public education with the risk inherent in approving new educational institutions and the high costs associated with evaluating charter applications, monitoring charter schools' performance, and assessing the value of new educational practices that they develop. Section 89(i) also recognizes the state's important interests in maintaining some degree of local control over elementary and secondary education, the collective bargaining rights of public employees, and the longstanding tradition of municipal

public schools.

Throughout their complaint, plaintiffs criticize Section 89(i) on policy grounds, describing it, for example, as an "arbitrary and unnecessary barrier" and "extrinsic to any educational purpose." *See, e.g.*, Compl. ¶¶ 1, 103. But plaintiffs' disagreement with the Legislature's rationale for enacting and amending Section 89(i) over the years does not give rise to a claim that it violates the Constitution. Allowing plaintiffs to proceed with this claim would create "an unacceptable danger of this court's substituting its judgment for that of the Legislature." *Blue Hills Cemetery, Inc. v. Bd. of Regis. in Embalming & Funeral Directing*, 379 Mass. 368, 375 (1979); *see also Sperry & Hutchinson Co. v. McBride*, 307 Mass. 408, 418 (1940) ("It is not for us to inquire into the expediency or the wisdom of the legislative judgment. Unless the act of the Legislature cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain it, the court has no power to strike it down as violative of the Constitution."). Any substantive due process claim that plaintiffs may assert should therefore be dismissed.

C. Plaintiffs Have No Claim for Violation of Procedural Due Process.

Finally, if plaintiffs are asserting a claim for violation of procedural due process, that too should be dismissed for failure to state a claim. First, plaintiffs' attack is clearly directed at the Legislature's enactment of the charter school cap through Section 89(i). "In general, neither State nor Federal legislative acts are subject to procedural due process challenges. . . . The rationale for this rule is that, regardless of whether a protected property interest is at stake, 'the legislative determination provides all the process that is due.'" *Liability Investigative Fund Effort, Inc. v. Mass. Med. Prof'l Ins. Ass'n*, 418 Mass. 436, 444 (1994) (citations omitted).

Second, plaintiffs do not allege a liberty or property interest sufficient to trigger

procedural due process protections. *See Hudson v. Comm'r of Correction*, 431 Mass. 1, 7 (2000). The "mere expectanc[y] or hope of a future benefit is neither sufficiently certain nor sufficiently material" to constitute a protected interest. *Hoffer v. Bd. of Regis. in Med.*, 461 Mass. 451, 454 (2012) (citations and internal quotation marks omitted). Property interests are not created by the federal or state constitution, but rather "are created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Mancuso v. Mass. Interscholastic Athletic Ass'n, Inc.*, 453 Mass. 116, 124 (2009) (quoting *Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Allen v. Bd. of Assessors of Granby*, 387 Mass. 117, 120 (1982) (citation omitted).

Here, Massachusetts law provides that "[e]very person shall have a right to attend the public schools of the town where he actually resides" and may not be excluded from admission based on "race, color, sex, gender identity, religion, national origin or sexual orientation." G.L. c. 76, § 5. While that right is qualified by the authority of school committees to make reasonable regulations as to numbers, qualifications, and other matters, *Leonard v. Sch. Comm. of Attleboro*, 349 Mass. 704, 708 (1965) (citations omitted), "no State actor could deny [plaintiffs] a public education without complying with the requirements of the due process clause," *Mancuso*, 453 Mass. at 125.

By contrast, Section 89 does not establish an unqualified right to attend a Commonwealth or Horace Mann charter school. To the contrary, the statute specifies that "[c]harter schools shall

be open to all students, *on a space available basis*." G.L. c. 71, § 89(m) (emphasis added). Section 89 also sets forth admissions lottery procedures to determine admissions when "the total number of students who are eligible to attend and apply to a charter school . . . is *greater than the number of spaces available*." G.L. c. 71, § 89(n) (emphasis added). Thus, any entitlement created by the charter-school statute is necessarily limited to the number of spaces made available under it. The fact that plaintiffs may prefer to attend a charter school instead of a local school does not create a legitimate claim of entitlement to a number of spaces greater than specified by law.

Furthermore, even if plaintiffs were able to show a protected liberty or property interest, their claim would still require dismissal because they have been provided with constitutionally adequate processes. "The fundamental requirement of due process is notice and the opportunity to be heard at a meaningful time and in a meaningful manner." *Gillespie*, 460 Mass. at 156 (citation and internal quotation marks omitted). Here, plaintiffs do not allege that they did not receive adequate notice of their right to apply for admission to charter schools or a sufficient opportunity to participate in any admissions lottery. Nor do they allege that the defendants or anyone else failed to comply with the admission procedures set forth under Section 89.

Instead, plaintiffs appear to attack the facial validity of the procedures themselves, asserting that the mere fact that "children in less affluent communities" must participate in admissions lotteries is arbitrary and unfair. *See, e.g.*, Compl. ¶¶ 114-15. Of course, Section 89 does not distinguish between "more affluent" and "less affluent" communities in this (or any other) respect. Rather, it provides that where "the total number of students who are eligible to attend and apply to a charter school and who reside in the city or town in which the charter school is located or are siblings of students already attending said charter school, is greater than

the number of spaces available, an admissions lottery . . . shall be held to fill all of the spaces in that school from among the students." G.L. c. 71, § 89(n).

There is no inherent unfairness in allocating access to an over-subscribed program through a randomized lottery process. To the contrary, lotteries are routinely used, for example, to distribute affordable housing units in a fair and equitable manner – free of favoritism, connections, and financial influence. *See, e.g.*, 760 C.M.R. § 56.02 (DHCD regulation stating that an "Affirmative Fair Marketing Plan" for affordable housing in Massachusetts must include "provisions for a lottery or other resident selection process"). The fact that an individual who applied to a particular charter school did not win admission does not give to rise to the kind of "unfair or mistaken exclusion from the educational process" that due process protects. *Goss v. Lopez*, 419 U.S. 565, 579 (1975). Because plaintiffs can show neither a protected interest nor a deprivation of due process, Count II must be dismissed.

CONCLUSION

For the reasons stated above, plaintiffs' complaint should be dismissed in its entirety.

Respectfully submitted,

Defendants,

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,

By their attorney,

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