COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

JANE DOE 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

PROPOSED DEFENDANT-INTERVENORS' MOTION TO INTERVENE

Proposed Defendant-Intervenors, seven public school students (Savina Tapia, Samuel Ding, N.H., Z.L., A.Q., T.K., R.H.) and the New England Area Conference of the National Association for the Advancement of Colored People (collectively, "Movants"), move pursuant to Mass. R. Civ. P. 24 to intervene in this action. In their Complaint, Plaintiffs seek a declaration that the cap on charter schools in the Commonwealth is unconstitutional. To Movants, the cap on charter schools serves a critical role in protecting the quality of their education. Because already limited funding is diverted from traditional school districts to charter schools, the cap

helps ensure that districts continue to receive essential funding to serve students remaining in traditional public schools. Eliminating the cap will undermine the careful funding balance struck by the Legislature and reduce the educational opportunities available to Movants and their peers in traditional public schools. This is particularly true for Movants, who represent the groups of students most likely to be harmed by lifting the cap: students of color, students with disabilities, and English language learners. As charter schools demonstrably fail to recruit and retain these groups, eliminating the cap would contract, rather than expand, the number of quality educational choices of Movants and other students like them.

Movants therefore seek leave to intervene as defendants pursuant to Mass. R. Civ. P. 24, to protect their interest in maintaining the statutory cap on charter schools in the Commonwealth. Movants also submit (1) a memorandum in support of their Motion to Intervene, and (2) a Motion to Dismiss and supporting memorandum of Defendant-Intervenors, attached hereto as Exhibit A.[1]

REQUEST FOR A HEARING.

Proposed Defendant-Intervenors request a hearing on their motion.

[1] Movants file their Motion to Dismiss along with their intervention papers to comply with the provision of Mass. R. Civ. P. 24 that states that a "pleading" should accompany any motion to intervene. Rule 24 is silent as to how this provision should be interpreted where, as here, proposed intervenors seek to enter the case as defendants and the existing defendants have yet to file their own responsive pleading. Massachusetts courts have noted, however, that the purpose of Rule 24's requirement is to ensure that the parties and the Court are "fully informed ... of the intervener's allegations and arguments" and have interpreted the Rule flexibly to further this goal. *City of Worcester* v. *AME Realty Corp.*, 77 Mass. App. Ct. 64, 70 (2010) (allowing intervention based on opposition brief, even though no "pleading" filed). Movants' Motion to Dismiss satisfies this purpose.

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CERTIFICATE OF SERVICE

I certify that I served this document on the attorneys for each other party by hand on January 28, 2016.

Melissa C. Allison

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS

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Defendants,

and

SAVINA TAPIA, SAMUEL DING, N.H., Z.L., A.Q., T.K., B.H., and NEW ENGLAND AREA CONFERENCE, NAOTIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Defendants-Intervenors.

Civil Action No. 15-2788-F

DEFENDANT-INTERVENORS' MOTION TO DISMISS

Defendant-Intervenors, seven public school students together with the New England Area Conference of the NAACP (collectively, "Defendant-Intervenors"), move to dismiss this action pursuant to Mass R. Civ. P. 12(b)(6) for failure to state claims upon which relief may be granted.

The grounds for the Defendant-Intervenors' motion are set forth more fully in the accompanying Memorandum in Support of their Motion to Dismiss. In short, the Plaintiffs' allegations do not plausibly suggest that the cap on charter schools in the Commonwealth violates the Education or Equal Protection Clauses of the Massachusetts Constitution. The charter school cap is not "arbitrary, non-responsive, or irrational" in violation of the Education Clause. To the contrary, the cap serves a critical and compelling purpose by ensuring funding for both charter schools and traditional public schools that already contend with regular reductions in funding and services.

Plaintiffs' Equal Protection claim fails on similar grounds. The Equal Protection Clause assures that *all* students have educational opportunity. As the number of charter schools increases, however, funds are diverted from traditional public schools, leaving students attending those public schools with fewer opportunities and services. Moreover, charter schools on the whole do not serve all students equally. Students with disabilities, students of color, and English language learners, like the Defendant-Intervenors, are much less likely to be enrolled in charter schools and/or are more likely to be harshly disciplined or "pushed out" if they are enrolled. An Equal Protection claim premised upon relief for a narrow class of students at the expense of the remainder of the Commonwealth's students cannot survive.

For these reasons, and those stated in Defendant-Intervenors' accompanying Memorandum, the Court should dismiss the Complaint.

REQUEST FOR A HEARING.

Defendant-Intervenors request a hearing on their motion.

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Melissa C. Allison

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Defendants-Intervenors.

Civil Action No. 15-2788-F

DEFENDANT-INTERVENORS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

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DEFENDANT-INTERVENORS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Defendant-Intervenors, seven public school students together with the New England Area Conference of the NAACP (collectively "Defendant-Intervenors"), move to dismiss the Complaint filed by Plaintiffs in this action.

Introduction

Plaintiffs' Complaint, seeking to invalidate Massachusetts' charter cap law under the Education and Equal Protection Clauses of the Massachusetts Constitution, fails to state a claim upon which relief can be granted, because it ignores the realities of school funding in the Commonwealth and fundamentally misapprehends the law. Increased funding to charter schools translates directly to less funding for traditional public schools, and means fewer vital educational services for students who remain in traditional public schools. Thus, far from being "arbitrary, non-responsive, or irrational" – the standard for an Education Clause violation – the charter cap serves a crucial purpose: ensuring a balance between funding for both types of schools and limiting the cuts to services that students in traditional public schools perennially face. In light of this manifest and compelling purpose, Plaintiffs' Education Clause claim must fail.

Plaintiffs' Equal Protection Clause claim also must fail. The Legislature's constitutional duty "to cherish ... the public schools" means ensuring that *all* students have educational opportunity. The Commonwealth's current school funding scheme, where money for charter schools comes from traditional public school budgets, is essentially a zero-sum game, where students in traditional public schools are directly and negatively affected as funds are diverted away from their schools. Moreover, as the Legislature is well aware, charter schools on the whole do not serve all students equally: they enroll far fewer students with disabilities and

English language learners than traditional public schools, and they subject students of color to harsher discipline and increased "push-out." By seeking to upset the careful funding balance set by the Legislature, Plaintiffs' Equal Protection claim thus asks for relief for a narrow class of students at the direct expense of the remainder of the Commonwealth's students. That is the antithesis of Equal Protection and therefore fails as a matter of law.

Plaintiffs' allegations do not plausibly suggest an entitlement to relief and should be dismissed.

Procedural History

On September 15, 2015, Plaintiffs filed this action to challenge the constitutionality of the cap on charter schools as an "arbitrary, nonresponsive and irrational" barrier to children's right to an education. Compl. at ¶10. Plaintiffs pled two claims: one under the Education Clause and one under the Equal Protection Clause.[1] Plaintiffs seek a declaratory judgment that G.L. c. 71 § 89(e), the charter school cap, be declared unconstitutional.

On November 13, 2015, Defendants moved to dismiss the case for lack of jurisdiction and for failure to plausibly allege violations of the Education Clause and the various constitutional provisions involving equal protection of the laws and due process. Mot. to Dismiss at 1-2. On January 28, 2016, Defendant-Intervenors, representing students of color, students with disabilities, and English language learners, served a motion to intervene, arguing that they would be directly affected by the outcome of the lawsuit and would add a critical perspective to the case. Defendant-Intervenors now file this Motion to Dismiss to articulate additional arguments for dismissal that are unique to Intervenors.

[1] Count II of the Complaint alleges violations of various rights under Articles I, VI, VII, X, and XII, and Part II, Chapter 1, section 1, Art. 4 of the Massachusetts Constitution. In their Opposition to the State Defendants' Motion To Dismiss, Plaintiffs have clarified that this is intended as an Equal Protection claim. See Plaintiffs' Brief In Opposition To Motion To Dismiss, p.3 n. 1.

Standard of Review

For a complaint to survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6), "[w]hat is required at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect[ ] the threshold requirement of [Fed.R.Civ.P.] 8(a)(2) that the plain statement possess enough heft to sho[w] that the pleader is entitled to relief." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007) (internal citations omitted)). "[W]holly conclusory statement[s]" and "bare assertion[s]" are insufficient to state a claim. *Id.* at 632, 636. In addition to the allegations of the complaint, a court may properly consider "matters of public record" and documents of undisputed authenticity on a motion to dismiss. *Schaer* v. *Brandeis University*, 432 Mass. 474, 477 (2000); *Lalchandani* v. *Roddy*, 86 Mass. App. Ct. 819, 824 (2015); *Watterson* v. *Page*, 987 F.2d 1, 3 (1st Cir. 1993).

Argument

Massachusetts' constitutional right to an education is not limited to providing opportunities for the narrow class that Plaintiffs purport to represent, but for all schoolchildren. The charter cap law represents the Legislature's careful attempt to balance these competing interests and in particular protects children such as Intervenors – themselves discrete and insular minorities – who on the whole are not equally served by charter schools. On its face, the charter cap law is neither "irrational" nor "arbitrary"; to the contrary, it serves a compelling state interest and is narrowly tailored to do so. For these reasons, Plaintiffs' Complaint fails to demonstrate any plausible entitlement to relief.

I. PLAINTIFFS' CLAIM FOR VIOLATION OF THE EDUCATION CLAUSE OF THE MASSACHUSETTS CONSTITUTION MUST BE DISMISSED.

The Education Clause of the Massachusetts Constitution "impose[s] an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled." *McDuffy* v. *Secretary of the Executive Office of Educ.*, 415 Mass. 545, 621 (1993). The Commonwealth violates the Education Clause where it acts in an "arbitrary, nonresponsive, or irrational way to meet the constitutional mandate." *Hancock* v. *Comm'r of Educ.*, 443 Mass. 428, 435 (2005).

Plaintiffs' Education Clause claim is implausible on its face. There is nothing "arbitrary, nonresponsive, or irrational" about the charter school cap. To the contrary, setting a cap on charters serves a fundamental purpose: it affords a modicum of stability in funding and enrollment for the benefit of all children attending traditional public schools. The balance between charter schools and traditional public schools in Massachusetts is in many ways a zero-sum game. Out-of-district charter schools are funded by the school districts from which they draw their students. 603 C.M.R. § 1.07(2) ("Every operating Commonwealth charter school shall receive tuition payments from each school district whose students attend the charter school."); *id.* at 1.07(1) (setting formula for how Horace Mann charter schools "shall be funded through the local school district"). The result is that, as charter schools increase, funding for traditional public schools decreases even further, as Plaintiffs' Complaint acknowledges in describing the cap's gradual expansion. See Compl. ¶¶ 86-88 (noting that up to 18% of a lowest performing district's budget can be directed to out-of-district charter schools serving its city's students, which is double the percentage allowed before 2010).

In arguing that the cap "imposes an arbitrary limit" on charter school growth with "no relation to any legitimate educational goal," *id.* ¶ 103, Plaintiffs essentially ask this Court to

ignore the funding scheme of which the cap is an integral part and to pretend that the cap exists in isolation. The Court need not do so. The laws that establish public school funding – and the fact that funds to charter schools come directly from traditional public school budgets – are matters of public record, and Plaintiffs cannot shield their Complaint from this reality. *See Schaer*, 432 Mass. at 477; *Lalchandani*, 86 Mass. App. at 824.

Moreover, Plaintiffs' Education Clause argument is wholly conclusory and therefore insufficient. *Iannacchino*, 451 Mass. at 632, 636. The Education Clause imposes a "duty" to educate *all* children. To meet that duty, the state must balance the number of charter schools with the needs of children attending traditional public schools. Indeed, *failing* to do so would be irrational and would risk failing to provide the "funds sufficient to meet the constitutional mandate" of the Education Clause to traditional public school districts. *McDuffy*, 415 Mass. at 621. This is particularly true for Intervenors and similarly situated students of color, English language learners and students with disabilities who, despite state efforts to "eliminate impediments to education" on their behalf, *Hancock*, 443 Mass. at 434, are chronically underserved by charter schools and disproportionately likely to enroll in traditional public school districts. Office of the State Auditor, *The Department of Elementary and Secondary Education's Oversight of Charter Schools* 50 (2014).

Regardless of whether the Court treats the right to education as fundamental, there is nothing "arbitrary, nonresponsive, or irrational" about the "barrier" the cap presents to enrollment in charter schools because there is no right to attend a particular school or type of school in Massachusetts. The Education Clause imposes a duty on the Commonwealth to "devise a plan and sources of funds sufficient to meet the constitutional mandate," *McDuffy*, 415 Mass. at 621. The Clause affords no more a right to attend a charter school than a right to attend

a vocational/technical school, a pilot school, an innovation school, an exam school, or any of the other types of schools recognized in Massachusetts.

In light of Plaintiffs' fundamental misunderstanding of the duty established by the Education Clause and their wholly conclusory statements about the arbitrariness of the cap, Plaintiffs fail to plausibly allege a claim for which relief must be granted. Therefore, their Education Clause claim must be dismissed.

II. PLAINTIFFS' CLAIM FOR VIOLATION OF EQUAL PROTECTION MUST BE DISMISSED.

In equal protection claims, where a statute implicates a fundamental right or uses a suspect classification, Massachusetts courts employ "strict judicial scrutiny." *Lowell* v. *Kowalski,* 380 Mass. 663, 666 (1980). When strict scrutiny is used, the Commonwealth has the burden of demonstrating that the law in question is narrowly tailored to achieve a compelling government interest. *Goodridge* v. *Department of Pub. Health,* 440 Mass. 309, 330 (2003). When statutes "neither burden a fundamental right nor discriminate on the basis of a suspect classification," they are "subject to a rational basis level of judicial scrutiny." *Finch* v. *Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655, 659 (2011) (citations omitted).

Whether, as Defendants argue, rational basis review applies to Plaintiffs' claims, or whether a higher level of scrutiny is applied, Plaintiffs have not alleged a plausible claim for violation under equal protection in light of the compelling state interests in establishing the cap. Given the constitutional duty to educate all children imposed by the Education Clause, there is a compelling state interest in establishing a cap that seeks to preserve sufficient funds for the education of all students attending traditional public schools.

Across the Commonwealth, larger, traditional public school districts are experiencing significant budget shortfalls. Earlier this year, for example, Boston Public Schools announced

that it expects to cut $50 million from its 2016-17 school year budget in order to keep up with the rising costs of healthcare, the declining amounts of state and federal aid, and "shifts in enrollment...." Tommy Chang, *Letter to Boston Public Schools Families* (Jan. 12, 2016).[2] As a result, the district is faced again with the prospect of severe cuts to educational services, warning for example that it intends to expand class sizes for students with emotional and behavioral disabilities, which would further reduce the support that students with disabilities need. *Id.* By placing an upper limit on the amount of students and funds that can depart for charter schools, the cap limits this type of devastating budget cut and helps ensure that the students who remain in these schools do not suffer from ever more cuts to vital educational services.

For Intervenors, themselves discrete and insular minorities, the cap helps protect their educations and that of similarly situated peers. As the Massachusetts Auditor has found, despite legislation requiring greater student recruitment and retention, Massachusetts charter schools do not enroll English language learners and students with disabilities – the costliest students to serve – in a manner proportionate to their presence in their sending districts. Office of the State Auditor, *The Department of Elementary and Secondary Education's Oversight of Charter Schools* 50 (2014). Students of color face disproportionate discipline rates at charter schools,[3] and are disproportionately likely to attend traditional public schools that are closed entirely when budget gaps increase, as occurs when more funds are diverted to charter schools. For example, between 2003 and 2012, students of color represented 87 percent of district enrollment but 96 percent of the students enrolled in the 19 Boston Public Schools that were closed and not

[2]Available at http://www.bostonpublicschools.org/cms/lib07/MA01906464/Centricity/Domain/4/Familybudgetletter.pdf

[3] The Lawyers' Committee for Civil Rights and Economic Justice, Not Measuring Up: The State of School Discipline in Massachusetts 8-9 (2014).

reopened with substantially similar student populations. Citizens for Public Schools, *Twenty Years After Education Reform* 82 (2013). Thus, as described above, the cap helps ensure that there is funding for the educations of these students in traditional public schools, even when they are not properly or proportionately served in charter schools.

Finally, the cap is narrowly tailored to achieve these compelling state interests. For a statute to be narrowly tailored to achieve compelling state interests, it must be "limited as narrowly as possible consistent with its proper purpose." *Commonwealth* v. *Chou,* 433 Mass. 229, 237 n.6 (2001). Massachusetts' charter schools were intended to "stimulate the development of innovative programs within public education" and "provide parents and students with greater options in selecting schools" among other purposes. G.L. c. 71 § 89(b). In its efforts to strike the appropriate balance between these interests, the Legislature has amended the Massachusetts' charter school statute 13 times since enactment in 1993. Massachusetts has raised the number of charter schools allowed in the state from 25 to 120. St. 2000, c. 227, § 2. It has raised the limit on the amount of district funds allocable to charter schools from 6% in 1997 to 18% in FY 2017 (for the lowest performing school districts). St. 2010, c. 12, § 7. It has also created a type of charter school to which the cap does not apply that is under the supervision of the school districts. St. 1997, c. 46, § 2.

These gradual adjustments to the cap have given charters ample opportunity to fulfill their purposes. These adjustments reflect ongoing legislative attention to this issue, allowing charters to expand while still providing greater stability in funding for traditional public school districts, particularly those that serve English language learners and students with disabilities, the costliest students to serve. In setting the cap, the Court does "not demand of legislatures scientifically certain criteria of legislation." *Commonwealth* v. *Weston W.*, 455 Mass 24, 26

(2009) (internal citations omitted). However, the Legislature has more than met its requirement for narrowly tailoring the cap to ensure educational opportunities for all students. *See Finch* v. *Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232, 243 (2012) (reviewing narrowly tailored statutes and ordinances regarding child curfews, racial preferences in hiring, and grandparent visitation).

Conclusion

For the reasons stated above, Plaintiffs' Complaint should be dismissed in its entirety.

Respectfully submitted,

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