All for One and One for - Some: Challenging the Constitutionality of Massachusetts Charter School Legislation after Doe No. 1 v. Secretary of Education

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ALL FOR ONE AND ONE FOR . . . SOME?:
CHALLENGING THE CONSTITUTIONALITY OF
MASSACHUSETTS CHARTER SCHOOL
LEGISLATION AFTER DOE NO. 1 V. SECRETARY
OF EDUCATION

"The funds available for public education on the whole have shrunk dramatically over the past decade. Available data suggests that the decline correlates with the expansion of choice and that the overall pot of public education funding, even if charters were included, is shrinking. In other words, states' choice policies are not simply robbing Peter to pay Paul. They are robbing Peter under the auspices of giving it all to Paul, but actually shaving a chunk off of public education funding and leaving Peter and Paul to fight one another. The push for choice makes the ruse possible."2

INTRODUCTION:

In 1635, Boston, Massachusetts became the birthplace of the United States’ first public school. 3 Fast forward almost four hundred years, and access to a free, public education has become commonplace.4 Though the Supreme Court of the United States has held that the right to an education is not a fundamental right granted by the United States Constitution, the Court still recognizes public education as one of society’s most important institutions, vital for the developmental growth and success of its citizens.5

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1 95 N.E.3d 241 (Mass. 2018).
5 See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (holding that education is not fundamental right by restating continued importance of education); see also Plyler v. Doe,
Inherent in the assertion that education is necessary to cultivate a productive society is the notion that where public education is available, everyone should be afforded equal access to its proffered benefits. But, the public education system in the United States is not without its flaws, and many school districts throughout the country lack sufficient funding to provide students with what is deemed to be an "adequate" education.

In an effort to remedy the inequities in some of these struggling districts, education reformers have turned to charter schools as one possible solution. Still, whether charter schools are the solution to the problematic state of traditional public school systems remains a hotly contested subject.
of debate. Consequentially, there are a growing number of challenges to the constitutionality of charter school legislation.

This Note seeks to explore certain constitutional challenges brought by charter school opponents and the viability of future challenges to Massachusetts charter school law. Though the plaintiffs in Doe No. 1 v. Secretary of Education, a recent challenge to the constitutionality of certain Massachusetts charter school legislation, were charter school proponents seeking to expand the creation of charter schools in Massachusetts, this case will become the focal point of the following discussion as it may prove to be a vital guide for future plaintiffs who believe they have a case against the Massachusetts charter school system. But, before turning to the case law, it is necessary to discuss some of the legal history surrounding the right to an education under the United States Constitution as compared to state...

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10 See Martin, supra note 9, at 45 ("In pursuing their struggle against charter schools, adversaries have utilized both state and federal court systems."); see, e.g., Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996) (denying request for injunction preventing opening of new charter school); Save Our Sch.-Se. & Ne. v. D.C. Bd. of Educ., No. 04-01500 (HHK), 2006 U.S. Dist. LEXIS 45081, at *4-11 (D.D.C. 2006) (describing D.C. school districts in dire straits); Doe No. 1, 95 N.E.3d at 244 (dismissing claim that state’s cap on number of charter schools was unconstitutional); League of Women Voters of Wash. v. State, 355 P.3d 1131, 1141 (Wash. 2015) (holding state charter school funding statute unconstitutional); Wilson v. State Bd. of Educ., 89 Cal. Rptr. 2d 745, 747 (Cal. Dist. Ct. App. 1999) (rejecting allegation that California charter schools were unconstitutional).

11 See infra notes 57-166 (summarizing failures and successes of prior charter school litigation).

12 95 N.E.3d at 252-59 (outlining requirements for stating claim under certain provisions of Massachusetts Constitution).
constitutions, to describe what makes a charter school a charter school, and to explain how these schools are typically funded.¹³

THE RIGHT TO AN EDUCATION:

In the landmark case, Brown v. Board of Education, a unanimous Supreme Court took a strong stance in favor of providing all of the country’s children with equal access to an education.¹⁴ The Court opined,

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁵

The Court implied, however, that the right to an education is only guaranteed in states that have implemented a public education system.¹⁶ The Court later clarified this implication and held that although its “dedication to public education” has remain unchanged since Brown, education is not a fundamental right granted by the United States Constitution.¹⁷ But, if a state grants its citizens the right to a public education, all of its citizens must be afforded equal access to the state’s education system.¹⁸

¹³ See infra notes 14-35 (briefing constitutional right to education and defining charter schools).
¹⁵ See id. at 493.
¹⁶ See id. ("Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").
¹⁷ See San Antonio Indep. Sch. Dist., 411 U.S. at 30 ("[T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental . . . ."); see also Plyler, 457 U.S. at 221 (affirming determination that public education is not constitutionally protected right.). But see San Antonio Indep. Sch. Dist., 411 U.S. at 63 (Brennan, J., dissenting) ("[T]here can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. This being so, any classification affecting education must be subjected to strict judicial scrutiny . . . .").
¹⁸ See Plyler, 457 U.S. at 230 (finding exclusion of undocumented immigrant children from public schools unconstitutional under Fourteenth Amendment). After an in-depth discussion of the Equal Protection Clause of the Fourteenth Amendment, the Plyler Court concluded, "If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest." Id.; see also, Robyn K. Bitner, Note, Exiled From Education: Plyler v. Doe’s Impact on the Constitutionality of Long-Term Suspensions and Expulsions, 101 Va. L. Rev. 763, 778 (2015) ("Plyler’s reasoning, combined with Brown, suggests the possibility of a right of equal access to education under the Equal Protection Clause."). "While there is no absolute right to education, Plyler implies that it is constitutionally problematic for states to exclude discrete
Today, all fifty state constitutions include provisions mandating statewide public education systems. Generally, these constitutional provisions have been interpreted to guarantee that the applicable state's public education system will provide its students with an "adequate" level of education. This theory that state constitutions guarantee an adequate level of education emerged in cases addressing disparities between the quality of education provided by different districts as a direct result of the state's school funding scheme. However, unless state courts have defined "adequate" in the context of public education, its meaning can be difficult to discern. This quest for assuring the provision of adequate educational opportunities has helped catalyze the charter school movement, but it is also the foundation for the argument that the creation of charter schools prevents traditional public schools from providing adequate levels of education.

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What Is A Charter School?

Charter schools are independently operated schools authorized by statutes that vary from state to state. Despite these variations, charter schools across the board do share characteristics relevant to understanding how they typically differ from "traditional public schools." First, charter schools are independent from public school districts as they are operated by nonprofit organizations, private corporations, teachers, parents, and a number of other groups. They are publicly funded, tuition free schools that are governed by charter agreements, which are contracts between the school and an agency designated to authorize the school. These agreements outline the conditions of operation, renewal, and other rights and responsibilities of the parties including the school’s performance expectations. Depending on the state, "authorizers" will take different forms including, but not limited to certain government agencies, educational entities, local school boards, or nonprofit private entities. Additionally, charter schools are not required to comply with many of the state and local regulations imposed on "traditional" public schools, such as those pertaining to curriculum, staffing, and budget, among others.

Students are not "assigned" to attend charter schools, but rather, students choose to attend as an alternative to the available "traditional"

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25 See sources cited supra note 24 (listing aspects common to most charter schools).

26 See Garnett, supra note 8, at 14 (describing "charter authorizers"); Gallen, supra note 24, at 1126 (listing entities that operate charter schools).

27 See Ryan & Heise, supra note 24, at 2073 (defining charter agreements).


29 See sources cited supra note 26 (noting examples of agencies which may be deemed charter school "authorizers").

30 See sources cited supra note 26 (discussing ways in which charter schools are granted more freedom than public schools).
public schools. Charter schools are technically open to all students and typically do not require applicants to meet eligibility standards such as prior academic performance or test scores. But, enrollment is often limited by statute, and when a charter school reaches capacity, it will begin to admit applicants at random through a lottery, and ultimately many applicants are unable to enroll. Further, a number of states do allow charter schools to give preference to certain applicants, such as siblings of students who already attend the school and children of the school’s founders and employees. Charter schools are also granted more freedom than “traditional” public schools when it comes to student discipline and are able to exclude students whose behavior would not otherwise justify expulsion.

Charter Schools in Massachusetts

Massachusetts charter schools “ha[ve] the freedom to organize around a core mission, curriculum, theme, and/or teaching method and [they] control [their] own budget and hire (and fire) teachers and staff.”

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31 See Lehnen, supra note 28, at 842 (“Charters provide parents and students with educational choice, which is especially meaningful to those students who would otherwise not have such choice.”).

32 See Jeanette M. Curtis, A Fighting Chance: Inequities in Charter School Funding and Strategies for Achieving Equal to Public School Funds, 55 HOW. L.J. 1057, 1064-65 (2012) (“Charter Schools are not allowed to screen student acceptance or select students based on certain criteria . . . .”); see also Gallen, supra note 24, at 1142-43 (stating typical charter school admissions processes).

33 See Gallen, supra note 24, at 1126 (“If more students apply than a charter school has space for, the school must institute a lottery system . . . .”); Charter School FAQ, supra note 28 (claiming charter school lotteries are completely random). But see Garnett, supra note 8, at 13 (“[S]ome [charter schools] are permitted to prefer neighborhood students and/or to test applicants for admission.”); Valerie Strauss, How Charter Schools Choose Desirable Students, WASH. POST (Feb. 16, 2013), https://www.washingtonpost.com/news/answer-sheet/wp/2013/02/16/how-charter-schools-choose-desirable-students/?utm_term=.9cfe2278a781 (bringing attention to charter schools’ use of selective enrollment procedures).


35 See Black, supra note 2, at 1383 (“[C]harter have far more leeway to exclude students once they are enrolled.”).


The purposes of establishing charter schools are: (i) to stimulate the development of innovative programs within public education; (ii) to provide opportunities for innovative learning and assessments; (iii) to provide parents and students with greater options in
Massachusetts, there are two categories of charter schools: Commonwealth charter schools and Horace Mann charter schools. Both Commonwealth and Horace Mann charter schools are governed by a board of trustees, they operate independently of any school committee, and their charter agreements must be approved by the Massachusetts Board of Elementary and Secondary Education (the “Board”). If approved, the charter agreements remain in place for five years. At the end of the five year term, a school’s agreement may be renewed if it has attracted students and produced “positive results” during the initial five year term. The main difference between Horace Mann charter schools and Commonwealth charter schools is that, in addition to approval by the Board, Horace Mann charter schools must also be approved by the local school committee and, in certain cases, the local teacher’s union.

For each student who attends a Commonwealth charter school, the school receives a “tuition payment” from the state equal to the amount that

selecting schools within and outside their school districts; (iv) to provide teachers with a vehicle for establishing schools with alternative, innovative methods of educational instruction and school structure and management; (v) to encourage performance-based educational programs; (vi) to hold teachers and school administrators accountable for students’ educational outcomes; and (vii) to provide models for replication in other public schools.

See Questions and Answers About Charter Schools, supra note 36, at 1 (responding to frequently asked questions regarding Massachusetts charter schools).

See id. (defining basic tenets of Massachusetts charter schools).

See id. (stating term length of charter agreements in Massachusetts).

See id. (listing Massachusetts’ charter school renewal conditions).

See id. (noting difference between two types of Massachusetts charter schools); see also MASS. ANN. LAWS ch. 71 § 89(c) (LexisNexis 2018) (classifying Massachusetts charter schools into two broad categories); 603 MASS. CODE REGS. 1.04 (2015) (providing procedures for creating new charter schools). There are three types of Horace Mann charter schools: Horace Mann I, Horace Mann II, and Horace Mann III. Questions and Answers About Charter Schools, supra note 36, at 2. Horace Mann I and Horace Mann III charter schools are newly created schools, while Horace Mann II charter schools are existing schools that are converted into charter schools. Id. A Horace Mann I charter school must be approved by the Board, the local teacher’s union, and the school committee in its respective school district. Id. Any modifications to a collective bargaining agreement must be submitted with the school’s initial application and “must be approved by the school committee and collective bargaining unit.” Id. Horace Mann II charter schools must also be approved by the Board and the local school committee, and any modifications to “a collective bargaining agreement must be approved by a majority of faculty at the school, with the vote to be held within [thirty] days of submission of the application.” Id. Likewise, Horace Mann III charter schools must be approved by the Board and the local school committee, but “an agreement with the local collective bargaining unit is not required prior to Board approval, however, the charter school’s board of trustees must negotiate with the collective bargaining unit and the school committee in good faith regarding any modifications to collective bargaining agreements following the award of a charter.” Id. Additionally, at least four Horace Mann III schools must be located in Boston. Id.
the Massachusetts Department of Elementary and Secondary Education ("DESE") deems to be the cost of educating one student; this is referred to as the "per-pupil amount." The state then deducts this per-pupil amount from the aid received by the school district (the "sending district") where the student would have otherwise attended. Simply put, the state reallocates funding from the sending district to the Commonwealth charter school(s) in an amount equal to the per-pupil expense multiplied by the number of students in the sending district that have chosen instead to attend a charter school. Commonwealth charter schools are also eligible to receive funding through federal and state grants, and they may also apply for private grants and receive contributions.

Horace Mann charter school funding "comes directly from the school district in which the school is located, through a memorandum of understanding with the district." During the first year of operation, Horace Mann applications "may specify a total budget allocation" that has been approved by the local school committee, and "each year thereafter, the board of trustees . . . will submit a budget request for the following year to the superintendent and school committee under the district." These schools may also apply for private grants and receive individual contributions.

Massachusetts also imposes a limitation on the number of charter schools that are permitted to operate at one time. This limitation is commonly referred to as the "cap" on charter schools and restricts the total number of charter schools to 120 (48 Horace Mann charter schools and 72

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43 See id. (explaining per-pupil funding reallocation).
44 See id. (summarizing funding formula for Commonwealth charter schools).
45 See id. (detailing Commonwealth charter schools' ability to receive certain grants).
46 See id. (explaining funding method for Horace Mann charter schools).
47 See Questions and Answers About Charter Schools, supra note 36, at 9 (summarizing budget requests at Horace Mann charter schools).

Under the law, a Horace Mann charter school cannot receive less than it would have under the district's standard budgetary allocation rules. A school may appeal a disproportionately lower budget allocation to the Commissioner [of Elementary and Secondary Education]. Depending upon the terms of its charter and the memorandum of understanding, a Horace Mann charter school may receive its share of federal and state grant funds from the district or receive funds directly.

Id.
48 See id. (detailing Massachusetts charter Horace Mann charter schools' ability to receive certain grants).
49 See id. at 5 (stating that there is limitation on number of charter schools permitted in Massachusetts).
Commonwealth charter schools). Further, "no public school district's total charter school tuition payment to [C]ommonwealth charter schools shall exceed [nine] per cent of the district's net school spending."51

If all of the seats at a charter school are filled, applicants to that school will be placed on a waiting list, and the school will hold an admissions lottery to fill any open spaces that become available. However, Commonwealth charter schools do give preference to siblings of students who already attend the school and to applicants who live in the city or town in which the charter school is located. In an initial lottery, Horace Mann charter schools give first priority to "students attending said school, or attending school in the school building previously occupied by said school, on the date that the final [charter school] application is filed with the

50 See id. (specifying Massachusetts' "cap" on number of permitted charter schools); see also Doe No. 1, 95 N.E.3d at 244 (using the term "cap" in reference to limitation on Massachusetts charter schools). There is one exception to the cap, which is as follows:

In any fiscal year, if the board determines based on student performance data collected pursuant to section 11, said district is in the lowest 10 per cent of all statewide student performance scores released in the 2 consecutive school years before the date the charter school application is submitted, the school district's total charter school tuition payment to commonwealth charter schools may exceed 9 per cent of the district's net school spending but shall not exceed 18 per cent. For a district qualifying under this paragraph whose charter school tuition payments exceed 9 per cent of the school district's net school spending, the board shall only approve an application for the establishment of a commonwealth charter school if an applicant, or a provider with which an applicant proposes to contract, has a record of operating at least 1 school or similar program that demonstrates academic success and organizational viability and serves student populations similar to those the proposed school seeks to serve, from the following categories of students, those: (i) eligible for free lunch; (ii) eligible for reduced price lunch; (iii) that require special education; (iv) English learners or of similar language proficiency level as measured by a standardized English proficiency assessment chosen by the department; (v) sub-proficient, which shall mean students who have scored in the "needs improvement", "warning" or "failing" categories on the mathematics or English language arts exams of the Massachusetts Comprehensive Assessment System for 2 of the past 3 years or as defined by the department using a similar measurement; (vi) who are designated as at risk of dropping out of school based on predictors determined by the department; (vii) who have dropped out of school; or (viii) other at-risk students who should be targeted to eliminate achievement gaps among different groups of students. For a district approaching its net school spending cap, the board shall give preference to applications from providers building networks of schools in more than 1 municipality.

51 See Questions and Answers About Charter Schools, supra note 36, at 5 (stating Massachusetts' charter school spending cap). The nine per cent tuition payment cap may increase to 18 percent. MASS. ANN. LAWS, ch. 71, § 89(i)(3) (LexisNexis 2018).

52 See MASS. ANN LAWS ch. 71, § 89(n) (LexisNexis 2018) (listing permissible, and sometimes mandated, Massachusetts charter school admissions preferences).

Then, priority is given to “siblings attending said school, or attending school in the school building previously occupied by said school, on the date that the final [charter school] application is filed with the Board.” In subsequent lotteries, Horace Mann charter schools prioritize siblings of students who already attend the charter school, students who are enrolled in the public schools in the district where the Horace Mann school is located, and students who live in the city or town where the charter school is located. Thus, despite an ultimately “random” lottery, some applicants will have an increased chance of enrollment as compared to those who are not given preference.

An Overview of Past Challenges to the Constitutionality of Charter Schools

Charter schools’ growing presence in the United States’ public education system is no doubt controversial, polarizing those in favor of school choice and those who contest its efficacy. Unsurprisingly, this debate has made its way to the courtroom. Much of the litigation in this area has been initiated by charter school opponents claiming that the creation of charter schools will ultimately deprive students of equal access to an adequate level of education in contravention of certain state constitutional rights. Because education is not a fundamental right granted by the United States Constitution, most of these claims have been litigated in state courts.
There are, however, a handful of federal cases that have addressed this issue in the context of equal protection.\textsuperscript{62}

At the federal level, equal protection claims have continuously failed, as plaintiffs have been unable to present strong evidence that the charter schools at issue were created with a discriminatory intent.\textsuperscript{63} Challenges to the constitutionality of charter school laws brought at the state level have also been largely unsuccessful, and though they do differ from the federal claims, they are often dismissed for similar reasons.\textsuperscript{64} Furthermore, to succeed on such claims in the future, these past failures cannot be ignored.\textsuperscript{65} The following summarizes two federal cases in which plaintiffs contested the expansion of local charter schools on the basis of equal protection.\textsuperscript{66} Each case highlights the need for specific evidence of discrimination and confirms that conclusory arguments are unlikely to hold up in a court of law.\textsuperscript{67}

In Villanueva v. Carere, a Colorado school board elected to close two public schools just three months after approving the opening of a new charter school.\textsuperscript{68} Parents of students who attended those public schools sought to enjoin the school closings, claiming that the school board violated


\textsuperscript{63} See cases cited supra note 62 (failing to succeed on claims of equal protection); see also Martin, supra note 9, at 100 ("In these federal cases plaintiffs have consistently failed in their attempts to establish that state charter school programs have violated constitutional provisions or other federal law.").

\textsuperscript{64} See, e.g., State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1166 (Ohio 2006) (rejecting allegations that Ohio charter schools were unconstitutional); In re Grant of Charter Sch. Application of Englewood Palisades Charter Sch., 727 A.2d at 20 (finding "none of the challenges advanced by appellant districts persuasive"); Council of Orgs. & Others for Educ. About Parochiaid, 566 N.W.2d at 222 (upholding constitutionality of Michigan's charter school act); see also Black, supra note 2, at 1409 ("With the exception of the Washington Supreme Court, high courts have rejected these [constitutional] challenges [to charter school programs] . . ."); Martin, supra note 9, at 102 ("The state and federal courts have shown almost unwavering constancy in rejecting the challenges brought by school boards and other adversaries against the opening or continued operation of charter schools.").

\textsuperscript{65} See Black, supra note 2, at 1408-11 (analyzing why past charter school cases have failed and proposing ways to improve future outcomes).

\textsuperscript{66} See Smith, 54 F. Supp. 3d at 61 (dismissing equal protection claims); Villanueva, 85 F.3d at 484 (finding no equal protection violations).

\textsuperscript{67} See cases cited supra note 62 (holding evidence insufficient to establish valid equal protection claims). "[C]laims must become far more factually granular. Plaintiffs cannot assume that choice programs inherently harm public education." Black, supra note 2, at 1416.

\textsuperscript{68} See 85 F.3d at 483-86 (analyzing equal protection claims brought by parents whose children's schools were closed).
their Fourteenth Amendment right to equal protection of the laws. This equal protection claim was based on the plaintiffs’ assertion that the closings were motivated by the intent to discriminate against Hispanic students, as the student population at the schools elected to close was predominantly Hispanic.

For the claim to succeed, the plaintiffs in Villanueva not only had to show that the schools were closed in furtherance of a “racially discriminatory intent or purpose,” but also that the discriminatory purpose was the “motivating factor in the decision.” The plaintiffs presented no direct evidence of discriminatory intent, though the court acknowledged that equal protection claims require a “sensitive inquiry” into both direct and circumstantial evidence of discriminatory intent. In light of the lower court’s finding that the school board’s decisions were made in a “sincere” effort to improve the overall quality of education, and this court’s own finding that the members of the school board and the school superintendent were Hispanic and had a history of commitment to the Hispanic and minority communities in the district, the court held that there was insufficient evidence of a discriminatory intent. The court also found that the plaintiffs failed to demonstrate that the closures had a discriminatory impact on the Hispanic students, noting that approximately fifty percent of the students projected to attend the charter schools were Hispanic, a proportion nearly identical to the percentage of Hispanic students within the entire district.

Last, the court rejected the plaintiffs’ argument that Colorado’s Charter Schools Act’s use of the phrase “cultural factors” in its definition of “at-risk pupils” was code for “ethnic minority” and therefore created a suspect classification. The court was sensitive to the parents’ concerns, but found that after a reading of the entire statute, it did not seem to create any classification of students, and even included an express mandate that charter schools’ enrollment decisions “be made in a nondiscriminatory manner.”

In Smith v. Henderson, several schools in Washington D.C.’s public school system were under-enrolled, and in an effort to use resources more

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69 See id. at 483-84 (stating constitutional claims to be reviewed).
70 See id. at 485 (summarizing school closure plan).
71 See id. (asserting requirements for proving racially discriminatory intent and purpose).
72 See id. at 486 (finding no direct evidence of discriminatory intent).
73 See id. (justifying determination that there was no evidence of discriminatory intent).
74 See Villanueva, 85 F.3d at 487 (opining that population data revealed lack of discriminatory impact).
75 See id. at 488 (summarizing plaintiffs’ reasons for asserting statute created suspect classification).
76 See id. (disagreeing with plaintiffs’ characterization of suspect classification).
efficiently, the district began to create and implement a school closure plan. Parents of students who attended public schools closed under the plan filed a complaint alleging that the closings were discriminatory and violated the Fifth Amendment’s Equal Protection clause. They set forth a few reasons for why the closure plan was discriminatory, one being that its purpose was “to make room for charters.” They posited that “making room” for charters was discriminatory because “reforms like charter schools . . . will ultimately harm black students in the District.” The court made note of aspects of the plaintiffs’ brief that revealed their evident distaste for charter schools, and explained that questions of policy are political issues, and not legal issues to be resolved by a judge. It then pointed to the fact that the plaintiffs offered no explanation for why charter school expansion was discriminatory beyond their allegation that it would “ultimately harm black students,” nor did they offer[] real evidence that their schools were actually closed to make way for charters.” As a result of the plaintiffs’ generalized and opinionated assertions about charter school policy, and the absence of any actual evidence of discrimination, the court concluded that no reasonable jury would find an equal protection violation, and dismissed the claim.

At the state level, plaintiffs challenging the constitutionality of charter school statutes frequently focused on charter school funding. Specifically, they argued that it is unconstitutional for a state to reallocate traditional public school funds for charter school use. Despite the

77 See 54 F. Supp. at 61 (providing background regarding plaintiffs’ complaint).
78 See id. at 68-69 (addressing equal protection claims).
79 See id. at 72 (discussing claim that charter school expansion was discriminatory).
80 See id. at 61 (pointing to plaintiffs’ only justification for discrimination claim).
81 See id. at 67 (criticizing aspects of plaintiffs’ argument that relied on policy opinions).
82 See Smith, 54 F. Supp. 3d at 72 (finding no evidence of discrimination caused by charter school expansion).
83 See id. at 73 (“[N]o reasonable jury could find an Equal Protection . . . violation here.”)
84 See, e.g., Iberville Parish Sch. Bd. v. La. State Bd. of Elementary & Secondary Educ., 248 So.3d 299, 301 (La. 2018) (reversing holding that charter school funding was unconstitutional); State ex rel. Ohio Cong. of Parents & Teachers, 857 N.E.2d at 1160 (rejecting allegations that charter school funding was unconstitutional); In re Grant of Charter Sch. Application of Englewood Palisades Charter Sch., 727 A.2d at 39 (disagreeing that funding scheme was unconstitutional on its face); Council of Orgs. & Others for Educ. About Parochiaid, 566 N.W.2d at 211 (upholding constitutionality of Michigan’s charter school act). These suits have been filed by public school systems, charter schools, public and charter school attendees, and various other groups. See, e.g., cases cited supra notes 60, 60, 62. Though such cases have been brought by plaintiffs with varying and often opposing opinions regarding the “charter school debate,” most, if not all, are centered on the same underlying issue: one group believes it is not receiving the same level of education as the other as a result of funding disparities between the traditional public schools and the state’s charter schools. See cases cited supra notes 60, 60, 62.
85 See cases cited supra note 84 and accompanying text (claiming that diverting funds from public schools to charter schools decreases quality of public education).
abundance of such claims, the vast majority have been dismissed.\textsuperscript{86} In 2015, the Washington Supreme Court became the first to deem charter schools unconstitutional.\textsuperscript{87} Following this ruling, the Washington legislature modified the state's charter school act, and in 2018, the Washington Supreme Court found that the new law was, indeed, "constitutional on its face."\textsuperscript{88} Only one other court, The Court of Appeal of the First Circuit of Louisiana, has since declared that its state charter school statute was unconstitutional; however, this court's ruling was recently reversed on appeal.\textsuperscript{89}

The Washington Supreme Court, in 2015, concluded that the state's proposed "Charter School Act" was unconstitutional because its treatment of charter schools as "common schools" violated the language in the Washington State Constitution.\textsuperscript{90} The court found that the proposed charter schools did not fall under the definition of a common school because they were to be run by "an appointed board or nonprofit organization" and would not be under the control of "voters of the school district."\textsuperscript{91} The court stressed that "common school" funds must be protected from what it deemed an "invasion" by anything falling outside the definition of a common school.\textsuperscript{92} It went on to specify that the Charter School Act's reallocation of funds from common schools to the proposed charter schools was precisely the sort of "invasion" that the constitution sought to proscribe.\textsuperscript{93} In sum, the court's holding was rooted in its interpretation of the Washington Constitution's definition of "common schools" and its belief that the proposed charter schools were not embodied by that definition.\textsuperscript{94}

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\textsuperscript{86} See sources cited \textit{supra} note 64 (confirming consistent failures to challenge constitutionality of charter school laws).

\textsuperscript{87} See \textit{League of Women Voters of Wash.}, 355 P.3d at 1133-34 (holding state charter school funding statute unconstitutional); see also Laura Habein, Note, \textit{League of Women Voters v. State: The Rejection of Public and Private Hybridity Within Washington State Public Schools}, 31 NOTRE DAME J.L. ETHICS & PUB. POL'Y 201, 201 ("On September 4, 2015, Washington's Supreme Court became the first in the country to find the taxpayer-funded charter schools unconstitutional.").


\textsuperscript{90} See \textit{League of Women Voters}, 355 P.3d at 1135-37 (interpreting constitutional definition of common schools).

\textsuperscript{91} See \textit{id.} at 1137 (using definition of common schools to explain why charter schools cannot be classified as such).

\textsuperscript{92} See \textit{id.} (concluding that funds for common schools must only be used for common schools).

\textsuperscript{93} See \textit{id.} at 1137-41 (disapproving charter school use of common school funds).

\textsuperscript{94} See \textit{id.} (looking only to constitution to determine charter school statute was unconstitutional).
In accordance with this ruling, the Washington state legislature amended the Charter School Act in 2016.\textsuperscript{95} In an attempt to eliminate the funding issue central to the Washington Supreme Court’s 2015 holding, the new law no longer designates charter schools as common schools.\textsuperscript{96} In 2018, upon reviewing the legislature’s alterations, the Washington Supreme Court found that under the new law, charter schools would be funded by the state’s lottery revenue, and no longer “divert[s] restricted common school funds to support charter schools.”\textsuperscript{97} Thus, the court held that the funding method described in the modified Charter School Act was constitutional.\textsuperscript{98}

Courts that have dismissed similar claims have routinely stated that charter school policy determinations are questions for the legislature, never questioning whether the legislature’s classification of charter schools as “public” schools is actually consistent with the applicable state constitution.\textsuperscript{99} Many of these courts have also found that plaintiffs failed to present facts establishing that the impact of charter school funding on the provision of education at “traditional” public schools was sufficiently detrimental to be considered unconstitutional.\textsuperscript{100} The Washington Supreme Court, on the other hand, never “deferred to the legislature” in its 2015 opinion, nor did it
evaluate facts evidencing the actual effects of the funding formula.\textsuperscript{101} Its holding was based solely on the court's own interpretation of the state constitution.\textsuperscript{102}

Many attempts to persuade state courts that charter school funding is unconstitutional either allege that charter schools are not truly public and thus should not be granted funds designated for use by the state's public school system, or they contend that directing funding away from public schools for use by charter schools will prevent the affected public schools from providing students with a constitutionally adequate level of education.\textsuperscript{103} The following provides just three examples of such cases: the first illustrates courts' reluctance to contradict the rule of the legislature, while the second two demonstrate that plaintiffs who allege charter school funding adversely effects the overall adequacy of the education provided by "traditional" public schools must present specific evidence of such injury.\textsuperscript{104}

In \textit{Council of Organizations & Others for Education About \textit{Parochiaid}, Inc. v. Governor}, plaintiffs sought to enjoin the distribution of public funds to charter schools authorized by the Michigan Charter School Act.\textsuperscript{105} They argued that the charter schools were not public schools because they were not under the "immediate and exclusive control of the state," and therefore the funding scheme was unconstitutional under the education provisions of the Michigan Constitution.\textsuperscript{106} The Michigan Supreme Court held that the Charter School Act was constitutional, noting that the Michigan Constitution does not define the term "public schools," but it does grant the legislature the responsibility of "maintaining and supporting a system of free public education," and the legislature had classified the charter schools as

\textsuperscript{101} \textit{See League of Women Voters of Wash.}, 355 P.3d at 1135 ("This case turns on the language of article IX, section 2 of our state constitution and this court's case law addressing that provision."). \textit{But see El Centro de la Raza v. State}, 428 P.3d 1143, 1146 (Wash. 2018) (stating that courts do not play role of legislature critic).

\textsuperscript{102} \textit{See League of Women Voters}, 355 P.3d at 1135 (citing specific constitutional language).

\textsuperscript{103} \textit{See cases cited supra note 100 (alleging either charter schools are not public or are detrimental to public education system}).

\textsuperscript{104} \textit{See, e.g., Ohio Cong. of Parents & Teachers}, 857 N.E.2d at 1159 ("[Appellants] allege that the funding method used to support community schools diverts funds from city school districts, depriving them of the ability to provide a thorough and efficient system of common schools."); \textit{Council of Orgs. & Others for Educ. About \textit{Parochiaid}}, 566 N.W.2d at 216 ("[T]he plaintiffs reason that [charter schools] are not public schools because they were not under the immediate and exclusive control of the state."); \textit{In re Grant of Charter Sch. Application of Englewood Palisades Charter Sch.}, 727 A.2d at 39 ("Franklin Township argues that the Act is unconstitutional on its face because its funding scheme—diverting funds away from an existing district in order to pay for a charter school—will prevent existing districts from meeting their obligation under the State Constitution to provide a 'thorough and efficient' education.").

\textsuperscript{105} 566 N.W.2d at 211 (stating plaintiffs’ claim and request for injunction).

\textsuperscript{106} \textit{See id.} at 216 (expanding on Michigan Constitution’s “immediate and exclusive control” requirement).
public schools. The court went on to say that the Michigan Constitution "does not mandate exclusive control," but rather only requires that the legislature "maintain and support' a system of public schools" and "[t]his Court gives deference to a deliberate act of the Legislature, and does not inquire into the wisdom of its legislation." The court did acknowledge that the constitution required the state to have "general supervision over all public education," but found that because the state had the power to authorize and revoke the charters, and could control the allocation of funds to the schools, the supervision requirement was satisfied.

In 1999, three public school districts in New Jersey challenged various aspects of the New Jersey Charter School Program Act of 1995. One district argued that the charter school act was "unconstitutional on its face" because it permitted the "diversion of funds away from" public school districts "to pay for . . . charter school[s]," which would "inevitably" prevent the public districts "from meeting their obligation under the State Constitution to provide a ‘thorough and efficient’ education.” The court responded saying that this claim was abstract, and provisions in the act providing for funding adjustments to the public schools may very well alleviate the hypothetical financial problem. The court concluded, "[n]ot until the school has operated for at least a year, or perhaps more, will it be possible to gauge whether its presence is subverting the district’s ability to provide a constitutionally adequate education for its regular students.”

Similarly, in a 2006 challenge to the constitutionality of Ohio’s charter school statute, the plaintiffs alleged that the diversion of funds from public school districts to charter schools deprived the public schools “of the ability to provide a thorough and efficient system of common schools.” The Supreme Court of Ohio disagreed, stating, “[t]he mere increase or decrease in the local share percentage does not violate the Thorough and Efficient Clause [of the Ohio Constitution], because the district still receives state funding for the children actually attending the district traditional

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107 See id. at 219, 222 (confirming constitutionality of statute).
108 See id. at 215-16 (detailing Michigan’s constitutional requirements for statewide public education system).
109 See id. at 212-14, 221 (quoting MICH. CONST. of 1963, art. VIII, § 3) (opining that state had sufficient control over charter schools to satisfy constitutional requirements).
110 See In re Grant of Charter Sch. Application of Englewood Palisades Charter Sch., 727 A.2d at 20-22 (addressing three public school districts’ challenges to New Jersey’s charter school act).
111 See id. at 39 (rejecting claim as “speculative”).
112 See id. at 40-41 (finding no merit in future “fiscal doom” hypothesis).
113 See id. (taking issue with speculative aspects of funding claim).
114 See State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d at 1159 (arguing that per-pupil funding overcomes plaintiffs’ funding concerns).
schools." It emphasized that the charter schools were funded on a per-pupil basis, and implied that state funds effectively attach to the students, and not to the school. This implication seemed to assume that the “traditional” public schools were unlikely to suffer from a loss of funds that would have hypothetically been used to educate that single student because when that student leaves to attend a charter school, the public school is no longer responsible for educating that student. The Supreme Court of Ohio, unpersuaded by the plaintiffs’ general assertions that their schools would lose funding, held that plaintiffs did not “present clear and convincing evidence” that the charter school statute was unconstitutional.

MASSACHUSETTS LAW: ADEQUACY AND DOE NO. 1 V. SECRETARY OF EDUCATION

In April of 2018, the Supreme Judicial Court of Massachusetts (the “SJC”), made its first ever ruling as to the constitutionality of the state’s charter school statute. The plaintiffs, five students who attended Boston Public Schools, filed a complaint alleging that the Massachusetts charter school cap prevented them from accessing an “adequate” education, and therefore violated the education clause and equal protection provisions of the Massachusetts Constitution. Each student applied to attend at least one charter school, but none were admitted through the school admissions lotteries and so had to attend “constitutionally inadequate schools in Boston.” The defendants, Massachusetts’ Secretary of Education and

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115 See id. at 1160 (claiming per-pupil funding prevents public school from losing funds it was otherwise entitled to).

116 See id. (“[T]he state still fulfills its obligation to fund each student at a specific level according to the statutory formula.”).

117 See id. (“When a student leaves a traditional school to attend a [charter] school, the state funds follow the student.”).

118 See id. (“The appellants have not presented clear and convincing evidence that community schools are raiding local funds that school districts are otherwise entitled to receive.”).

119 See Doe No. 1, 95 N.E.3d at 244-45 (summarizing claims alleging Massachusetts charter school cap was unconstitutional).

120 See id. at 250 (providing legislative history of plaintiffs’ claims). The plaintiffs in Doe No. 1 sought a “declaratory judgment,” which “declares conclusively the rights and duties, or the status, of the parties but involves no executory or coercive relief following as of course.” Declaratory Judgment, BALLENTINE’S LAW DICTIONARY (3d ed. 1969).

121 See Doe No. 1, 95 N.E.3d at 250 (“In their complaint, the plaintiffs sought to represent a class including themselves and all other children attending or assigned to attend constitutionally inadequate schools in Boston who have applied to public charter schools, but have failed to gain entry via the lottery.”).
other members of the Massachusetts Board of Elementary and Secondary Education, filed a motion to dismiss.\textsuperscript{122}

Prior to plaintiffs' appeal to the SJC, the Suffolk County Superior Court granted defendants' motion for dismissal as to both of the plaintiffs' claims.\textsuperscript{123} The lower court held that the charter school cap did not violate Massachusetts' education clause, finding that although the state is obligated to educate all of its children, there is no "constitutional right to choose a particular flavor of education" and thus, "denial of access to a particular type of school providing a particular type of education" did not constitute "the sort of Statewide abandonment of duty" required for a finding of an education clause violation.\textsuperscript{124} The lower court also held there was no equal protection violation, finding that the plaintiffs had not established that the charter school cap was not "rationally related to the furtherance of a legitimate State interest in providing public education to every child of this Commonwealth."\textsuperscript{125} The SJC affirmed.\textsuperscript{126}

As this case was initiated by charter school proponents who sought to expand access to charter schools, it may appear distinct from the discussion regarding claims brought by charter school opponents.\textsuperscript{127} But, this is the first, and thus far the only Massachusetts case to address a constitutional challenge relating to charter school legislation, and the SJC's opinion describes, in detail, the requirements for establishing education clause and equal protection violations within the charter school context.\textsuperscript{128} Accordingly, it will be necessary for future litigants seeking to challenge any aspect of the Massachusetts charter school statute to understand the court's holding.\textsuperscript{129}

\textsuperscript{122} See id. (reviewing lower court's allowance of defendant's motion to dismiss de novo).

\textsuperscript{123} See id. ("The motion judge granted the motion, concluding that, although an actual controversy between the parties existed and the plaintiffs had standing to bring their claims against the defendants, the plaintiffs had failed to state a claim under either the education clause or the equal protection provisions of the Massachusetts Declaration of Rights."); see also Does v. Peyser, No. 2015-2788, 2016 WL 9738404, at *1 (Mass. Super. Oct. 4, 2016) (granting defendants' motion to dismiss).

\textsuperscript{124} See Does, 2016 WL 9738404, at *9 (rejecting plaintiffs' education clause claim).

\textsuperscript{125} See id. at *9-10 (rejecting plaintiffs' equal protection claim).

\textsuperscript{126} See Doe No. 1, 95 N.E.3d at 244-45 ("We affirm the judgment of dismissal and conclude, as did the motion judge, that the plaintiffs have failed to state a claim for relief under either provision.").

\textsuperscript{127} See id. at 244 ("[Plaintiffs] alleg[ed] that the charter school cap under G.L. c. 71 § 89 (i) violates the education clause and the equal protection provisions of the Massachusetts Constitution because the students were not able to attend public charter schools of their choosing.").

\textsuperscript{128} See id. at 250-59 (detailing elements necessary to successfully state constitutional claims challenging Massachusetts' charter school statute).

\textsuperscript{129} See id. (addressing each claim and its elements to highlight requirements for stating valid claims).
In *Doe No. 1*, the SJC first determined whether it had jurisdiction to adjudicate the plaintiffs' claims. In Massachusetts, when a plaintiff seeks declaratory relief, a court has jurisdiction if the plaintiff can demonstrate "the existence of an actual controversy" and "the requisite legal standing to secure its resolution."\(^{130}\) Actual controversy exists when a plaintiff has set forth a "real dispute caused by" one party's assertion of "of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter . . . ."\(^{131}\) Additionally, the circumstances must indicate that "unless the matter is adjusted," litigation is almost inevitable.\(^{132}\) The SJC found that an actual controversy existed, explaining that the plaintiffs had an "identifiable interest in the opportunity to attend a commonwealth charter school" and that interest was "actually limited" by the charter school cap.\(^{133}\)

The court also found that the plaintiffs demonstrated standing as to both constitutional claims.\(^{134}\) "A party has standing when it can allege an injury within the area of concern of the statute, regulatory scheme, or constitutional guarantee under which the injurious action has occurred."\(^{135}\) A plaintiff will have suffered an injury if the defendant "violated some duty owed to the plaintiff."\(^{136}\) Importantly, the defendant's mere "act or omission" will not be enough to constitute an injury that justifies standing.\(^{137}\) The plaintiffs demonstrated standing as to their alleged injury pursuant to the education clause of the Massachusetts Constitution—denial of an adequate public education—because the education clause "imposes a duty on the Commonwealth to provide an adequate public education to its

\(^{130}\) *See id.* at 250-51 (asserting that plaintiffs must demonstrate existence of actual controversy and requisite legal standing).

\(^{131}\) *See Doe No. 1*, 95 N.E.3d at 251 ("In declaratory judgment actions, both requirements are liberally construed.").


\(^{133}\) *See S. Shore Nat'l Bank*, 220 N.E.2d at 902 (quoting *Sch. Comm. of Cambridge*, 70 N.E.2d at 300) (defining actual controversy); *see also Doe No. 1*, 95 N.E.3d at 251 (holding plaintiffs "adequately demonstrated" existence of actual controversy).

\(^{134}\) *See Doe No. 1*, 95 N.E.3d at 252 (reasoning that because cap inhibited plaintiffs' interest in attending charter school actual controversy existed).

\(^{135}\) *See id.* ("The plaintiffs have set forth sufficient facts to demonstrate standing as to both counts in their complaint.").

\(^{136}\) *See id.* (defining requirement for demonstrating standing).

\(^{137}\) *See id.* (quoting *Penal Insts. Comm'r v. Comm'r of Corr.*, 416 N.E.2d 958, 962) (articulating when plaintiff's alleged injury will demonstrate standing).

schoolchildren.”

Regarding the plaintiffs’ equal protection claim, pursuant to which the alleged injury was “discrimination in the provision of public education without adequate justification,” lawmakers are prohibited from “treating similarly situated citizens differently without adequate justification” and therefore plaintiffs had standing. After concluding that the plaintiffs demonstrated both the existence of an actual controversy and the requisite legal standing, the court proceeded to determine whether the plaintiffs’ claims would survive the motion to dismiss. It addressed the education clause claim first. To state a claim under the education clause, it is not enough for the plaintiffs to “plead facts suggesting [that they were] deprived of an adequate education,” but the facts must also suggest “that the defendants have failed to fulfil their constitutionally prescribed duty to educate.”

To allege that the defendants have not fulfilled their duty to educate, the facts must “demonstrate that the Commonwealth’s extant public education plan does not provide reasonable assurance of an opportunity for an education to ‘all of its children . . . ’ over a reasonable period of time, or is otherwise ‘arbitrary, nonresponsive, or irrational.’” The court conceded that the plaintiffs were attending schools where the education provided was, “at the moment, inadequate,” but to meet the requirements for stating a claim under the education clause, they also needed to show that there was no “reasonable assurance” that their schools would improve “over a reasonable period of time.”

Rather than claiming that the Commonwealth’s “framework for ensuring” educational adequacy failed to provide assurance that their schools would improve over a reasonable period of time, the plaintiffs’ sole focus

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139 See Doe No. 1, 95 N.E.3d at 252 (confirming plaintiffs demonstrated standing as to education clause claim because state had duty to educate).

140 See id. (confirming plaintiffs’ standing as to equal protection because state cannot discriminate).

141 See id. (setting forth conditions for surviving motion to dismiss). “To survive a motion to dismiss, the facts alleged must ‘plausibly suggest[]’ (not merely be consistent with) an entitlement to relief.” Id. (alterations in original) (quoting Edwards v. Commonwealth, 76 N.E.3d 248, 254 (Mass. 2017)). “Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” Id. (alterations in original) (quoting Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008)).

142 See Doe No. 1, 95 N.E.3d at 253 (beginning discussion of education clause claim).

143 See id. (concluding plaintiffs did not plead facts suggesting defendants breached duty to educate).


145 See Doe No. 1, 95 N.E.2d at 254 (“[T]here may be moments in time where particular public schools are not providing an adequate education to their students. . . . This alone is insufficient to support a claim that the Commonwealth has failed to fulfill its constitutional obligation.”).
was on the charter school cap and their inability to leave the public school
system. The court emphasized that "there is no constitutional entitlement
to attend charter schools, and the plaintiffs' complaint [did] not suggest that
charter schools are the Commonwealth's only plan for ensuring that the
education in the plaintiffs' schools will be adequate." Thus, the court
found that the plaintiffs failed to state a claim under the education clause.

The court proceeded to discuss the plaintiffs' equal protection
claim. The plaintiffs claimed that the charter school cap "create[d] two
classes of children: those who [were] guaranteed to receive an opportunity
for an adequate education because all traditional public schools in their
districts provide[d] one, and those in districts with many failing schools
whose educational prospects [were] determined by a lottery." The court
did not decide whether the charter school statute was discriminatory for the
purposes of an equal protection analysis, but found that even assuming that
it was discriminatory, the plaintiffs' claim would not survive the motion to
dismiss.

Before it could evaluate whether the plaintiffs alleged facts that
"plausibly suggested" an equal protection violation, the court had to consider
the applicable standard of review. If a statute "burdens a fundamental
right or targets a suspect class," the court will review the statute with "strict
scrutiny." Otherwise, the statute will be subject to "rational basis

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146 See id. at 255 (acknowledging inadequacy of education provided by plaintiffs' schools).
147 See id. (affirming lower court's dismissal of education clause claim.). "The education clause provides a right for all the Commonwealth's children to receive an adequate education, not a right to attend charter schools. . . . [T]he clause does not permit courts to order 'fundamentally political' remedies or 'policy choices that are properly the Legislature's domain.'" Id. (quoting Hancock, 822 N.E.2d at 1156-57). "There may be any number of equally effective options that also could address the plaintiffs' concerns; however, each would involve policy considerations that must be left to the Legislature." Id.
148 See Doe No. 1, 95 N.E.3d at 255 ("Whether to divert an increased amount of school district funds from traditional public schools to charter schools to comply with the education clause mandate is a choice for the Legislature, not for the courts.").
149 See id. (addressing equal protection claim).
150 See id. (describing plaintiffs' assertion that charter school cap created two classes of children).
151 See id. (concluding plaintiffs did not state plausible claim for purposes of equal protection). On its face, the net school spending cap operates in a way to encourage more commonwealth charter schools in the plaintiffs' school district than in higher performing districts. . . . Under the plaintiffs' theory of discriminatory injury, they are part of the advantaged class associated with the statute's facial discrimination, and likely would not have standing to challenge it.
152 See id. at 256 (explaining differences in application of strict scrutiny compared to rational basis review).
153 See Doe No. 1, 95 N.E.3d at 256 (providing circumstances when strict scrutiny is appropriate standard of review).
review.\textsuperscript{154} The charter school statute did not target a suspect class, but the plaintiffs argued that strict scrutiny should still apply because the statute did burden the "fundamental right to education protected by the Massachusetts Constitution."\textsuperscript{155} However, the SJC has yet to decide whether the education clause imparts a fundamental right under the circumstances presented in this case.\textsuperscript{156} The court declined to resolve this question, finding that even if education was a fundamental right, the charter school cap did not warrant heightened scrutiny.\textsuperscript{157}

A statute burdens a fundamental right only if it "significantly interferes" with that right.\textsuperscript{158} Here, the court did not believe that the charter school cap significantly interfered with the right to education.\textsuperscript{159} It reiterated that there is not a constitutional right to attend charter schools, adding that "the charter school cap [did] not interfere with the students' ability to attend traditional public schools."\textsuperscript{160} In sum, even where there is a right to obtain an education, and even if that right is fundamental, there is no right to attend a charter school, and therefore, under this set of facts it would have been impossible for the court to find that the charter school cap interfered with the plaintiffs' right to an education as they were still able to attend public schools.\textsuperscript{161} Like their education clause claim, the plaintiffs' focus on the constitutionality of the cap, and not on the inadequacy of the education at their public schools, resulted in their failure to state a claim.\textsuperscript{162}

\textsuperscript{154} See id. at 257 (indicating where strict scrutiny is inapplicable, the court turns to rational basis review).
\textsuperscript{155} See id. at 256 (declining to determine whether education is fundamental right in Massachusetts).
\textsuperscript{156} See id. (stating that it has not held whether and when education is fundamental right).

We have had occasion to hold that the Massachusetts Constitution does not guarantee each individual student the fundamental right to an education in circumstances in which a student's behavior leads to expulsion. \ldots Although heightened scrutiny does not apply in the individual student misconduct context, whether the education clause implies heightened scrutiny of education-related discriminatory classifications in other circumstances is an open question. We need not determine whether such circumstances exist and, if so, what they might be, in order to conclude that heightened scrutiny does not apply to the charter school cap statute.

\textsuperscript{157} See id. (opining that state had not interfered with plaintiffs' right to education).
\textsuperscript{158} See Doe No. 1, 95 N.E.3d at 256 (citing Zablocki v. Redhail, 434 U.S. 374, 386 (1978)) (specifying extent of burden on fundamental right required for strict scrutiny).
\textsuperscript{159} See id. at 257 (agreeing with lower court's assertion that there is no constitutional right to attend charter schools).
\textsuperscript{160} See id. (confirming that strict scrutiny would not apply to plaintiffs).
\textsuperscript{161} See id. (reiterating charter school cap has no impact on general ability to obtain public education).
\textsuperscript{162} See id. at 256-57 (addressing application of rational basis review in this case).
A law will be upheld under rational basis review "as long as it is rationally related to the furtherance of a legitimate state interest." Additionally, an equal protection analysis under the Massachusetts Constitution "requires the court to look carefully at the purpose to be served by the statute in question and at the degree of harm to the affected class." Further, the court must evaluate whether "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." In applying this standard of review, the court acknowledged that although the charter school cap did not burden any fundamental right, the cap may still "impose a serious degree of harm on the plaintiffs . . . given the nature of the educational interest at stake." Despite this potential harm, the court opined that "the purposes of the charter school cap reflect[ed] a legislative attempt to balance the plaintiffs' strong educational interest" with the education interests of those students who do not attend charter schools. Accordingly, the court believed that the purpose of the cap transcended any harm it may have caused the plaintiffs, concluding "that no plausible set of facts exist to overcome the statute's presumption of rationality."

To conclude, this opinion not only explained why the plaintiffs failed to establish that the charter school cap violated the education clause or the equal protection rights within the Massachusetts Constitution, but it also illustrated what would be necessary for such claims to succeed. The SJC outlined the requirements for each claim and even characterized the

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164 See id. at 257 (quoting English, 541 N.E.2d at 333) (highlighting need to balance purpose of statute with harm it causes).
165 See id. at 257 (quoting English, 541 N.E.2d at 333) (expanding on application of rational basis review).
166 See id. at 257 (returning to issue of statute’s degree of harm to affected class).
167 See id. at 258 (listing various reasons that provide rational basis for charter school statute). As the Superior Court judge noted in this case, funding for charter schools necessarily affects the funding for traditional public schools. The cap is an effort to allocate education funding among all the Commonwealth’s students attending these two types of publicly funded schools. Because of the statutory funding mechanism that mandates payment of charter school tuition from resources that would otherwise go to traditional public schools, the expansion of charter schools has detrimental effects on traditional public schools and the students who rely on those schools and their services. . . . This attempt to allocate resources among all the Commonwealth’s students represents the rational basis for the statutory cap.
168 See Doe No. 1, 95 N.E.3d. at 258 (determining plaintiffs’ claims did not survive rational basis review).
169 See id. at 250-59 (describing how to state valid claim under applicable constitutional provisions).
legislative interests at stake.\textsuperscript{170} Furthermore, it is not impossible to overcome such interests, but the standard is high, and a plaintiff must plead facts plausibly suggesting that an actual constitutional right has been violated, that the violation is unlikely to be cured within a reasonable period of time, and the resulting harm must be such that it cannot be justified or overcome by the legislative interests at play.\textsuperscript{171}

\textit{Future Challenges to the Constitutionality of Massachusetts Charter School Laws}

Despite the evidently widespread concern that charter school funding disrupts the quality, and equality, of education provided by state public education systems, the majority of claims addressing such concerns have been unsuccessful.\textsuperscript{172} But, courts’ consistent refusals to deem charter school statutes unconstitutional seems to be the product of advocates who assert broad claims rarely supported by specific evidence.\textsuperscript{173}

At the federal level, Equal Protection claims fail because evidence of discriminatory intent is lacking.\textsuperscript{174} Arguments that public schools are treated differently from charter schools, or that certain schools have a seemingly disproportionate number of minority students compared to others, will not survive the high standard that must be met for an equal protection claim to hold any merit.\textsuperscript{175} It may be that in the context of challenges to the constitutionality of charter school laws, federal equal protection claims will rarely, if ever, succeed, as there is no fundamental right to education, and in the absence of true discrimination, the standard of review is unlikely to rise

\begin{footnotes}
\item[170] See id. (illustrating elements of each claim).
\item[171] See id. at 259 ("Where a statute does not use a suspect classification or burden a fundamental right, is supported by a rational basis, and does not otherwise violate the Constitution, advocates may not turn to the courts merely because they are unsatisfied with the results of the political process.").
\item[172] See Black, supra note 2, at 1414 ("Prior litigation, on the whole, has been a failure. Even the rare victories have been cut short by legislative work-arounds. The flaw of the litigation may be that it simply claims too much—that state constitutions prohibit charters . . . entirely."); Martin, supra note 9, at 102 ("It seems clear that the outcome of charter school cases decided in state and federal courts have not served as a significant derailment to the growth of the charter school movement.").
\item[173] See cases cited supra note 62, 64 (providing examples of plaintiffs unable to persuade courts due to vague evidence); see also Black supra note 2, at 1415-17 (theorizing that plaintiffs must make precise showing of charter schools’ harm to public education).
\item[174] See cases cited supra note 62 (listing cases where courts rejected federal equal protections claims).
\item[175] See sources cited supra note 62 (exemplifying that broad assertions cannot support equal protection claims).
\end{footnotes}
to the level of "strict scrutiny." Thus, under the assumption that these challenges will almost always be subject to rational basis review, it also seems likely that federal courts will tend to find that the law in question is rationally related to the governmental interest in furthering educational opportunities.

At the state level, however, there may be more hope. Though the majority of charter school claims to date have failed in state courts, it seems that these cases, more so even than those heard in federal courts, were unsuccessful because of the broad, sometimes hypothetical, and often polemical assertions of plaintiffs. Further, the SJC's opinion in Doe No. 1 delineated, in rather precise terms, how to establish constitutional violations under the education clause and equal protection provisions of the Massachusetts Constitution. Thus, this case may not only be used as precedent, but it can help guide future plaintiffs who may wish to challenge the constitutionality of Massachusetts' charter school statutes.

Below, the description of a hypothetical claim will exemplify how Doe No. 1 may help guide future challenges to the constitutionality of Massachusetts charter school laws. But first, recent changes to the Massachusetts Department of Elementary and Secondary Education ("DESE") school "accountability system" must be noted. When the plaintiffs in Doe No. 1 filed their claim, DESE classified schools by level.

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176 See sources cited supra note 62 (requiring strong evidence of discriminatory intent, and actual discriminatory impact).

177 See sources cited supra note 62 (revealing federal courts tend to find legitimate governmental purpose for charter school statutes).

178 See Doe No. 1, 95 N.E.3d at 250-59 (providing in-depth clarification of elements required to challenge education laws); see also League of Women Voters of Wash., 355 P.3d at 1141 (striking down charter school act due to unconstitutional funding); Black, supra note 2, at 1416 ("The state's motivations and rationale for its policies are irrelevant if the net result is a failure to provide appropriate educational opportunities. A court might strike down the implementation of a charter system and demand reform in the same way that it has struck down state funding formulas and demanded that they be rewritten. In doing so, courts do not preclude any particular form of school funding or school choice; courts simply demand that the state's chosen policies produce outcomes consistent with the constitution.").

179 See cases cited supra note 94 (listing state level charter school claims attempting to persuade courts with little evidentiary support).

180 See 95 N.E.3d at 250-59 (taking reader through each claim step by step).

181 See id. (outlining required elements of education clause and equal protection claims).

182 See id. (providing "guide" for similar claims).


184 See Doe No. 1, 95 N.E.3d at 249, n.17 (describing Massachusetts' classification of schools based on performance); see also Summary of the Next-Generation District and School
At that time, schools that were ranked level four and five were among the worst performing schools in the state, and therefore were generally considered to provide inadequate levels of education. Since the publication of the Doe No. 1 opinion, however, DESE updated its "accountability system." Instead of assigning a numeric level to each Massachusetts school, DESE will now place each school into one of two general categories: "schools requiring assistance or intervention," and "schools not requiring assistance or intervention." Within each of these two broad categories, a school will also be placed into an "accountability category" depending on its academic performance as evaluated by DESE. There are two accountability categories for schools that "require assistance or intervention": (1) schools "in need of broad/comprehensive support" and (2) schools "in need of focused/targeted support." The "broad/comprehensive support" category falls at the lowest end of the performance spectrum under DESE guidelines, while the "focused/targeted support" category, though still low on the spectrum, requires evidence of stronger academic performance. Of the schools that do not "require assistance or intervention," DESE will place those deemed to have exhibited the highest level of performance in the "schools of recognition" accountability category. The remaining "schools that do not require

Accountability System, supra note 183, at 1 (providing background on Massachusetts' formerly used assessment system).

See id. (briefing school ranking system).

See Summary of the Next-Generation District and School Accountability System, supra note 183, at 1 (explaining Massachusetts' newly implemented school assessment system). This Note does not detail the specific factors that DESE analyzes when assessing school performance, as it is not particularly relevant to this discussion. The summary of Massachusetts' new school classification system is included in the text to provide the reader with the current language associated with Massachusetts school performance. Furthermore, the Note's description of a hypothetical challenge to the constitutionality of Massachusetts charter school laws must use language that is accurate and up-to-date if it is to be realistic and convincing. Thus, an in-depth discussion of the particulars of the Massachusetts' assessment system is not necessary, and the brief overview provided is sufficient for the purpose of this Note.

See Summary of the Next-Generation District and School Accountability System, supra note 183, at 7-8 (defining classifications used for Massachusetts' school assessments).

See id. at 8 (detailing additional categories used to indicate school's performance).

See id. at 7-8 (listing "accountability" categories for "schools requiring assistance or intervention")

See id. at 8 (providing chart summarizing differences between each accountability category); see also Massachusetts' New School and District Accountability System, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC. (2018), http://www.doe.mass.edu/accountability/lists-tools.html (follow "One-Page Summary of Massachusetts' Accountability System – For Parents" hyperlink under "General Information") (showing image of school performance spectrum according to accountability categories).

assistance” will be categorized as either “meeting targets” or “partially meeting targets.”

Though DESE has not analogized these accountability categories to the formerly used numeric levels, for the purposes of the following hypothetical, it seems fair to say that schools deemed to “require assistance or intervention” would likely have been classified as level four or five schools. Thus, assume the hypothetical plaintiff attends a public school in Massachusetts that “requires assistance or intervention,” and thus performs at a level equivalent to the level four and five schools described in *Doe No. 1*. She would like to challenge the constitutionality of Massachusetts charter school funding, asserting that she is not only receiving an inadequate education, but funding initially designated for use by her public school was diverted to charter schools and has inhibited her school’s ability to obtain resources necessary for improvement. Assuming the plaintiff has statistical evidence that the charter school funding has actually contributed to the inadequacy of her school, she may succeed if she follows the path laid by the SJC in *Doe No. 1*.

First, *Doe No. 1* established that the standard for establishing jurisdiction is fairly low. Plaintiff would likely be able to show that an actual controversy existed, as she attends an underperforming school and is claiming that charter school funding impeded her access to an adequate education because it prevented her school from improving academically. Thus, her identifiable interest in obtaining an adequate education is impeded by Massachusetts’ charter school funding scheme. She would likely have

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192 See *Summary of the Next-Generation District and School Accountability System*, supra note 183, at 8 (summarizing “schools of recognition” accountability category).

193 Compare *Summary of the Next-Generation District and School Accountability System*, supra note 183, at 7-8 (outlining when schools will “require assistance or intervention” “schools of recognition” accountability category), with *Doe No. 1*, 95 N.E.3d at 249, n.17 (explaining when school performance would warrant level four or five designation).

194 See sources cited, supra note 193 and accompanying text (comparing updated school assessment system with the previous classification system).

195 See *Black* supra note 2, at 1363 (asserting that charter school funding actually threatens quality of public school education).

196 See *Doe No. 1*, 95 N.E.3d at 250-59 (delineating elements of successful claims).

197 See id. at 251 (confirming both actual controversy and standing are liberally construed).

198 See id. (finding actual controversy existed where access to adequate education was inhibited by statute).

199 See id. at 252 (stating identifiable interest was opportunity to attend Commonwealth charter school).
standing under both the education clause and equal protection provisions of the Massachusetts Constitution. Under the education clause, her injury, an inadequate public education, is within the constitution’s area of concern as it imposes a duty on the state to provide an adequate public education to all children. Under the equal protection principles of the constitution, her injury, like that in Doe No. 1, would be “discrimination in the provision of public education without adequate justification.”

Next, under the education clause, this plaintiff would allege that her assignment to an inadequate school is caused by charter school funding. As explained above, she would likely succeed in proving that she has been deprived of an adequate education, but whether defendants have failed to fulfill their constitutionally prescribed duty to educate is a bit trickier. This plaintiff’s situation is different from that of the plaintiffs in Doe No. 1, as they had no constitutional right to attend a charter school, whereas this plaintiff has a right to attend a constitutionally adequate public school. But, this plaintiff would still have to establish that the Commonwealth’s “extant public education plan does not provide reasonable assurance of an opportunity for an adequate education... over a reasonable period of time.” Under the assumption that she has data to support the contention that charter school funding is actually preventing her school from improving and causing it to remain inadequate, she could argue that as long as the state continues to fund charter schools by reallocating funds from public schools, her school will continue to provide an inadequate education. Thus, it is possible the court could find that under the current funding scheme, there is no reasonable assurance of an opportunity for her to receive an adequate education over a reasonable period of time.

As for the equal protection claim, the plaintiff may argue that the charter school funding method creates two classes of children: those who attend schools with funding sufficient for providing an adequate education,

200 See id. ("A party has standing when it can allege an injury within the area of concern of the statute, regulatory scheme, or constitutional guarantee under which the injurious action has occurred.").

201 See Doe No. 1, 95 N.E.3d at 252 (concluding plaintiffs’ alleged injury fell within area of concern of education clause).

202 See id. (defining plaintiffs’ equal protection injury).

203 See id. at 253 (finding charter school cap caused assignment to inadequate school).

204 See id. (requiring that plaintiff plead facts suggesting deprivation of adequate education and state’s failure to educate).

205 See id. at 255 (stating that there is no right to attend charter schools).

206 See Doe No. 1, 95 N.E.3d at 254 (demonstrating reasonable assurance requirement).

207 See id. (asserting education clause claims cannot succeed if reasonable assurance of adequate education over reasonable time). “[T]here may be moments in time where particular public schools are not providing an adequate education to their students.” Id.
and those who attend failing schools that are unable to improve as a result of charter school funding.\textsuperscript{208} A court would be unlikely to apply strict scrutiny, as education has not been deemed a fundamental right in Massachusetts, and in this case, the charter school funding does not target a suspect class.\textsuperscript{209} However, the plaintiff’s claim may survive rational basis review.\textsuperscript{210} A court would likely find that the governmental purpose for enacting the charter school statute was to create innovative alternatives to the state’s traditional public school system with the hopes of improving the overall quality of public education.\textsuperscript{211} But, this plaintiff’s specific, statistical evidence that charter school funding detrimentally impacts the quality of education that her school can provide, may persuade the court that the degree of harm to the provision of adequate public education outweighs the governmental purpose to be served by the charter school statute.\textsuperscript{212} If the court is persuaded that the plaintiff’s school cannot improve so long as charter schools are allocated funds from public districts, then it would be unlikely to conclude that the governmental purpose transcends the harm it is causing.\textsuperscript{213}

It may not be impossible to successfully challenge charter school legislation, but claims have to be strategic, and evidence has to be grounded in specific facts that leave little to no room for dispute.\textsuperscript{214} Of course, the hypothetical plaintiff may not find the success described in the preceding paragraphs, but she does make a pretty convincing argument.

\textsuperscript{208} See id. at 255 (setting forth plaintiffs’ claim that charter school cap creates two classes of children).

\textsuperscript{209} See id. at 256 (stating strict scrutiny is only appropriate if statute burdens fundamental right or targets suspect class).

\textsuperscript{210} See id. at 257 (conveying that court considers degree of harm caused by statute in addition to state interest).

\textsuperscript{211} See Doe No. 1, 95 N.E.3d at 257 (providing governmental purpose for charter school creation). “The Legislature first created charter schools as laboratories only twenty-five years ago to accomplish purposes such as ‘simulat[ing] the development of innovative programs within public education’ and ‘provid[ing] models for replication in other public schools.’” Id. (alterations in original) (quoting ALM GL c. 71 § 89 (b)).

\textsuperscript{212} See id. (discussing evidence necessary to show significant harm).

\textsuperscript{213} See id. at 257-58 (highlighting consideration of whether statute’s legitimate public purpose transcends harm).

\textsuperscript{214} See Black, supra note 2, at 1425 (“The conceptually and factually more direct challenge to choice programs is that they impede the delivery of constitutionally required public education opportunities. Again, the claim is not that charters or vouchers are per se barred, but that as a practical matter, the state’s statutory structure for choice programs is undermining public education. This claim requires evidence of the precise effects of choice on public education in particular locations.”).
CONCLUSION

Proving to a court that charter school laws are unconstitutional will never be an easy task, but it may be possible. This is a developing area of legislation that inevitably needs some fine tuning, but legal precedent has already revealed some of the adjustments that need to be made. Broad allegations that lack specific evidence will not prevail. However, specific data, actual statistics, and evidence of the impact of specific charter schools on specific public schools all have the potential to change the course of these constitutional challenges. Furthermore, hostile arguments conveying an anti-charter school attitude will not help the cause. Attacking charter schools as an institution may be tempting for those who oppose school choice reform, but for change to occur, more strategic and focused methods must be sought.

Perry Gans