

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

**MEMORANDUM IN SUPPORT OF PROPOSED
DEFENDANT-INTERVENORS' MOTION TO INTERVENE**

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DEFENDANT-INTERVENORS' MOTION TO INTERVENE**

Proposed Intervenor, seven public school students and the New England Area Conference of the NAACP (collectively, the "Movants"), seek to intervene in this action to oppose Plaintiffs' efforts to have the cap on charter schools declared unconstitutional. As the Legislature recognized in setting the cap, diverting funds from traditional public schools to charter schools has a profound impact on the educational opportunities of those students who remain in traditional public schools; this is particularly true for minority schoolchildren, English language learners, and students with disabilities. The interests of these students should be heard in this litigation.

The experience in the Boston Public Schools exemplifies the impact of reduced funding related to charter school expansion. For this school year, Boston sent over \$121 million from its school budget to out-of-district charter schools. The Superintendent of Schools has recently announced that for the next school year the district faces a budget gap of approximately \$50 million, and he has warned families to brace themselves once again for significant cuts to educational services. Individual school budgets will be slashed; class sizes for students with disabilities will increase; and cuts to other much-needed programs are likely. Under the current educational funding system, money diverted to charter schools comes directly out of traditional public school budgets, with direct and negative impacts on students in traditional public schools.

Plaintiffs in this lawsuit are seeking to eliminate the current cap on charters. This would have dire consequences for the tens of thousands of Boston schoolchildren who will remain in district schools. The Intervenor are some of those children. They are also typical of children throughout the state whose needs have not been met in charter schools: English learners with low

levels of English proficiency, children with special education needs, and students of color who are disproportionately disciplined in charter schools.

The Movants satisfy each of the requirements for intervention as of right under Mass. R. Civ. P. 24(a). This motion is timely, as the case is still at the pleading stage. The interests that Movants have in ensuring the integrity of their public education would unquestionably be impaired if Plaintiffs prevail in their effort to have the cap on charter schools declared unconstitutional. Moreover, the existing Defendants will not adequately represent Movants' interests. Several of the Defendants in fact are vocal proponents of lifting the cap and others continue to authorize charter schools that fail to comply with state laws and regulations on special education, school discipline, and services provided to English language learners.

Movants also satisfy the requirements for permissive intervention under Mass. R. Civ. P. 24(b). Movants' claims and defenses share numerous common questions of law and fact with the issues in this litigation, and intervention at this early stage of the litigation will cause no prejudice or delay.

A ruling that invalidated the careful balance set by the Legislature between funding for traditional public schools and for charter schools would have a profound impact on Movants and the other students of color, English language learners, and students with disabilities whom they represent. Intervention should be granted in order to allow the interests of these students to be fully and fairly brought before this Court.

Background

Charter School Funding and Enrollment. 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. G.L. c. 71, § 89(i), 603 C.M.R. § 1.07. The result is that, as the number of charter schools increases,

funding for traditional public schools decreases. Reduced funding for traditional public school districts translates to school closures and cutbacks in student programs and services as districts adjust to changes in enrollment.

Boston Public Schools, the district whose schools Plaintiffs allege are providing a “constitutionally inadequate education,” provides a useful example of the impact of reduced funding related to charter school expansion. In a recent letter to Boston Public Schools families, Boston Superintendent Tommy Chang warned that the district is bracing for \$50 million in cuts for the next school year; is expecting to cut \$10-12 million from individual schools’ budgets and \$20 million from its central office; and plans to increase class sizes for students with disabilities.¹ This year, Boston Public Schools will pay out \$121,858,338 million to the out-of-district charters that serve its residents. <http://www.doe.mass.edu/charter/finance/tuition/fy16/Q2-preliminary-distsum.xlsx>. To help districts like Boston adjust to funding and enrollment reductions, Massachusetts reimburses school districts for some of the funds lost to new and recent enrollments in charters.² However, these reimbursements are subject to appropriation, and the Legislature’s failure to fully fund these reimbursements – this year by less than half of what state law calls for – has led to shortfalls of \$12.2 million in FY 2015 and \$18.6 million in FY 2016. See Mayor Martin J. Walsh’s testimony to the Education Committee, October 13, 2015, cited at <http://www.bostonpublicschools.org/cms/lib07/MA01906464/Centricity/Domain/4/FY17FAQ.pdf>.

¹ See Tommy Chang, Letter to Boston Public Schools Families (Jan. 12, 2016) (available at <http://www.bostonpublicschools.org/site/default.aspx?PageType=3&DomainID=4&ModuleInstanceID=14&ViewID=047E6BE3-6D87-4130-8424-D8E4E9ED6C2A&RenderLoc=0&FlexDataID=9343&PageID=1>).

² See G.L. c. 71, § 89(gg) (providing for 100% of departing students’ per-pupil funding in the first year after departure, then 25% of the departing students’ per-pupil funding for each of the subsequent five years).

In Boston and across Massachusetts, on the whole charter schools are not serving all students equally, particularly higher needs students. As the Office of the State Auditor has found, many charter schools enroll far fewer English language learners, students with disabilities, and low-income students than the districts from which they draw students. Suzanne M. Bump, Office of the State Auditor, *The Department of Elementary and Secondary Education's Oversight of Charter Schools* 50 (2014). Thus, for example, in 2014 there were approximately 54% fewer English language learners (ELLs) at out-of-district charter schools statewide than would be expected if the schools were representative of sending district demographic patterns. *Id.* Boston charter schools enrolled approximately 73% fewer English language learners than would be expected in 2014. *Id.* at 51. Not only do charters enroll far fewer ELL students generally, even those who *are* enrolled in charters are disproportionately those with high levels of English proficiency. For example, in 2015 12% of ELL students in Boston Public Schools had the lowest level of English language proficiency (Level 1); however, in that same year, only 2% of the few ELLs in Boston out of district charters were classified at this beginning level of proficiency.³

Boston's charter schools, and urban charter schools throughout the state, also fail to enroll proportionate numbers of students with disabilities, particularly those with more severe

³ Massachusetts Department of Education, *ACCESS for ELLs 2015 District Results* found at <http://www.doe.mass.edu/mcas/access/results.html>. As required by state and federal laws, Massachusetts assesses ELLs annually to measure their proficiency in reading, writing, listening and speaking English and to measure their progress in learning English. For this purpose Massachusetts uses ACCESS, a standards-based, criterion referenced English language proficiency test to determine their level of need and support. Using ACCESS, ELLs are identified as "Level 1" which is described as "Entering", "Level 2 Emerging", "Level 3 Developing", "Level 4 Expanding", "Level 5 Bridging", and "Level 6 Reaching." According to the Language Classification Recommendations, "[s]tudents performing at Levels 1-3 require significant support to access content area instruction delivered in English." Students at Level 4 "typically require continued language and instructional support to access content area instruction delivered in English. Student at this proficiency level must still remain in the program and be provided services to reach higher levels of English." <http://www.doe.mass.edu/ell/Guidance.pdf>

disabilities. In the 2013-14 school year, Boston's charters enrolled students with disabilities at only about three-quarters of the rate at which Boston's traditional public schools enroll students with disabilities. Massachusetts Association of School Committees, *Who Is Being Served by Massachusetts Commonwealth Charter Schools* 27 (2015). That year, charter schools in Barnstable, Cambridge, Everett, Somerville and Springfield enrolled students with disabilities at a rate roughly two-thirds of their sending districts, and Chicopee, Fall River, Holyoke and Worcester charters enrolled students with disabilities at a rate about half of their sending districts. *Id.* For students with the most severe needs, the discrepancies are even more stark: traditional public schools enrolled twice as many students with autism, those with developmental delays, and students with intellectual disabilities as charters. *Id.*

Charter schools, particularly those in Boston, are also far likelier to suspend students, a problematic practice as suspension predicts school dropout, grade retention, and involvement in the juvenile justice system. See Tony Fabelo et al., The Council of State Governments Justice Center, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (2011); American Academy of Pediatrics Committee on School Health, *Out-of-School Suspension and Expulsion*, 131 *Pediatrics* 1000 (2013). While Massachusetts charter schools enrolled only 3% of the students in Massachusetts in 2012-13, charters accounted for 6% of all disciplinary removals. The Lawyers' Committee for Civil Rights and Economic Justice, *Not Measuring Up: The State of School Discipline in Massachusetts* 8-9 (2014). On average, Massachusetts' charter schools suspended, in-school or out-of-school, 10.7% of their students at least once, almost double the state average (5.6%) that year. *Id.*

Boston's charter schools in particular suspend their students at a far higher rate than Boston Public Schools. While Boston Public Schools' in-school and out-of-school suspension rate was 6.6% in the 2012-13 school year, the in-school and out-of-school suspension rate in Boston-area charter schools was 17.1%. *Id.* That year, one Boston-area charter suspended 59.8% of its students out of school at least once. *Id.* While Boston Public Schools suspended 9.7% of its Black students, 5.4% of its Latino students, and 11.1% of its students with disabilities, the charter suspended 62% of its Black students, 56.6% of its Latino students, and 77% of its students with disabilities out of school at least once. *Id.* The U.S. Departments of Education and Justice have recognized that nationally "racial discrimination in school discipline is a real problem," U.S. Dep't of Justice & U.S. Dep't of Education, *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline* 6 (2014). Students of color and students with disabilities alike would risk greater exposure to harmful educational practices like suspension were the number of Boston-area charters to increase and the number of traditional Boston public schools to decrease as a result.

In light of these and other considerations, six years ago, the Legislature required charter schools to plan for and report on both their recruitment and retention of students with disabilities, English language learners, and other student groups, including those at risk of dropping out, to ensure a "comparable demographic profile" to their sending districts. G.L. c. 71, § 89(e). To date, however, the Board of Elementary and Secondary Education has taken few steps to address charters' noncompliance with state and federal law regarding students with disabilities and English language learners, and it has cited few, if any, charters for their failure to reflect a "comparable demographic profile," despite the overwhelming disparities cited above.

Existing Parties to the Case. Plaintiffs, five students who applied unsuccessfully for enrollment in Boston-area charter schools, filed this action seeking “a declaration that the cap on charter schools violates the Education Clause, as well as the Equal Protection, Due Process, and Liberty Clauses, of the Massachusetts Constitution.” Compl. ¶ 12. Claiming to be informed by research asserting the high quality education offered by Boston-area charter schools, Plaintiffs allege that they have been assigned to Boston Public Schools that are “constitutionally inadequate.” *Id.* ¶ 48. Plaintiffs argue that the cap on the number of charter schools in Boston and statewide is an “arbitrary limit” that “bears no relation to any legitimate educational goal.” *Id.* ¶ 103. Moreover, they allege the cap disproportionately impacts “children in less affluent school districts with failing schools.” *Id.* ¶ 104. As such, Plaintiffs request the cap be declared unconstitutional. Plaintiffs do not address the “constitutional inadequacy” of the education that children who remain in Boston Public Schools would receive were the cap lifted.

Representing the Defendants, the Massachusetts Attorney General moved to dismiss the case. As Boston has yet to reach its cap on either out-of-district (“Commonwealth”) or in-district (“Horace Mann”) charter schools, the Attorney General argues that there is no actual controversy warranting declaratory judgment. Mot. to Dismiss at 14. Moreover, the Attorney General contends that, because the cap has not yet been reached in Boston or statewide, the Plaintiffs have not yet been injured and therefore lack standing. *Id.* at 2. The Attorney General argues that the Plaintiffs do not allege a systemic deprivation of the right to education protected by the Massachusetts’ Education Clause, and that the Education Clause itself allows only the legislature, and not the court, to offer the remedy the Plaintiffs seek. *Id.* at 3. The Attorney General notes that “less affluent” school districts are not a suspect class warranting heightened scrutiny. *Id.* Finally, the Attorney General argues that the cap on charters is not an arbitrary

barrier to education but instead is rationally related to legitimate state interests, such as funding all schools. *Id.*

Summary of Movants' Position

Movants are students of color, students with disabilities, and English language learners attending traditional public schools, together with an organization that represents similarly situated students, whose educations are benefitted by the presence of G.L. c. 71, §89(i), the cap on charter schools. Movants wish to intervene as Defendant-Intervenors to defend the constitutionality of the cap and protect the quality of their educations.

While the subject of charter schools has been hotly debated in the Massachusetts Legislature and the media, to the Movants, the cap on charter schools serves a straightforward purpose: As per-pupil funding follows each student from a school district to a charter school, the cap helps ensure that there is enough funding left in districts to offer proper educational services to all students remaining in traditional public schools. To the Movants, eliminating the cap will undoubtedly weaken the educational offerings for Movants and their peers in traditional public schools.

In particular, as students of color, students with disabilities, and English language learners, Movants represent the groups of students who are most likely to be harmed by declaring the cap unconstitutional. As charters fail to recruit and retain these groups in a proportionate manner to their sending districts, eliminating the cap would contract, rather than expand, the number of quality educational offerings from which Movants and those like them can choose. This could only serve to exacerbate educational disparities in Boston and other larger districts, where budget shortfalls are already causing cuts to particular services for students with disabilities, English language learners, and other under-served groups.

Movants have long endeavored to secure a quality education for themselves, their children, and their constituents. They are hardly cheerleaders for the Boston Public Schools. Moreover, Movants do not doubt that some students may be receiving quality educations in some charter schools. However, Movants seek solutions that will improve the quality of education for all students in the Commonwealth. To Movants, removing the cap, and defunding school districts in the process, simply will not meet that goal.

Description of the Proposed Intervenors

Savina Tapia is a biracial, Latina and Asian-American student attending Boston Latin Academy, a Boston Public School. Savina's school is slated to lose \$500,000 from its budget next school year. Savina believes that lifting the cap will lead to further reductions in funding for her school, resulting in cuts to student support services as well as arts and language programs and staffing. Prior to attending Latin Academy, she attended Roxbury Preparatory Charter School, but chose to leave in part because the school did not adhere to her Individualized Education Plan.⁴ She serves as the student representative on the Boston School Committee.

Samuel Ding is a Chinese-American senior at Boston Latin School. Sam's school is slated to lose \$700,000 from its budget next year. Sam believes that lifting the cap will result in additional cuts to his school's budget. Sam believes that fewer funds will mean fewer teachers and, as a result, less support and attention for individual students. Sam is also concerned that fewer funds will result in fewer electives that encourage students to push themselves in different ways. Sam serves on the Education Committee of the Mayor's Youth Council and served on the transition team for Boston Public Schools Superintendent Tommy Chang.

⁴ An Individualized Education Plan ("IEP") is developed for students with disabilities receiving services under the Individuals with Disabilities Education Act, 42 U.S.C. §§ 1400 et seq.

N.H.⁵ is an African-American student attending Boston Tech Academy. N.H. appreciates the exposure to technology her school offers. N.H. believes that, were the cap to be declared unconstitutional, class sizes at Tech, which she has seen increase since enrolling, would become too large and overcrowded, thus diminishing teachers' ability to work closely and effectively with their students.

Z.L. is a 6-year-old grade 1 student of Chinese ancestry who attends the Edison School in the Allston/Brighton neighborhood of Boston. Z.L. was initially identified by the Newcomer Assessment Center of Boston Public Schools as limited English proficient (LEP), and is currently identified as a Level 1 student on the ACCESS test administered by the Edison School. As a Level 1 student, Z.L. needs Structured English Immersion (SEI) Chinese language specific services that are provided at the Quincy Elementary School where he was denied admission in September 2014 because of a lack of available seats. Z.L.'s language needs are so significant that during his first two months at the Edison School, he had to communicate with staff by signing one finger for bathroom, two for water. The Edison School lacks SEI Chinese language specific services and supports available at the Quincy School, including a bilingual principal, a bilingual teacher, and other bilingual staff. He and his parents are taken away from the Chinese community to a different cultural environment where the school administrators, teachers, and other support staff constructively exclude Z.L.'s parents from the life of the school and from participation in their son's educational program.

A.Q. is a three and one half year old child with limited English proficiency. His parent has unsuccessfully sought to find and enroll him in a K0 SEI program for which he is age eligible. Because of limited funding, BPS offers only a limited number of K0 classrooms which

⁵ Proposed intervenors ask the Court to allow those proposed intervenors who are minors to be identified by their initials only.

are oversubscribed with lengthy waitlists, and A.Q.'s parents were therefore unable to find him an appropriate program.

T.K. is a 7-year-old grade 1 student of Chinese ancestry who has attended the Quincy School in the Chinatown neighborhood of Boston since 2014. T.K. was initially identified by the Newcomer Assessment Center of Boston Public Schools with limited English proficiency, and is currently assessed as a Level 1 student. T.K. is also a child with autism who needs special education and related services to address her multiple disability related educational needs, based on her Individualized Education Program (IEP). Despite significant communication and behavior challenges, and her being a Level 1 student who clearly is in need of SEI Chinese language specific services that are available at the Quincy Elementary School, T.K. was initially placed in Kindergarten at the Jackson Mann School which lacked the Chinese SEI services she requires. Although subsequently she was permitted to enroll at the Quincy school where some SEI Chinese language specific services are available, because of lack of funding, T.K. is placed in a substantially separate classroom and does not receive adequate special education instruction.

B.H. is a 14-year-old grade 8 student of Chinese ancestry with cerebral palsy who is non-ambulatory and non-verbal, with significant developmental disabilities. He has attended the Carter School in the South End neighborhood of Boston that serves only students with disabilities since 2014. B.H. was initially identified as having limited English proficiency (LEP), and he is currently a Level 1 student as determined by the Carter School's assessment. As a Level 1 student, B.H. needs SEI Chinese language specific services of the type that are available at the Quincy School. Because he is non-verbal and his home language is Chinese, B.H. also needs SEI Chinese language specific services provided by qualified special education personnel. He is denied this SEI Chinese language specific services and supports because neither the Carter

School nor any other BPS program appropriate to meet his needs employs Chinese speaking qualified special education teachers or paraprofessionals. As a result, B.H. attends a school that does not meet his Chinese language based needs as either a Level 1 student or a student who is non-verbal. B.H. is isolated by BPS's inability to provide him Chinese SEI language specific services to help address his language deficit and his disability. He and his parents are taken from the Chinese community to a different cultural environment where the administrators, classroom teachers, support staff and other parents do not include his parents from the life of the school or from participation in their son's education program.

New England Area Conference, National Association for the Advancement of Colored People is a non-profit organization whose mission is to work within the states of Rhode Island, Massachusetts, New Hampshire, Maine and Vermont to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. The organization includes members whose children attend traditional public schools in the Commonwealth, and it has, as part of its mission, long sought to ensure equal educational opportunity for all schoolchildren throughout the Commonwealth.

Argument.

I. MOVANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Massachusetts Rule of Civil Procedure 24(a)(2) provides that upon timely application, intervention shall be allowed as of right:

when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Movants satisfy each of Rule 24(a)'s requirements for intervention as of right.

A. The Motion to Intervene is Timely.

For motions to intervene, timeliness depends on “whether the applicant had the opportunity to intervene at an earlier stage of the litigation, whether the delay engendered by the intervention at a particular stage of the litigation will prejudice existing parties, and the applicant's particular need to intervene.” *Corcoran v. Wigglesworth Mach. Co.*, 389 Mass. 1002, 1003 (1983). With this case still at the pleading stage, there has been no earlier opportunity for Movants to intervene. On November 13, 2015, Defendants filed a motion to dismiss under Mass. Super. Ct. R. 9A, less than two months after Plaintiffs filed their complaint. Plaintiffs and Defendants agreed to a briefing schedule on the motion to dismiss that will not be complete until February 19, 2016, and no hearing on the motion has yet been scheduled. Plaintiffs have not moved for preliminary relief, and no discovery has been conducted.

Because this case is still in its earliest stages, intervention will not prejudice the existing parties. Indeed, the courts have granted intervention as of right even where proceedings were much more advanced. *See Cruz Mgmt. Co. v. Thomas*, 417 Mass. 782, 786 (1994) (finding post-judgment motion to intervene timely). Moreover, the parties have yet to engage in any discovery. *See, e.g., Cosby v. Dept. of Soc. Services*, 32 Mass. App. Ct. 392, 395 (1992) (finding a labor union’s motion to intervene as timely because “[t]he trial on the underlying action had not yet commenced, nor...had the parties engaged in extensive discovery”).

B. Movants Have A Direct Interest in Public School Funding.

In order to intervene as of right, an applicant must possess “an interest relating to the property or transaction which is the subject of the action.” Mass. R. Civ. P. 24(a)(2). That “interest...must be ‘significantly protectable,’ and it must be sufficiently direct and immediate to justify intervention.” *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 471 Mass. 465, 484 (2015) (internal quotations omitted). An asserted interest is assessed through a case-specific

inquiry. *Id.* Where a public interest is implicated, the ‘interest’ requirement is assessed more leniently. *Id.* at 823.

Here, Movants’ interest is “significantly protectable” to allow for intervention. Massachusetts students have a constitutional “right to a public education.” *Mancuso v. Massachusetts Interscholastic Athletic Ass’n*, 453 Mass. 116, 125 (2009) (citing *McDuffy v. Secretary of Executive Office of Educ.*, 415 Mass. 545, 621 (1993)). While this constitutional right is collective, and not an individual right (*i.e.*, a student can forfeit the right by individual misbehavior), *Doe v. Superintendent of Schools of Worcester*, 421 Mass. 117, 129-30 (1995), where a state accords such a constitutional right, the U.S. Supreme Court has held that students have a property interest in it. *Mancuso*, 453 Mass. at 124-25 (citing *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975)).

Likewise, Movants’ interest in this case is direct and immediate. Charter schools are funded by the school districts from which they draw their students. 603 C.M.R. § 1.07. The result is that, as charter schools increase, funding for traditional public schools decreases even further. Given how supportive Defendants Peyser and Sagan are of charter school expansion, eliminating the cap on charter schools would be likely to result in charter school expansion in Boston and elsewhere in the Commonwealth. Reduced funding for traditional public school districts translates to school closures and cutbacks in student programs and services as the district adjusts to changes in enrollment. Such significant changes directly impact the educations that Movants and similarly-situated students receive. This is especially true given charters’ failure to enroll English language learners and students with disabilities at rates proportionate to their sending districts.

Because Movants' interest implicates the public interest, it is particularly clear that the "interest" requirement has been met here. *Bridgeman*, 471 Mass. at 484. Funding of public education is undoubtedly a matter of public interest in Massachusetts. As the Supreme Judicial Court has observed, Massachusetts' constitutional duty to educate its students implicates interests that go to the very core of democracy; it "is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts" *McDuffy*, 415 Mass. at 607. Given the paramount importance of education in Massachusetts, the "interest" requirement here is more than amply met.

C. Movants' Interests Would Be Impaired If Plaintiffs Prevail.

In order to intervene of right, Movants must also be "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest." Mass. R. Civ. P. 24(a)(2). If Plaintiffs prevail and the charter cap is lifted, financial resources will be diverted from the traditional public schools that Movants currently attend. As the Supreme Judicial Court noted, "fiscal support, or the lack of it, has a significant impact on the quality of education each child may receive." *McDuffy*, 415 Mass. at 552. The cutbacks in funding for traditional public schools will negatively affect the quality of Movants' education, risking reduced school programming, staffing, and operations as well as the possibility of school closure. This reduction in funding will also harm Movants' particularized interests in different ways:

- For Movants who are **English language learners (ELLs)**, invalidating the charter school cap will likely result in more charter schools; as noted above, charter schools as a whole serve far fewer ELL students -- and in particular far fewer ELL students with lower levels

of English proficiency -- when compared to their sending districts.⁶ Moreover, for ELL students remaining in traditional public schools, the diversion of funds will decrease those schools' capacity to provide dual immersion or sheltered English immersion classes taught by qualified teachers, including special educators and paraprofessionals who speak their native language. Of particular concern are English language learners with the least English proficiency, often newcomers to the United States, who require intensive English language development and other assistance from trained educators. These students are rarely enrolled in charter schools, and few urban charters provided the Sheltered English Immersion programs in the specific languages that the law requires. See note 3, *supra*. For Movants such as Z.I. and T.K., less funding for Boston Public Schools reduces the likelihood of hiring more school staff and teachers who can speak and understand Chinese or of expanding K1 classes in schools that are meeting such needs for Chinese-speaking families.

- For Movants who are **students with disabilities**, disposition of this case in favor of the Plaintiffs will similarly mean more charter schools which, as a whole, do not proportionately enroll students with disabilities, and disproportionately suspend those who do enroll. Moreover, the diversion of funds to charter schools will limit traditional public schools' capacity to provide Movants improved specialized instruction and services that they can benefit from. Of particular concern are the students with more

⁶ English language learners are identified by levels of English proficiency, with "Level 1" described as "Entering," "Level 2 Emerging," "Level 3 Developing," through six levels in total. According to Massachusetts' Language Classification Recommendations, "[s]tudents performing at Levels 1-3 require significant support to access content area instruction delivered in English." Massachusetts Department of Education, *Guidance on Identification, Assessment, Placement and Reclassification of English Language Learners*, August 2015, at 21. www.doe.mass.edu/cell/Guidance.pdf. As noted in footnote 2, the 2015 results of the Commonwealth's English Language Proficiency test, the ACCESS test, shows that while 12% of Boston Public Schools ELLs are at the lowest entry level of English proficiency, only 2% of the few ELLs in Boston out-of-district charters are beginners. <http://www.doe.mass.edu/mcas/access/results.html>.

severe disabilities, who need specialized instruction and a broad array of services, including physical and occupational therapy, behavioral regulation supports, and assistive technologies provided by qualified special educators. Due to funding cuts, in part from charter school enrollment, these students are already expecting to see their class sizes increased in Boston Public Schools. Like ELL students, these students with disabilities will find fewer educational options at charter schools given charters' failure to serve students with disabilities at rates proportionate to their sending districts.

- For Movants - and constituents of Movants - who are **students of color**, resolving this case in favor of the Plaintiffs increases the likelihood that Movants would attend a charter school that suspends students of their race at a rate far higher than those in Boston's traditional public schools, and, as a result, puts Movants at a far greater risk of grade retention and dropping out. Moreover, Boston's students of color 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. 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 reopened with substantially similar student populations. Citizens for Public Schools, *Twenty Years After Education Reform* 82 (2013).

Funding for education is limited, and is being spread across the equivalent of two public school systems in Boston: traditional and charter. When funds are directed away from the traditional schools serving students of diverse needs and channeled to charter schools focused on enhancing performance outcomes for the few, the implications are harsh for those left behind in traditional public schools. These harms are felt most acutely by the discrete student groups that

Movants represent, who feel the impact of reduced funding on their educations and see few viable alternatives in their city's charter schools. Declaring the cap unconstitutional only exacerbates these harms.

D. Defendants Do Not Adequately Represent Movants' Interests

If, as here, intervention is sought in a timely manner and the action may impair the proposed intervenors' ability to protect their interests, then intervention must be granted "unless the applicant's interest is adequately represented by the existing parties." Mass. R. Civ. P. 24(a)(2). No current party represents the particularized interest of Movants in ensuring the educational interests of minority schoolchildren, English Language Learners, and students with disabilities. Intervention is therefore proper here. *Bridgeman*, 471 at 465.

The Supreme Judicial Court has emphasized that analyzing adequacy of representation is necessarily case-specific, but that "[i]f the interest of the absentee is not represented at all, ..., then he is not adequately represented" and that "if his interest is similar to, but not identical with that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that a party will provide adequate representation...." *Mayflower Development Corp. v. Town of Dennis*, 11 Mass. App. Ct. 630, 636-37 (1981) (quoting 7A Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* §1909, 524 (2d. ed. 1987)). Here, Movants' particularized interests are not currently represented; to the extent these interests could be viewed as "similar to" the broad public interest that the Attorney General is asserting, it is far from "clear" that existing representation is adequate given the unique circumstances of this case.

Most notably, the most prominent named Defendants have explicitly stated their support for Plaintiffs' goal of lifting the charter cap. Secretary of Education James A. Peyser, the lead Defendant, is a nationally recognized proponent of charter schools, having led a 2009 ballot

initiative petition drive that resulted in raising the cap legislatively in 2010. Jonathan Schorr, *New Schools Venture Fund Managing Partner Jim Peyser Named to National Charter Schools Hall of Fame* (2011) available at <http://www.newschools.org/news/newschools-venture-fund-managing-partner-jim-peyser-named-to-national-charter-schools-hall-of-fame>. Similarly, Paul Sagan, the Chair of the Board of Elementary and Secondary Education and the second named Defendant, has served as the chairman of Massachusetts Business Leaders for Charter Public Schools and, in a 2013 *Boston Globe* op-ed, exhorted the Legislature to pass legislation lifting the cap. Barry Finegold and Paul Sagan, *Lift the Charter School Cap*, *Boston Globe*, Apr. 30, 2013.

Moreover, the remaining Defendants are appointed by the Governor, himself a noted proponent of the relief that Plaintiffs seek here. Shira Schoenberg, *Gov. Charlie Baker Gives Strong Support to Lifting Charter School Cap*, *MassLive* (Sept. 22, 2015) available at http://www.masslive.com/politics/index.ssf/2015/09/gov_charlie_baker_gives_strong.html. In addition, the body that they govern, the Board of Elementary and Secondary Education, has an unfortunate history of granting and renewing charters without adequately ensuring that charters are not unfairly excluding minority schoolchildren, English Language Learners, and students with disabilities. For these reasons, none of the Defendants will adequately represent Movants' interests here.

The Attorney General has filed a motion to dismiss and indicated her office's opposition to the lawsuit, apparently acting under her common law duty to protect the public interest. *Sec'y of Admin. & Fin. v. Attorney Gen.*, 367 Mass. 154, 163 (1975). Even that interest, however, is much different than the more particularized interest sought to be protected by Movants here. *See Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349 (9th Cir. 1974) (parents of children

of Chinese ancestry allowed to intervene in lawsuit, despite school committee's duty to represent all parents, to oppose a school district plan). Moreover, the fact that this representation is undertaken in direct conflict with the stated positions of many of the named Defendants makes the adequacy of representation of Movants' interests particularly tenuous.

II. MOVANTS ARE ENTITLED TO PERMISSIVE INTERVENTION

A party may permissively intervene "when an applicant's claim or defense and the main action have a question of law or fact in common." Mass. R. Civ. P. 24(b)(2). In deciding whether to allow a party to permissively intervene "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the original parties." *Id.*; *Mass. Fed'n of Teachers, etc. v. Sch. Comm. of Chelsea*, 409 Mass. 203, 209 ("Permissive intervention is wholly discretionary with the trial court") (quoting *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191-92 (2d Cir. 1978)).

Movants' claims that raising the cap will funnel existing resources away from traditional public schools with serious negative consequences for them and thousands of students who are disproportionately excluded from charter schools, raise common questions of law and fact with both Plaintiffs' claims and Defendants' anticipated responses. Further, Movants, due to their perspectives as student leaders, ELLs, and students with disabilities, possess a unique understanding of districts' capacity to provide proper instructional resources and support to them and their peers based on the current charter school cap, and can provide insight as to the effects of eliminating the cap. Accordingly, for the reasons stated above, Movants should be allowed to permissively intervene in this litigation.

Conclusion.

For these reasons, the Court should grant the Movants' Motion to Intervene.

Respectfully submitted,

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