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# CONSTITUTIONAL LAW—THE DIVERSION OF PUBLIC EDUCATIONAL FUNDS TO CHARTER SCHOOLS: CONSTITUTIONAL IMPLICATIONS IN MASSACHUSETTS

*Kaitlin Pomeroy-Murphy\**

*Throughout the country, charter schools have been advanced as the solution to the nation's failing educational system. In almost every state, charter school laws have been enacted and charters established as an alternative educational option to public schools. However, great controversy surrounds whether charter schools have positively contributed to the public educational system, and whether they should truly be considered public schools at all. Due to this, various states around the country have seen constitutional challenges to their individual charter school statutes. This Note examines the charter school funding schematic and its negative consequences on public schools, specifically in the Commonwealth of Massachusetts. This Note argues that Massachusetts case law serves as a foundation for a constitutional challenge to charter school funding within the state, as charter schools effectively deny public school students their established state right to an adequate education as a result of their diversion of public school funding.*

## INTRODUCTION

Education is “the lifeblood of a free people,”<sup>1</sup> and as such, public education is a bedrock of American society. The American public educational system was designed to ensure that every child in the United States would receive the education and skills necessary to become a productive and positive member of society.<sup>2</sup> Despite this intention,

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\* Candidate for J.D., Western New England University School of Law, 2018. I would like to thank Dean Beth Cohen for her time and guidance throughout the drafting phase of this Note, as well as my colleagues on the *Western New England Law Review* for their efforts in producing this piece over the last year. I would also like to extend a very special thank you to my family, for being my source of inspiration and for willingly reading my numerous number of drafts along the way.

1. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 550 (1992).

2. Richard D. Kahlenberg, Opinion, *Public Schools Have a Public Purpose*, N.Y. TIMES (Jan. 24, 2012), <http://www.nytimes.com/roomfordebate/2012/01/24/should-parents->

public schools throughout the nation have been failing to sufficiently educate children for some time.<sup>3</sup> During the past twenty years, in response to America's educational crisis, various educational trends have spread throughout the nation,<sup>4</sup> and numerous reforms have been implemented by presidential administrations.<sup>5</sup> However, these measures have in fact been "either irrelevant or destructive of [public] education."<sup>6</sup> Charter schools are the latest educational reform idea to sweep the nation.

Charter schools were designed to complement and bolster the public educational system,<sup>7</sup> and to do so, state governments have granted them independence and autonomy in educational objectives.<sup>8</sup> To sustain their existence, charter schools generally siphon money from state public school districts.<sup>9</sup> The exact way charter schools are funded, however, is governed by state law and thus varies from state to state.<sup>10</sup> This diversion in funding charter schools makes the problems currently

control-what-kids-learn-at-school/public-schools-have-a-public-purpose  
[<http://perma.cc/78L3-6UPE>].

3. See generally John Hood, *The Failure of American Public Education*, FOUND. FOR ECON. EDUC. (Feb. 1, 1993), <https://fee.org/articles/the-failure-of-american-public-education/> [<http://perma.cc/R3QK-6HU9>] (discussing the various ways in which public education in the United States has been deteriorating since the mid-twentieth-century).

4. See Sharon Hartin Iorio & M.E. Yeager, *School Reform: Past, Present and Future*, WICHITA ST. U. 23–24 (July 25, 2011), <http://webs.wichita.edu/depttools/depttoolsmemberfiles/COEdDEAN/School%20Reform%20Past%20Present%20and%20Future.pdf> [<http://perma.cc/TN37-KEA5>] (illustrating that these trends include an increase in parents choosing to homeschool their children, or send them to private, for-profit institutions).

5. See *id.* at 24–27 (discussing these implemented reforms, including the expansion of "school choice" options for parents, the Goals 2000: Educate America Act enacted during the Clinton administration, and the No Child Left Behind Act enacted by President George W. Bush in 2002).

6. Hood, *supra* note 3.

7. *Facts About Charters*, NAT'L ALL. FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/get-the-facts/public-charter-schools/faqs/> [<https://perma.cc/ZCZ8-TH35>] (explaining that the purpose of charter schools is to allow educators to "raise the bar for what is possible in public education."); see also *Charter Schools Should Be Seen as Complements, Not Threats*, TWIN CITIES PIONEER PRESS (Mar. 28, 2017, 11:01 PM), <http://www.twincities.com/2007/03/28/charter-schools-should-be-seen-as-complements-not-threats/> [<http://perma.cc/DHP7-NXMT>].

8. William Haft, *Charter Schools and the Nineteenth Century Corporation: A Match Made in the Public Interest*, 30 ARIZ. ST. L.J. 1023, 1034–35 (1998).

9. Carol Burris, *Do Charters and Vouchers Hurt Public Schools? The Answer is "Yes,"* THE NETWORK FOR PUB. EDUC. (Jan. 23, 2017), <https://networkforpubliceducation.org/2017/01/charters-vouchers-hurt-public-schools-answer-yes/> [<https://perma.cc/C3TM-7LEW>].

10. *Just the FAQs—Charter Schools*, CTR. FOR EDUC. REFORM, <https://www.edreform.com/2012/03/just-the-faqs-charter-schools/> [<https://perma.cc/B2Z4-DJZS>].

present within public schools—such as inadequate educational quality, underperformance, and failing facilities—more difficult to remedy as a result of the loss of monetary resources.<sup>11</sup> Consequently, it is no surprise that “[c]harter schools are one of the most debated . . . phenomena in American education” today.<sup>12</sup>

Charter school opponents have become visible throughout the country in an attempt to draw attention to the pitfalls of charter schools.<sup>13</sup> Nowhere has the charter school debate been more pronounced than in Massachusetts.<sup>14</sup> Like many other states around the country, school districts throughout Massachusetts are suffering direct losses due to the diversion of educational funding to charter schools.<sup>15</sup> This loss of funding greatly contributes to the public school districts’ inability to provide students with a sufficient education,<sup>16</sup> a constitutional right under the Massachusetts Constitution.<sup>17</sup>

Charter school funding has been challenged in courts throughout the country for violating state constitutions.<sup>18</sup> Such challenges had generally been rejected until 2015, when the Washington Supreme Court struck down the state’s Charter School Act, holding that the funding portion of the Act was inconsistent with the state constitution’s educational funding

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11. See generally Jeff Bryant, *Starving America’s Public Schools*, OURFUTURE.ORG, <https://ourfuture.org/report/starving-america-s-public-schools> [<https://perma.cc/MS4R-CJ48>] (discussing how meager budgets negatively affect the quality of public education, and how transferring funding to charter schools exacerbates the problem).

12. PAUL T. HILL ET AL., *CHARTER SCHOOLS AND ACCOUNTABILITY IN PUBLIC EDUCATION* 1 (2002).

13. See Margaret E. Raymond, *A Critical Look at the Charter School Debate*, EDUC. WEEK (Mar. 27, 2014), [http://www.edweek.org/ew/articles/2014/02/01/kappan\\_raymond.html](http://www.edweek.org/ew/articles/2014/02/01/kappan_raymond.html).

14. See Rachel Slade, *The Great Charter Schools Debate*, BOS. (Aug. 28 2016, 5:45 AM), <http://www.bostonmagazine.com/news/article/2016/08/28/charter-schools-debate/> [<https://perma.cc/JPL7-J79B>] (discussing the great debate over Question 2 on the ballot in the election of November 2016, which proposed abolishing the charter school cap in Massachusetts).

15. See PROJECTED FY17 SENDING DISTRICT TUITION PAYMENTS TO COMMONWEALTH CHARTER SCHOOLS, MASS. TCHRS. ASS’N, <https://massteacher.org/current-initiatives/-/media/c468519eefab4f9c9d68390888a9a5a2.ashx> [<http://perma.cc/6KS9-G239>].

16. See *infra* Part IV.

17. See generally MASS. CONST. pt. II, ch. 5, § 2; *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993).

18. Preston C. Green III et al., *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303, 305–13 (2013).

clause.<sup>19</sup> This Note will argue that charter school funding is in violation of the Massachusetts Constitution, and that an avenue to challenge charter school funding in Massachusetts exists under state precedent.

This Note will first provide an overview of charter schools and the controversy that surrounds them, including the constitutional challenges that charter schools have faced in different states. Part II will examine the current state of the Massachusetts public school system, and how charter schools fit into the existing system. Part III will assess the reasoning of the Washington Supreme Court case that deemed the state's charter school funding scheme unconstitutional, and determine whether a challenge in Massachusetts could follow under similar logic. Finally, in Part IV, this Note addresses whether a constitutional challenge to charter school funding could be brought under existing case law in Massachusetts, which affirms that students within the state are entitled to a sufficient education.<sup>20</sup>

### I. CHARTER SCHOOLS WITHIN THE UNITED STATES TODAY

The first charter school law was passed in Minnesota in 1991, and the first charter school was established and opened there the following year.<sup>21</sup> Since the early 1990s, charter school laws have been enacted in a total of forty-two additional states across the country, as well as in the District of Columbia.<sup>22</sup> Charter schools are independently run, publicly funded educational institutions that are free from the control of local school districts.<sup>23</sup> Charter schools operate under a "charter," which is "essentially a contract entered into between the school and its authorizing agency," typically the state.<sup>24</sup> The charter provides the school "significant operational autonomy to pursue specific educational objectives," such as curriculum choice and control over staff and budget

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19. *League of Women Voters of Wash. v. State*, 355 P.3d 1131, 1141 (Wash. 2015).

20. *See McDuffy*, 615 N.E.2d at 554–55.

21. Suzanne E. Eckes & Jonathon A. Plucker, *Charter Schools and Gifted Education: Legal Obligations*, 34 J.L. & EDUC. 421, 422 (2005).

22. *See Charter Schools-How Is the Funding for a Charter School Determined?*, EDUC. COMM'N OF THE STATES (Jan. 2016), <http://ecs.force.com/mbdata/mbquestNB2?rep=CS1521> [<https://perma.cc/H8AR-SUSP>].

23. *See Charter Schools in the States-A Series of Briefs*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/education/charter-schools-in-the-states.aspx> [<https://perma.cc/HW4V-XM52>].

24. *What is a Charter School?*, NAT'L CHARTER SCH. RES. CTR., <https://www.charterschoolcenter.org/what-is-a-charter-school#7.2>. [<https://perma.cc/P684-G7F6>].

decisions.<sup>25</sup> Charter schools were created with the intention of closing the achievement gap,<sup>26</sup> as well as to give parents a “choice” in where and how their children are educated.<sup>27</sup>

A. *Charter Schools—Private Institutions Sustained with Public Funding*

Despite the notable differences in freedom and autonomy from state and local rules between charter and public schools, in most states charter schools have been deemed an extension of the public school system.<sup>28</sup> However, despite this classification, whether charter schools are truly an extension of the public school system is a topic of great debate.<sup>29</sup> In August 2016, the National Labor Relations Board held in two separate cases<sup>30</sup> “that . . . charter schools are not public schools but private corporations.”<sup>31</sup> Despite the fact that, like public schools, charter schools are “tuition-free, open-enrollment institutions funded primarily with tax dollars,” charters are also run by internally appointed boards and officials, or nonprofit or for-profit corporations, which “are run by unelected boards that are unaccountable to voters.”<sup>32</sup> The two cases held that charter schools, like other government contractors, were comparable to “private corporations that receive taxpayer dollars”; thus, the schools must allow their teachers to unionize under the National Labor Relations

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25. *Id.* In Massachusetts and most other states, charter schools are allowed the freedom to “organize around a core mission, curriculum, theme, and/or teaching method” without interference or input from any school committee, as well as “control its own budget and hire (and fire) teachers and staff.” MASS. DEP’T ELEMENTARY & SECONDARY EDUC., QUESTIONS AND ANSWERS ABOUT CHARTER SCHOOLS 1 (May 2015), <http://www.doe.mass.edu/charter/new/2015-2016QandA.pdf> [<https://perma.cc/N5CA-FDH8>].

26. *See Facts About Charters*, *supra* note 7.

27. *See Just the FAQs—Charter Schools*, *supra* note 10.

28. *See What is a Charter School?*, *supra* note 24.

29. *See* Emanuella Grinberg & Aaron Kessler, *Charter Schools Controversy Will Only Grow Under DeVos*, CNN (Feb. 7, 2017, 3:28 PM), <http://www.cnn.com/2016/12/22/politics/charter-schools-controversy-enrollment-trump/index.html> [<https://perma.cc/EM95-RKLX>] (discussing how the current Secretary of Education, Betsy DeVos, considers charter schools to be an extension of the public school system, but there are many critics who oppose this view).

30. *See generally* Pa. Virtual Charter Sch. & Pa. Virtual Charter Educ. Ass’n, 364 N.L.R.B. 87 (2016); Hyde Leadership Charter Sch.—Brooklyn Fed’n, 364 N.L.R.B. 88 (2016).

31. Emma Brown, *National Labor Relations Board Decides Charter Schools Are Private Corporations, Not Public Schools*, WASH. POST (Aug. 30, 2016), <https://www.washingtonpost.com/news/education/wp/2016/08/30/national-labor-relations-board-decides-charter-schools-are-private-corporations-not-public-schools/> [<https://perma.cc/T9DA-MNZR>].

32. *Id.*

Act, which applies to employees in the private sector.<sup>33</sup> Interestingly, under Massachusetts law, charter schools are granted all the “powers available to a business corporation” upon the issuance of a charter.<sup>34</sup> The characteristics of charter schools, as well as the power they are granted by law, raise issues as to their “publicness,” and force us to question whether public educational funds should really be diverted for the establishment and maintenance of charter schools.

Further, charter schools are not, in fact, open to all students in a way comparable to public schools.<sup>35</sup> Charter schools have a limited number of seats available for students.<sup>36</sup> When there are more students who want to attend than seats available, charter schools are required to hold lotteries for admittance.<sup>37</sup> Though pro-charter school organizations claim that charter schools do not “cherry-pick” their applicants,<sup>38</sup> reports from different states around the country have discovered that some charter schools actually do handpick students—typically “from the most affluent families.”<sup>39</sup> The motivating factor is competition between the public schools, as it is well known that “[e]conomic advantage is the key to academic advantage” and achievement.<sup>40</sup> Students from wealthier families are known to do better academically, typically as a result of the increased opportunities and resources that money can buy.<sup>41</sup> Due to the

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33. *Id.*

34. MASS. GEN. LAWS ch. 71 § 89(k)(8) (2017).

35. See *Charter Schools*, MASS. TCHRS. ASS’N, <https://massteacher.org/current-initiatives/charter-schools> [<https://perma.cc/2ZAU-HH6X>] (stating that “[m]ost charters fail to serve as many high-need students as their host districts, creating separate and unequal conditions for success.”).

36. See NAT’L ALL. FOR PUB. CHARTER SCHS., CHARTER SCHOOL MYTHS VS. FACTS, [http://www.publiccharters.org/wp-content/uploads/2016/03/myths\\_facts-KM\\_030416.pdf](http://www.publiccharters.org/wp-content/uploads/2016/03/myths_facts-KM_030416.pdf) [<https://perma.cc/7K88-HRSX>].

37. *Id.*

38. *Id.*

39. Jac Wilder VerSteeg, Opinion, *Cherry-Picking Charter Schools Promote Stealth Segregation*, SUNSENTINEL (May 28, 2015, 5:34 PM), <http://www.sun-sentinel.com/opinion/commentary/fl-jvcol-oped0529-20150528-column.html> [<https://perma.cc/L7PD-V6GU>]; see also Alexa Chrysosovergis, *Northampton Study: Charter School Families Well-to-Do, Highly Educated*, DAILY HAMPSHIRE GAZETTE (Aug. 4, 2016), <http://www.gazettenet.com/New-report-sheds-light-on-socio-economic-status-of-charter-school-students-from-Northampton-3842776> [<https://perma.cc/5WAG-EV6B>] (drawing attention to the fact that forty-three percent of Northampton students attending charter schools come from wealthy families).

40. VerSteeg, *supra* note 39.

41. See Matt O’Brien, *Poor Kids Who Do Everything Right Don’t Do Better Than Rich Kids Who Do Everything Wrong*, WASH. POST (Oct. 18, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/10/18/poor-kids-who-do-everything-right-dont-do-better-than-rich-kids-who-do-everything-wrong/> [<https://perma.cc/ME34-M4AH>].

fact that charter schools are judged by “how well they meet the student achievement goals established by their charter contracts,”<sup>42</sup> it comes as no surprise that charter schools are motivated to select the highest performing students to fill their limited seating. Handpicking these students results in better ratings for the charter schools in the long term, most often giving them higher rankings than traditional public schools within the same state.<sup>43</sup>

Additionally, in most states, charter schools “continue to enroll proportionately fewer students with disabilities than traditional public schools.”<sup>44</sup> There are several different reasons for this disparity. First, parents of disabled children sometimes prefer to send their children to public schools because they have more established programs for disabled children.<sup>45</sup> Second, some charter schools “do not have the resources or teaching staff to support individual students’ needs.”<sup>46</sup> Lastly, certain charter schools “tacitly discriminate by discouraging students with disabilities from enrolling.”<sup>47</sup> Parents who *do* wish for their child with a disability to attend a charter school are often “counseled out and encouraged to leave the school during and subsequent to the enrollment stage.”<sup>48</sup> Such discrimination is in fact explicitly against federal law.<sup>49</sup> Whatever the reason for the underrepresentation of students with special needs and disabilities, such under-enrollment skews charter school academic data.<sup>50</sup> Charter schools may appear “to produce superior results, but they do so without serving comparable populations” to public schools.<sup>51</sup> Such distinction serves to separate charters from traditional

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42. *Just the FAQs—Charter Schools*, *supra* note 10.

43. *See* VerSteege, *supra* note 39.

44. Motoko Rich, *Charter Schools Still Enroll Fewer Disabled Students*, N.Y. TIMES (June 19, 2012), <http://www.nytimes.com/2012/06/20/education/in-charter-schools-fewer-with-disabilities.html>.

45. *Id.*

46. *Id.*

47. *Id.*

48. CTR. FOR LAW & EDUC., COUNCIL OF PARENT ATT’YS & ADVOCATES, CHARTER SCHOOLS AND CHILDREN WITH DISABILITIES: PRELIMINARY ANALYSIS OF THE LEGAL ISSUES AND AREAS OF CONCERN 31 (2012), <http://www.cleweb.org/sites/cleweb.org/files/assets/Administrative/Charter%20Schools%20and%20Students%20with%20DisabilitiesFinalDraft.pdf> [<https://perma.cc/5U96-TAVB>].

49. *See* U.S. DEPT. OF EDUC., KNOW YOUR RIGHTS: STUDENTS WITH DISABILITIES IN CHARTER SCHOOLS, (Jan. 13, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201612-504-charter-school.pdf> [<https://perma.cc/7X5Z-4B3X>].

50. *See generally* Thomas Hehir, *Charters: Students with Disabilities Need Not Apply?*, EDUC. WEEK (Jan. 26, 2010), [http://www.edweek.org/ew/articles/2010/01/27/19hehir\\_ep.h29.html](http://www.edweek.org/ew/articles/2010/01/27/19hehir_ep.h29.html).

51. *Id.*

public schools.

The National Association for the Advancement of Colored People (NAACP) has recently announced its policy against charter schools, stating that charter schools have contributed to an increase in segregation, put public funds at risk of being wasted or misused, and led to an erosion of local control over public education.<sup>52</sup> The organization has coined charter schools “separate and unequal” institutions.<sup>53</sup> Additionally, a study published by the Civil Rights Project in 2016 found that charter schools throughout the United States contribute to the school-to-prison pipeline.<sup>54</sup> The study demonstrates that a “disturbing number” of charters are “suspending big percentages of their black students and students with disabilities at highly disproportionate rates as compared to white and non-disabled students” also enrolled in the schools.<sup>55</sup> While charter school advocates tout charters as the answer to America’s educational woes,<sup>56</sup> it is evident from the facts that they are not the answer for all of America’s children.

Public schools, by definition, are meant to be “regulated by the local state authorities . . . and open and free to all children” living in the district where the schools are located.<sup>57</sup> Charter schools do not fit into this category because they are not “open and free to all children”;<sup>58</sup> however, charter schools insist upon their “publicness” and maintain their existence with the use of public tax dollars collected to support the majority of students attending traditional public schools.<sup>59</sup> The

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52. See Valerie Strauss, *NAACP Members Call for Ban on Privately Managed Charter Schools*, WASH. POST (Aug. 7, 2016), <https://www.washingtonpost.com/news/answer-sheet/wp/2016/08/07/naACP-members-call-for-ban-on-privately-managed-charter-schools/> [<https://perma.cc/J9AL-K8KV>].

53. Julian Vasquez Heilig, *10 Things to Know About the Charter School Debate*, PROGRESSIVE (Aug. 25, 2016), <http://progressive.org/public-school-shakedown/10-things-know-charter-school-debate/> [<https://perma.cc/6QPG-8XXE>].

54. *Study Finds Many Charter Schools Feeding “School-to-Prison Pipeline”*, CIVIL RIGHTS PROJECT (Mar. 16, 2016), <https://www.civilrightsproject.ucla.edu/news/press-releases/featured-research-2016/study-finds-many-charter-schools-feeding-school-to-prison-pipeline> [<https://perma.cc/4LB2-6CBD>]. Enforcing harsh discipline policies that result in suspension of students “for even minor infractions predicts lower academic achievement, higher dropout rates and too many kids being pushed onto a pathway to prison.” *Id.*

55. *Id.*

56. See generally *Facts About Charters*, *supra* note 7 (highlighting what makes charter schools a better choice than traditional public schools).

57. *Public School* (listed under *School*), BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2016).

58. *Id.*

59. Massachusetts relies heavily on local property tax revenues to fund public education specifically. Chris Gustafson, *Public School Funding in Massachusetts: Where We Are, What Has Changed, and How We Compare to Other States*, MASSBUDGET (Dec. 20,

aforementioned differences between charter and traditional public schools have not gone unnoticed. As a result, the constitutionality of charter schools, and their funding, have been challenged in states around the country.<sup>60</sup>

### B. *Constitutional Challenges to Charter School Funding*

In the 1990s, courts in Michigan and California specifically “examined whether the private characteristics of charter schools make them private schools that are ineligible for public funding.”<sup>61</sup> Until quite recently, courts have generally refused to hold charter school acts and their funding provisions as unconstitutional.<sup>62</sup>

#### 1. Challenge to Charter School Funding in Michigan

In 1997, the Michigan Charter School Act was challenged as unconstitutional under Article 8, Sections 2 and 3 of the 1963 Michigan Constitution.<sup>63</sup> The challengers argued that the charter system violated the Michigan Constitution because charter schools were not public, they were not under the immediate or exclusive control of the state, and local bodies did not publicly elect the boards of directors chosen to run individual charter schools.<sup>64</sup> The court, in construing the Constitution of Michigan, completely quashed these arguments and refused to give them any merit.<sup>65</sup>

The court claimed that the 1963 Michigan Constitution did not define the term “public school”; however, it did give the Legislature the “responsibility [of] ‘maintain[ing] and support[ing] a system of free public education.’”<sup>66</sup> Thus, the Legislature was given the power to define what public schools were within the State of Michigan, and form the institutional structures “through which public education [was] delivered.”<sup>67</sup> The court held that charter schools were an acceptable exercise of this power, and under enough state control to be publicly

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2012), [http://www.massbudget.org/report\\_window.php?loc=ed\\_census\\_2012.html](http://www.massbudget.org/report_window.php?loc=ed_census_2012.html) [https://perma.cc/5DZD-3N6F]. Charter schools are funded directly from the public school districts that charter school students would otherwise have attended. *See infra* Section II.B.2.

60. *See infra* Subpart I.B.

61. Green III et al., *supra* note 18, at 305.

62. *See infra* Subpart I.B.

63. Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Governor, 566 N.W.2d 208, 211 (Mich. 1997).

64. *Id.* at 216.

65. *Id.* at 213–22.

66. *Id.* at 215 (quoting MICH. CONST. art. VIII, § 2 (amended 1970)).

67. *Id.* at 216.

funded, as allowed by many other states.<sup>68</sup> The 1963 Michigan Constitution did not require that the state “have exclusive control of the school system.”<sup>69</sup> The state retained the power to revoke charter schools, control their creation through an application approval process, and—most importantly—control their allotment of money.<sup>70</sup> This, in the court’s view, was enough for the act to be upheld as constitutional.<sup>71</sup>

Additionally, the court noted that there was no direct requirement under the state constitution that schools “be under the control of the voters of the school district,” but only that public education be under the control of the Legislature.<sup>72</sup> Because the Legislature approved the creation of charter schools, and the way they were run—which was all that was required under the constitution—the Act could not be held unconstitutional.<sup>73</sup>

## 2. Challenge to Charter School Funding in California

Another constitutional challenge to charter school funding took place in California in the late 1990s, in the case *Wilson v. State Board of Education*.<sup>74</sup> In *Wilson*, the appellants facially challenged the California Charter School Act of 1992, and sought a petition for a writ of mandate demanding that respondents cease creating charter schools and expending public funds under the Act.<sup>75</sup>

Similar to the case in Michigan, the California Court of Appeals upheld the constitutionality of the Act.<sup>76</sup> The court noted that Article IX, Section 5 of the California Constitution granted the Legislature power over the creation and maintenance of the state’s system of schools.<sup>77</sup> Section 8 provided that “[n]o public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools.”<sup>78</sup> In light of these provisions, the court held that the Charter School Act was a “valid exercise of legislative discretion aimed at furthering the

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 216–17, 222.

72. *Id.* at 218.

73. *Id.* at 222.

74. *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 747 (Cal. Ct. App. 1999).

75. *Id.*

76. *Id.* at 760.

77. *Id.* at 751.

78. *Id.* at 753. (quoting CAL. CONST. art. IX, § 2).

purposes of education”<sup>79</sup> and rested on “constitutional ground.”<sup>80</sup> Having created charter schools through statute, the Legislature retained complete control over their existence, and could abolish them if it so wished.<sup>81</sup> Further, the court held that charter schools were, in fact, public schools because they were free and open to the public, subject to statewide standards and pupil assessments, and received comparable amounts of money.<sup>82</sup>

The reasoning of both the Michigan and California courts are strikingly similar. Each case focused on the power of the state legislature to create and abolish charter schools, and thus determined the state exercised enough control over them to satisfy the respective state constitutions.<sup>83</sup> It was not until September of 2015 that the discussion of the constitutionality of charter schools and their funding shifted, and potentially altered the course of all similar challenges going forward.<sup>84</sup>

### 3. Charter School Funding Opposed in Washington State

In November of 2012, Washington state voters approved I-1240, codified in the Charter School Act, which provided for the establishment of up to forty charter schools within five years.<sup>85</sup> Under the Act, charter schools were required to provide a basic education to students, similar to public schools.<sup>86</sup> However, the Act also freed staff and faculty employed in charter schools from many regulations that limit public schools, giving them flexibility in their staffing and curriculum choices.<sup>87</sup> Additionally, appointed charter school boards—rather than elected local school boards—independently controlled the entire operation of the schools.<sup>88</sup>

Despite their independence, “the Act require[d] the Superintendent to apportion funds to charter schools on the same basis as public school districts.”<sup>89</sup> A coalition of educators and parents were unhappy with the “lack of local accountability and fiscal impacts of the Act,” and as a result sued the State of Washington seeking declaratory judgment that

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79. *Id.* at 751.

80. *Id.* at 760.

81. *Id.* at 751.

82. *Id.* at 752–53.

83. *See supra* Subpart I.B.

84. *See infra* Section I.B.3.

85. *League of Women Voters of Wash. v. State*, 355 P.3d 1131, 1134 (Wash. 2015).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

the Act was unconstitutional.<sup>90</sup> The Washington Supreme Court held that under the state constitution educational funds could only be apportioned to “common schools,” which the state constitution defined as schools open to all children, free, and “subject to and under the control of the qualified voters of the school district.”<sup>91</sup> Although charter schools were defined as “common schools” in the Act, the court concluded that they could not be considered common schools under the Washington Constitution because they were “run by an appointed board or nonprofit organization” and were therefore not subject to local voter control.<sup>92</sup>

As a result, charter schools could not constitutionally be allowed to draw from common school funds under Article IX, Section 2.<sup>93</sup> This unconstitutional provision was deemed to be an integral portion of the Act, as it was clear that the charter schools could not exist without funding.<sup>94</sup> Based on this determination, the court also held that because the funding portion of the Act was so intertwined with the remaining provisions of the Act, the Act in its entirety was unconstitutional.<sup>95</sup>

Unlike previous challenges that had focused on the power of state legislatures to create such a system of schools, the Washington Supreme Court rightly focused on the distinct differences between charter and

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90. *Id.* at 1135.

91. *Id.* at 1137 (quoting *Sch. Dist. No. 20 v. Bryan*, 99 P. 28, 30 (Wash. 1909)).

92. *Id.*

93. *Id.* at 1141.

94. *Id.*

95. *Id.* Since the conclusion of this case, the legal battle over charter schools in Washington State has not come to an end. Following the state Supreme Court’s decision in 2015, the case was appealed. *See generally* *League of Women Voters of Wash. v. State*, No. 89714-0, 2015 Wash. LEXIS 1327 (Nov. 19, 2015). However, the Washington Supreme Court refused to further consider the case. *Id.* In March 2016, a new charter school law was passed in Washington which allowed charter schools to be funded through lottery money, and not from the same funds as the state’s “common” schools. WASH. REV. CODE ANN. § 28A.710.270 (LexisNexis 2016). After the law was enacted, it too was challenged as unconstitutional. *See generally* *El Centro de la Raza v. State*, No. 16-2-18527-4 SEA, slip op. (Super. Ct. Wash. Feb. 17, 2017). In February 2017, the Superior Court in King County granted a motion for summary judgment for the defendants, affirming the constitutionality of charter school funding through lottery funds. *Id.* at 25. Despite this decision, the holding of the Washington Supreme Court still stands. *League of Women Voters of Wash. v. State*, 355 P.3d 1131, 1141 (Wash. 2015). Within Washington, it remains unconstitutional to divert funds from the state’s public schools to charter schools. *Id.* Thus, both the reasoning and outcome of *League of Women Voters of Wash. v. State* are still vital to take into consideration for charter school opponents. *See generally id.* The state Supreme Court recently announced that it “will hear the latest legal challenge to charter schools” at some point in 2018. *See* Paige Cornwell, *State Supreme Court to Hear Charters-Schools Case Again*, SEATTLE TIMES (Dec. 19, 2017, 5:00 AM), <https://www.seattletimes.com/education-lab/state-supreme-court-to-hear-charter-schools-case-again/>.

public schools.<sup>96</sup> The Washington Legislature, like the Michigan and California Legislatures, created charter schools through statute, as they had the power to do.<sup>97</sup> However, this was not determinative of whether the statute could survive a constitutional attack. At the conclusion of the case, Washington became the first state to hold charter school funding unconstitutional.<sup>98</sup> Charter school opponents seeking to challenge charter school acts in their own states may rely on this case as a model and standard going forward.

## II. PUBLIC EDUCATION IN MASSACHUSETTS

The Massachusetts public educational system has been proclaimed one of the best in the nation.<sup>99</sup> The reforms that purportedly advanced Massachusetts into the forefront of educational achievement date back to 1993,<sup>100</sup> the same year it was adjudicated that children have a constitutional right to receive a sufficient education within the State of Massachusetts.<sup>101</sup> These reforms, however, are not perfect, and have not been necessarily helpful in every Massachusetts school district.<sup>102</sup> As the decades have passed, the positive impact of these reforms has become further removed.<sup>103</sup> The Massachusetts public school system has not been a consistent champion for all the children that reside within the state, and charter schools are playing a key role in the system's growing inadequacy as a result of their diversion of public educational funds.<sup>104</sup>

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96. These differences include the fact that charter schools were allowed to operate independently from local school districts, and were run by appointed boards or non-profit organizations which allowed them to operate freely from local voter control. *League of Women Voters of Wash.*, 355 P.3d at 1136–37.

97. *The Federal Role in Education*, U.S. DEPT. OF EDUC. (last modified May 25, 2017), <https://www2.ed.gov/about/overview/fed/role.html> [https://perma.cc/B6JZ-QDTB] (explaining that states and local communities have the ability to establish schools).

98. John Higgins, *State Supreme Court: Charter Schools Are Unconstitutional*, SEATTLE TIMES (Sept. 8, 2015, 11:45 AM), <http://www.seattletimes.com/seattle-news/education/state-supreme-court-charter-schools-are-unconstitutional/>.

99. See Garrett Quinn, *Massachusetts Public Schools Ranked Number 1—Again*, BOSTON (Jan. 8, 2016, 5:02 PM), <http://www.bostonmagazine.com/news/2016/01/08/massachusetts-best-public-schools/> [https://perma.cc/4AMC-6UK7].

100. Alia Wong, *What Are Massachusetts Public Schools Doing Right?*, ATLANTIC (May 23, 2016), <http://www.theatlantic.com/education/archive/2016/05/what-are-massachusetts-public-schools-doing-right/483935/> [https://perma.cc/B9TG-AKD9].

101. See generally *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993).

102. See *infra* Section II.B.1.

103. See *infra* Section II.B.1.

104. See *infra* Section II.B.2.

A. *The Constitutional Right to a Sufficient Education in Massachusetts*

In the 1973 Supreme Court case *San Antonio Independent School District v. Rodriguez*, a class action was brought on behalf of Texas students and parents who were members of minority groups or who were poor and “reside[d] in school districts having a low property tax base,” against the State Board of Education.<sup>105</sup> The students and parents claimed that the Texas school finance system was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it did not adequately fund their school district in comparison to other school districts in the state.<sup>106</sup> In its decision, the Court held that education was “not among the rights afforded explicit protection” under the Federal Constitution, nor did the Court “find any basis for saying it is implicitly so protected.”<sup>107</sup> Thus, the Court reasoned that the Constitution “does not provide a right to equal educational opportunity based on students’ relative wealth or poverty.”<sup>108</sup> Since *Rodriguez*, all challenges to public school financing have proceeded under state constitutions.<sup>109</sup>

In 1993, sixteen students from public schools in sixteen different towns and cities across Massachusetts sued the Board of Education, among others, claiming that the “Commonwealth [had] failed to fulfill its duty to provide them an education as mandated by the [State] Constitution.”<sup>110</sup> According to the students, the Commonwealth, through its school financing system, had “effectively denied the [students] the opportunity to receive an adequate education,” which they argued was a duty imposed on the Legislature by Part II, Chapter 5, Section 2 of the Massachusetts Constitution.<sup>111</sup>

The court in *McDuffy v. Secretary of Executive Office of Education* held that such a duty does in fact exist, and is imposed by the State Constitution.<sup>112</sup> As stated within the case, the Massachusetts Constitution makes clear that the diffusion of “wisdom, knowledge, and virtue” among the people “depend[s] on spreading the opportunities and advantages of education,” and thus it is the explicit “duty of legislatures

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105. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 5 (1973).

106. *Id.* at 6.

107. *Id.* at 35.

108. Rhoda E. Schneider, *The State Constitutional Mandate for Education: The McDuffy and Hancock Decisions*, MASS. DEP’T ELEMENTARY & SECONDARY EDUC. (Sept. 27, 2007), [http://www.doe.mass.edu/lawsregs/litigation/mcduffy\\_hancock.html](http://www.doe.mass.edu/lawsregs/litigation/mcduffy_hancock.html) [https://perma.cc/E4UN-ZPSH].

109. *Id.*

110. *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516, 517 (Mass. 1993).

111. *Id.* at 522.

112. *Id.* at 553–55.

and magistrates . . . to *cherish* . . . public schools.”<sup>113</sup> The court reasoned that the term “cherish,” read in its historical context, was intended to mean support, nourish, or nurture.<sup>114</sup> Thus, the state constitution was held to impose an obligation on the state legislature to “support or nurture” the public schools throughout the state, and to make sure that the schools “achieve their object and educate the people.”<sup>115</sup> This included the obligation of the Legislature to provide an adequate funding scheme, so that public schools could sufficiently educate the people and meet the constitutional mandate.<sup>116</sup>

In its decision, the court set forth guidelines to be followed by the Commonwealth to help remedy the constitutional violations identified in the case<sup>117</sup>:

An educated child must possess “at least the seven following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.”<sup>118</sup>

The *McDuffy* decision was incredibly important in Massachusetts, as it “established the state constitutional standards against which education reform efforts in Massachusetts would be judged.”<sup>119</sup>

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113. *Id.* at 524 (quoting MASS. CONST. pt. II, ch. 5, § 2).

114. *Id.* at 525.

115. *Id.* at 526.

116. *Id.* at 555–56.

117. *Id.* at 554.

118. *Id.* at 554 (quoting *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)).

119. *Schneider*, *supra* note 108.

B. *The Financial Conflict Between Public Schools and Charter Schools in Massachusetts*

In Massachusetts, charter schools derive their main source of funding from the public school districts their students would otherwise have attended.<sup>120</sup> This arrangement depletes resources from already financially strained public school districts throughout the state,<sup>121</sup> leaving many districts struggling to provide students with the type of education they are entitled to receive.<sup>122</sup>

1. Public Education Funding in Massachusetts

Massachusetts school districts are funded by district property taxes, in addition to Chapter 70 education aid.<sup>123</sup> Chapter 70 education aid “aims to ensure that each school district has sufficient resources to provide an adequate education for all of its students, taking into account the ability of each local government to contribute.”<sup>124</sup> This aid was put in place as part of the Educational Reform Act of 1993, which was the state’s attempt to rectify the educational inadequacies illustrated in *McDuffy*.<sup>125</sup> The amount of aid awarded to each school district is calculated by determining “each city and town’s ability to contribute local revenue towards the operation of its schools,” which “varies widely based upon the incomes and property values of different cities and towns.”<sup>126</sup>

Though this funding may at first glance seem sufficient, in 2015 the Foundation Budget Review Commission closely examined the twenty-five-year-old Chapter 70 formula.<sup>127</sup> The Commission found that to sufficiently meet existing needs today, the Commonwealth would need to “immediately invest nearly \$500 million more” into the state’s educational system.<sup>128</sup> Reports from the field indicate that the public education system is “fiscally strained,” as the “long standing formula

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120. See discussion *infra* Section II.B.2.

121. See discussion *infra* Subpart II.B.

122. See *infra* Part IV.

123. *Demystifying the Chapter 70 Formula: How the Massachusetts Education Funding System Works*, MASSBUDGET (Dec. 7, 2010), [http://www.massbudget.org/report\\_window.php?loc=Facts\\_10\\_22\\_10.html](http://www.massbudget.org/report_window.php?loc=Facts_10_22_10.html) [https://perma.cc/RE9C-UC8B] [hereinafter *Demystifying the Chapter 70 Formula*].

124. *Id.*

125. *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1137–38 (Mass. 2005).

126. *Demystifying the Chapter 70 Formula*, *supra* note 123.

127. Scott McLennan, *Budget Commission Says Funding Falls Short*, 46 MTA TODAY 12, 12 (2015).

128. *Id.*

used to determine how much K-12 public school districts should spend to provide an adequate education to students is woefully outdated.”<sup>129</sup> In general, state educational funding is failing students, and the problem is compounded by the diversion of district educational money to charter schools throughout the state.<sup>130</sup>

## 2. Charter Schools in Massachusetts

Massachusetts has fully embraced the charter school movement since the mid 1990s, opening the first charter school within the state in 1995.<sup>131</sup> Today, a total of seventy-one Commonwealth charter schools are in operation throughout the state.<sup>132</sup> Similar to other states, charter schools in Massachusetts are independently run, publicly funded educational institutions that are free from the control of local school districts.<sup>133</sup> The charter, which is the “contract entered into between the school and its authorizing agency,”<sup>134</sup> allows the school “significant operational autonomy” to essentially run the school as an independent, free-standing entity, giving them the freedom to determine the curriculum, staff, and budget.<sup>135</sup> Charter schools are run by a board of trustees who are deemed “public agents” by the state, authorized to “supervise and control” the charter school.<sup>136</sup> The state often approves charter schools over the opposition of communities where they are

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129. *Id.*

130. *See* discussion *infra* Part IV.

131. *About Charter Schools*, MASS. CHARTER PUB. SCH. ASS’N, <http://www.masscharterschools.org/about-charter-schools> [https://perma.cc/2C96-D5WH] (discussing how “[d]emand for charter schools has been strong since they first opened in [Massachusetts in] 1995.”).

132. *Charter Schools: Frequently Asked Questions—What Are Commonwealth Charter Schools?*, MASS. TCHRS. ASS’N, <https://massteacher.org/current-initiatives/charter-schools> [https://perma.cc/MVA5-448G]; *see also* Robert Bardwell, *How Many Charter Schools Are Too Many for Massachusetts: Viewpoint on Education*, MASSLIVE (Apr. 6, 2016), [http://www.masslive.com/living/index.ssf/2016/04/how\\_many\\_charter\\_schools\\_are\\_too\\_many\\_for\\_massachusetts\\_viewpoint\\_on\\_education.html](http://www.masslive.com/living/index.ssf/2016/04/how_many_charter_schools_are_too_many_for_massachusetts_viewpoint_on_education.html) [https://perma.cc/Q63V-VPC3] (noting that a total of eighty-one charter schools can be found within Massachusetts if also including Horace Mann charter schools within this number). Two different types of charter schools exist in Massachusetts: Commonwealth charter schools and Horace Mann charter schools. *See* MASS. DEP’T OF ELEMENTARY & SECONDARY EDUC., QUESTIONS AND ANSWERS ABOUT CHARTER SCHOOLS 1 (May 2015), <http://www.doe.mass.edu/charter/new/2015-2016QandA.pdf> [https://perma.cc/N5CA-FDH8]. Horace Mann charter schools are notably different from Commonwealth charter schools, as “a Horace Mann charter school must have its charter approved by the local school committee and, in some cases, the local teacher’s union in addition to the Board.” *Id.*

133. *Charter Schools in the States—A Series of Briefs*, *supra* note 23.

134. *See What is a Charter School?*, *supra* note 24.

135. *Id.*

136. MASS. GEN. LAWS ch. 71, § 89(c) (2017).

designated to open.<sup>137</sup>

Despite this great freedom awarded to charter schools and their autonomy from the public school districts, the current law in Massachusetts specifically notes that upon their creation, charter schools are to be deemed “public school[s],”<sup>138</sup> and are to be funded with money directly from public school districts.<sup>139</sup> The majority of charter school funding—approximately ninety percent—“comes from tuition payments paid by the sending district that a student otherwise would have attended,” while the “remaining 10 percent comes largely from state and federal grants and through private fundraising.”<sup>140</sup> The tuition payments paid by the districts are “roughly equal to average per pupil spending in the sending district.”<sup>141</sup> In 2015, more than four hundred million dollars was diverted from local school districts to charter schools across the Commonwealth.<sup>142</sup>

Massachusetts charter school advocates argue that charter school funding does not drain financial resources from public schools.<sup>143</sup> This argument is solely based on the fact that Massachusetts has a program in place that is designed to “reimburse” school districts for a period of time after a student transfers to a charter school.<sup>144</sup> However, this reimbursement plan has been underfunded by approximately eighty million dollars in recent years.<sup>145</sup> As a result, school districts have not been receiving the amount equal to what they have been losing when students attend charter schools—and thus have suffered direct and

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137. *Get the Facts: Charter Schools in Massachusetts*, GET CHARTER FACTS MA, <http://getcharterfactsma.org/> [<https://perma.cc/JX4Q-7BK6>].

138. MASS. GEN. LAWS ch. 71, § 89(c) (2017).

139. MASS. GEN. LAWS ch. 71, § 89(i)(2) (2017).

140. Luc Schuster, *Charter School Funding, Explained*, MASSBUDGET (Apr. 6, 2016), [http://www.massbudget.org/report\\_window.php?loc=Charter-School-Funding,-Explained.html](http://www.massbudget.org/report_window.php?loc=Charter-School-Funding,-Explained.html) [<https://perma.cc/M3M5-TJJ6>].

141. *Id.*

142. Laura Barrett, *National Spotlight on Charter Fight*, 46 MTA TODAY 6, 6 (2015).

143. Kathleen McKiernan, *Mass Taxpayers Group Knocks Claims Charter Schools Drain Resources*, BOS. HERALD (Sept. 28, 2016), [http://www.bostonherald.com/news/local\\_coverage/2016/09/mass\\_taxpayers\\_group\\_knocks\\_claims\\_charter\\_schools\\_drain\\_resources](http://www.bostonherald.com/news/local_coverage/2016/09/mass_taxpayers_group_knocks_claims_charter_schools_drain_resources) [<https://perma.cc/4LM4-XM2R>].

144. *Massachusetts Charter Schools: Understanding District Aid for Commonwealth Charter School Tuition*, MASS. DEP’T ELEMENTARY & SECONDARY EDUC. (Apr. 4, 2017), <http://www.doe.mass.edu/charter/finance/tuition/Reimbursements.html>

[<https://perma.cc/S632-SCHG>]; see also *About Charter Schools*, *supra* note 117.

145. BOS. PUB. SCHS., FINANCIAL IMPACT OF CHARTER CAP LIFT 10, [http://www.bostonpublicschools.org/cms/lib07/MA01906464/Centricity/Domain/162/160920%20September%20Ballot%20Initiative%20School%20Committee%20Presentation\\_FINAL.pdf](http://www.bostonpublicschools.org/cms/lib07/MA01906464/Centricity/Domain/162/160920%20September%20Ballot%20Initiative%20School%20Committee%20Presentation_FINAL.pdf) [<https://perma.cc/FL25-69JC>].

calculable losses.<sup>146</sup>

What currently exists in Massachusetts is an underfunded educational system being further deprived of resources by charter schools, which ironically were created with the intention of making the public school system better within the state.<sup>147</sup> Despite claims to the contrary,<sup>148</sup> the drain on funding has done nothing but hurt school districts, and deprive students of their right to receive an adequate education.<sup>149</sup> Unlike other states, Massachusetts has yet to see a constitutional challenge to charter school funding. However, as this Note argues, there are potential avenues for such a challenge to be brought in Massachusetts.<sup>150</sup>

### III. THE APPLICABILITY OF THE WASHINGTON SUPREME COURT'S REASONING IN MASSACHUSETTS

The holding of *League of Women Voters of Washington v. State* was significant, as it made Washington the first state to determine charter school funding to be unconstitutional.<sup>151</sup> Charter school opponents may use this case as a “roadmap” to striking down charter school legislation in their own states.<sup>152</sup> However, the reasoning of this case is limited to states that have similar constitutional language to Washington.<sup>153</sup>

The Washington Constitution provides that “the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.”<sup>154</sup> There are numerous states with comparable constitutional language that limit educational funding to only public or common

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146. See SAVE OUR PUB. SCHS. MA, FY17 BUDGET UNDERFUNDS CHARTER SCHOOL REIMBURSEMENTS, COSTING LOCAL SCHOOLS \$57 MILLION, (July 7, 2016), [http://www.goodschools.org/news/archive/2016/~media/Files/charter\\_schools/charter\\_reimbursement\\_funding.pdf](http://www.goodschools.org/news/archive/2016/~media/Files/charter_schools/charter_reimbursement_funding.pdf) [https://perma.cc/8YLZ-2XYK].

147. See MASS. GEN. LAWS ch. 71 § 89(b) (2017).

148. See Jeff Jacoby, *Charters Aren't Draining District School Funding*, BOS. GLOBE (Sept. 30, 2016), <https://www.bostonglobe.com/opinion/editorials/2016/09/30/charters-aren-draining-district-school-funding/DF81HESotWRd7VzuRTk4JN/story.html> (reporting that charters do not drain public school funds, and instead asserts that the “district-charter balance has been stable.”).

149. See *infra* Part IV.

150. See *generally infra* Part IV.

151. Higgins, *supra* note 98.

152. Arianna Prothero, *Wash. Court Ruling Could Be Roadmap to Charter Opponents in Other States*, EDUC. WEEK (Dec. 17, 2015), <http://www.edweek.org/ew/articles/2015/12/17/wash-court-ruling-could-be-roadmap-to.html>.

153. See *infra* Part III.

154. WASH. CONST. art. IX, § 2 (2016).

schools;<sup>155</sup> Massachusetts, however, is not one of these states.<sup>156</sup> As a result, the applicability and reasoning of the Washington case would have little effect on a constitutional challenge to charter school funding in Massachusetts.

Under the Massachusetts Constitution, there is no requirement that educational funding only be apportioned to common schools.<sup>157</sup> Instead, the constitution requires that no appropriation of public money can be made to any primary or secondary school that “is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both.”<sup>158</sup> The most essential portion of this amendment is the element of the Commonwealth’s “exclusive control” over the educational institution in question.

The argument that charter schools are not under the “exclusive control” of the state—and thus should not be apportioned funding in the same manner as public schools—would likely not prevail in a constitutional challenge. Under Massachusetts charter school law, charter schools must be “approved” by the state’s Department of Elementary and Secondary Education.<sup>159</sup> Upon a charter’s approval, the “board of trustees of a commonwealth charter school” are “deemed to be public agents” by the state.<sup>160</sup> The charters are subject to reporting requirements and ongoing state review.<sup>161</sup> Additionally, the state, through the Board of Education, retains a right to implement conditions on the charter schools; probate, suspend, or revoke a charter; or deny a charter renewal.<sup>162</sup> This power retained by the state—essentially to grant and abolish charters—would likely be viewed as retaining complete control over charter schools, thus justifying their expense.

California has a similar constitutional provision to Massachusetts regarding the apportionment of educational funds.<sup>163</sup> The California Constitution states that no public money shall be apportioned to any school within the state that is “not under the exclusive control of the

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155. Green III et al., *supra* note 18, at 305–06 (noting that these states include Connecticut, Georgia, Missouri, New Jersey, Rhode Island, and Texas).

156. *See infra* Part III; *see also* MASS. CONST. pt. II, ch. 5, § 2, amend. CIII (1974).

157. *See* MASS. CONST. pt. II, ch. 5, § 2, amend. CIII (1974).

158. *Id.*

159. 603 MASS. CODE REGS. 1.04 (2015).

160. MASS GEN. LAWS ch. 71 § 89(c) (2016).

161. 603 MASS. CODE REGS. 1.08 (2015).

162. 603 MASS. CODE REGS. 1.12 (2015).

163. *See* CAL. CONST. art. IX, § 8.

officers of the public schools.”<sup>164</sup> As previously discussed, when the constitutionality of charter schools was challenged in California in 1999,<sup>165</sup> the court upheld both the state’s charter school funding and Charter School Act as constitutional.<sup>166</sup> The California court ruled that charter schools were public schools within the meaning of California’s Constitution,<sup>167</sup> and were under the complete control of the state as necessary under the constitution’s educational funding provision.<sup>168</sup> This was solidified by the fact that under the Act, charter schools were required to meet certain state educational requirements,<sup>169</sup> and the Legislature was deemed to have plenary power over charter schools because they retained the power to create, refine, expand, and abolish charters if they so wished.<sup>170</sup>

It is likely that if charter school funding in Massachusetts was challenged directly under the constitution in this way, the court would follow the same pattern of reasoning. Thus, opponents seeking to challenge the state’s charter school funding would have to approach the issue from a different angle.

#### IV. CHARTER SCHOOL FUNDING DEPRIVES PUBLIC SCHOOL STUDENTS OF THEIR CONSTITUTIONAL RIGHT TO A FULLY SUFFICIENT EDUCATION IN MASSACHUSETTS

The most successful avenue for those hoping to challenge charter school funding within Massachusetts would be to confront the issue through the lens of existing Massachusetts case law. As a result of the divergence of public educational funds caused by funding charter schools, established educational standards set forth in the *McDuffy* case are not being met throughout the state.<sup>171</sup> This deficiency has created a potential avenue for a constitutional challenge that could be pursued by those who oppose charter schools in Massachusetts.

##### A. *Loss of Funding and the Direct Effect on School Districts*

At present, charter school funding diverts more than four hundred

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164. *Id.*

165. *See* *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 747 (Ct. App. 1999); *supra* Section I.B.2.

166. *Wilson*, 89 Cal. Rptr. 2d at 760.

167. *Id.* at 752.

168. *Id.* at 759–60.

169. *Id.* at 750.

170. *Id.* at 750–51.

171. *See* discussion *infra* Subparts IV.A, IV.B.

million dollars away from public school districts in Massachusetts each year.<sup>172</sup> Cities and towns throughout the state are “forced to make budget cuts every year due to the state’s underfunding of education and the money lost to charters.”<sup>173</sup> School districts have continuously articulated the negative effects their school systems have endured as a result of charter school funding.<sup>174</sup>

For example, due to the diversion of three hundred thousand dollars of charter school funds from Ludlow public schools in 2015, the town had to consider cutting five classroom teachers.<sup>175</sup> Multiple school districts acknowledge that for many students, the loss of public school funding to charter schools “means larger class sizes, fewer enrichment courses such as music, art and athletics, and other damaging cutbacks.”<sup>176</sup> In Amherst, due to the diversion of a little more than a million dollars to nearby charter schools, “[thirty-seven] staff positions were cut over the last three years to balance the budget.”<sup>177</sup> Building maintenance has been delayed, computer instruction and physical education were cut from the curriculum in the middle school, world languages have been eliminated, and high school classes are now up to approximately thirty students.<sup>178</sup>

These effects are exacerbated in districts that are poor and where charter schools are concentrated, such as in Boston, the state’s largest school district.<sup>179</sup> In 2015, Boston was projected to lose approximately

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172. *Get the Facts: Charter Schools in Massachusetts*, *supra* note 137; see also *Public School District Losses to Charters Jump to \$450 Million*, MASS. TCHRS. ASS’N (Aug. 26, 2016), <https://massteacher.org/news/2016/08/public-school-district-losses-to-charters-jump-to-450-million> [https://perma.cc/455L-5UE4].

173. Andy Metzger, *Mass. Democrats Vote to Oppose Charter School Question*, HERALD NEWS (Aug. 17, 2016, 8:59 AM), <http://www.heraldnews.com/news/20160817/mass-democrats-vote-to-oppose-charter-school-question> [https://perma.cc/5DK6-28RA].

174. See *infra* Subpart IV.A.

175. *Adverse Effects of Charter Schools Are Focus of State House Hearing*, MASS. TCHRS. ASS’N (Oct. 14, 2015), <https://massteacher.org/news/2015/10/adverse-effects-of-charter-schools-are-focus-of-state-house-hearing> [https://perma.cc/TS5X-7VTZ].

176. Wayne Bergeron, *Charters Drain Funds from Public Schools*, CAPE COD TIMES (June 1, 2016, 2:01 AM), <http://www.capecodtimes.com/opinion/20160601/charters-drain-funds-from-public-schools> [https://perma.cc/8CRS-EGNQ].

177. Nancy Grossman, *The Charter School Drain on Local School Budgets*, MASSLIVE (Aug. 29, 2016), [http://www.masslive.com/opinion/index.ssf/2016/08/the\\_charter\\_school\\_drain\\_on\\_lo.html](http://www.masslive.com/opinion/index.ssf/2016/08/the_charter_school_drain_on_lo.html) [https://perma.cc/6MQZ-J3EQ].

178. *Id.*

179. BTU Staff, *City of Boston to Lose \$104 Million to Charter Schools*, BOS. TCHRS. UNION (Mar. 13, 2014), <https://btu.org/city-of-boston-to-lose-104-million-to-charter-schools/> (noting that “most of the dollars spent on charters comes from urban areas in Massachusetts.”) [https://perma.cc/M39V-XC62].

\$104 million to charter schools.<sup>180</sup> This amount has only increased with time—in 2018, Boston Public Schools (BPS) is estimated to divert a total of \$149,513,865 of educational funding to charter schools.<sup>181</sup> Because the state has been underfunding its reimbursement plan, BPS has suffered a direct loss of \$48,000,000 to charter schools in the last three years.<sup>182</sup> In 2017, charter schools were projected to receive fourteen percent of Boston’s total educational funding.<sup>183</sup>

The poorest school districts in the state—including Springfield, Holyoke, Lawrence, and Worcester<sup>184</sup>—have the most money diverted to charter schools, with the amount only increasing each year as more and more children attempt to escape their failing school systems.<sup>185</sup> The projected district payment to charter schools in the year 2017, before state reimbursement, was approximately \$41,754,170 for Springfield; \$11,855,562 for Holyoke; \$20,475,184 for Lawrence; and \$24,579,722 for Worcester.<sup>186</sup> After state reimbursement, Springfield will suffer a projected direct loss of \$35,883,246; Holyoke will lose \$9,752,574; Lawrence will lose \$17,610,949; and Worcester will lose a total of \$22,417,614.<sup>187</sup> When every penny is important to keep a school afloat and student educational quality high in these impoverished districts, the loss of this money to charter schools has immeasurable negative

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180. *Id.*

181. *Preliminary FY18 Sending District Tuition Payments to Commonwealth Charter Schools*, MASS. TCHRS. ASS’N, <https://massteacher.org/current-initiatives/-/media/c468519eefab4f9c9d68390888a9a5a2.ashx> [https://perma.cc/F96Y-SXDK].

182. Alison Bauter, *Boston School Committee Unanimously Votes to Oppose Question 2*, BOS. PATCH (Oct. 6, 2016, 10:17 AM), <http://patch.com/massachusetts/boston/boston-school-committee-unanimously-votes-oppose-question-2> [https://perma.cc/DY25-M3JB].

183. THOMAS J. KANE & WALTER H. GALE, *LET THE NUMBERS HAVE THEIR SAY: EVIDENCE ON MASSACHUSETTS’ CHARTER SCHOOLS 5*, <http://cepr.harvard.edu/files/cepr/files/evidence-ma-charter-schools.pdf> [https://perma.cc/J3FA-FJEC].

184. Jeanette DeForge, *War on Poverty: Where Are the Top 20 Poorest Schools?*, MASSLIVE, (Jan. 8, 2015), [http://www.masslive.com/news/index.ssf/2015/01/war\\_on\\_poverty\\_top\\_20\\_poorest.html](http://www.masslive.com/news/index.ssf/2015/01/war_on_poverty_top_20_poorest.html) [https://perma.cc/Y6QE-XXHY].

185. *See Public Charter School Enrollment*, NAT’L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/coe/indicator\\_cgb.asp](https://nces.ed.gov/programs/coe/indicator_cgb.asp) [https://perma.cc/CG4N-652G] (discussing that between fall 2004 and fall 2014, “[t]he number of students enrolled in public charter schools increased by 1.8 million students . . . while the number of students attending traditional public schools decreased by 0.4 million”); *see also* JEANNE H. BALLANTINE & JOAN Z. SPADE, *SCHOOLS AND SOCIETY: A SOCIOLOGICAL APPROACH TO EDUCATION* 367 (3d ed., 2008) (“charter schools . . . appear to be a better opportunity for aggrieved parents whose children are attending poorly funded, dilapidated public schools.”).

186. *Has Your School Lost Funding to a Commonwealth Charter School?*, MASS. TCHRS. ASS’N, <https://massteacher.org/current-initiatives/charter-schools> [https://perma.cc/MVA5-448G] (click on “Additional Data (Excel)” to access the Microsoft Excel Spreadsheet).

187. *Projected FY17 Sending District Tuition Payments to Commonwealth Charter Schools*, *supra* note 15.

effects.<sup>188</sup>

The Mayor of Worcester, Joseph Petty, has stated that the millions of dollars being spent on charter schools “is money that could be used to hire more teachers, improve [Worcester’s] facilities, and invest” in the majority of the district’s students.<sup>189</sup> In order to make up for this loss of funding, school districts are forced to “raise money elsewhere or make deep budget cuts.”<sup>190</sup> According to Geoff Beckwith, the Executive Director of the Massachusetts Municipal Association, the charter funding system “does not take into account the fact that many of a school’s costs are fixed and do not vary by child.”<sup>191</sup> Although a school district that loses one child to a charter school technically has one less child to teach, this has no effect on the fact that schools must still have classrooms, heat the building, and employ staff, teachers, and principals.<sup>192</sup> The only thing that can be done is to “cut back on the overall quality of the programing they’re offering the vast majority of kids who stay behind in the regular public school system.”<sup>193</sup> This has immeasurable negative effects on many young students across the state, and effectively infringes on their constitutional right to receive an adequate education.

#### B. *The Effects of Insufficient Funding on Students*

Educational funding, quality of education, and student performance are deeply intertwined.<sup>194</sup> As a result, “poorly funded districts will rarely be centers of excellence,”<sup>195</sup> while the children in affluent communities in Massachusetts will academically outperform all others.<sup>196</sup> Poor public

188. See discussion *infra* Part IV.

189. Shira Schoenberg, *Financial Impact Fuels Charter School Debate*, REPUBLICAN (Springfield, Ma), Oct. 27, 2016, at A1.

190. *Id.* (quoting Andrew Farnitano, a spokesperson for the “No on 2” effort in Massachusetts).

191. *Id.*

192. See *id.*

193. *Id.*

194. See Holly Yettick, *School Spending Increases Linked to Better Outcomes for Poor Students*, EDUC. WEEK (May 29, 2014), <http://www.edweek.org/ew/articles/2014/05/29/33finance.h33.html?r=435826939>.

195. DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY 19 (2001).

196. The poorest school districts in the state are among the worst performing. See discussion *infra* Subpart IV.B; see also Lisa Guisbond, *If Education Justice is the Goal, Don’t Follow Massachusetts*, CTVIEWPOINTS (Dec. 19, 2017), <https://ctviewpoints.org/2017/12/19/if-education-justice-is-the-goal-dont-follow-massachusetts/> (noting the “huge differences in academic outcomes linked to . . . inequalities in school funding between rich and poor districts.”). The wealthiest school districts in the state, on the other hand, are notably among

school districts are typically among the worst academically performing in the state.<sup>197</sup> The Massachusetts Department of Elementary and Secondary Education classifies all Massachusetts school districts into one of five accountability and assistance levels, “with the highest performing in Level 1 and the lowest performing in Level 5.”<sup>198</sup> The Springfield, Worcester, and Boston school districts have been classified into level four, meaning that over half the students in those districts did not meet their projected educational targets.<sup>199</sup> The Holyoke and Lawrence school districts have been placed into level five, meaning that they are chronically underperforming districts, with the majority of students not being able to meet their grade level educational targets.<sup>200</sup>

Placement into high categories is evidence that children in impoverished districts are not receiving an adequate education, as they are unable to meet their projected educational targets.<sup>201</sup> It is absurd that the poorest and worst performing public school districts in the state would be those transferring the largest portions of funding to charter schools; however, this is the present reality.<sup>202</sup> The diversion of educational funds to charter schools depletes the funding of these districts even further,<sup>203</sup> which hinders their ability to be sufficiently funded and ultimately to provide students with an adequate education as detailed in the *McDuffy* case<sup>204</sup> and promised under the Massachusetts Constitution.<sup>205</sup>

1. Lack of Resources and Student Underperformance Demonstrate Prongs of the *McDuffy* Standard Are Not Being Met

In 2005, students from the Massachusetts public school districts of

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the best performing; Dover, Weston, Cambridge, Provincetown, Nantucket, and Edgartown are a few examples of the wealthiest and highest funded school districts in the state. *Education Spending Across Massachusetts*, MASSBUDGET, [http://www.massbudget.org/tool\\_window.php?loc=education\\_by\\_district.html#tool](http://www.massbudget.org/tool_window.php?loc=education_by_district.html#tool) [https://perma.cc/6LXD-8RL7]. Each of these districts has been classified into one of the two highest levels of academic performance within the state. *School and District Profiles: 2016 Accountability Report*, MASS. DEP'T ELEMENTARY & SECONDARY EDUC., [http://profiles.doe.mass.edu/state\\_report/accountability.aspx](http://profiles.doe.mass.edu/state_report/accountability.aspx) [https://perma.cc/7R8K-C9X4].

197. *Id.*

198. *School and District Profiles: 2016 Accountability Reports*, *supra* note 196.

199. *Id.*

200. *Id.*

201. *Id.*

202. *See supra* Subpart IV.A.

203. *See discussion supra* Subpart IV.A.

204. *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993).

205. MASS. CONST. pt. II, ch. 5, § 2.

Brockton, Lowell, Springfield, and Winchendon brought suit against the Massachusetts Commissioner of Education.<sup>206</sup> The students claimed that the Commonwealth was “still in violation of its constitutional obligation to educate children in its poorer communities,” as those districts had not significantly improved since the *McDuffy* decision.<sup>207</sup> The court refused to draw a comparison to *McDuffy*, stating that the situation in the school districts could not be classified as an “egregious, [s]tatewide abandonment of . . . constitutional duty” as was present in *McDuffy*.<sup>208</sup> The court admitted that “serious inadequacies in public education” still remained throughout the state; however, the Commonwealth was already in the process of “moving systemically to address those deficiencies.”<sup>209</sup> The court noted that the goal of education reform adopted since *McDuffy* had clearly not been achieved, but because the plaintiff school districts failed to show that the defendants were “acting in an arbitrary, nonresponsive, or irrational way to meet the constitutional mandate,” the case was dismissed.<sup>210</sup>

In his dissent, Judge John M. Greaney pointed out that there were clear inadequacies that existed in the four focus districts “in the core subjects of English language arts, mathematics, science and technology, and history,” and found even larger deficiencies in the subjects of “health, the arts, and foreign languages.”<sup>211</sup> These subjects are explicitly represented in the prongs of the *McDuffy* standard.<sup>212</sup> The dissent draws attention to the fact that these prongs were clearly not being met in the focus districts, and thus the holding against the plaintiffs was undermining the “protections guaranteed to the students” under *McDuffy*.<sup>213</sup>

Judge Greaney pointed out that in Springfield “thirty-six per cent [sic] of fourth graders at one elementary school failed the English

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206. *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1138 (Mass. 2005).

207. *Id.*

208. *Id.*

209. *Id.* at 1139.

210. *Id.* at 1140.

211. *Id.* at 1166–67 (Greaney, J., dissenting).

212. *See McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993). *McDuffy* holds that children must possess *at least* the seven prongs of the standard set forth in the case to receive an adequate education. *Id.* Prong one requires children to possess “sufficient oral and communication skills;” prong two requires students to obtain sufficient knowledge to allow them to understand the “economic, social, and political systems” of the country; prong five requires that students have a sufficient grounding in “the arts” and their “historical heritage.” *Id.* Prong seven requires that students achieve a “sufficient level of academic” skills for them to be able to compete academically with students in other states. *Id.*

213. *Hancock*, 822 N.E.2d at 1171 (Greaney, J., dissenting).

Language Arts (ELA) Massachusetts Comprehensive Assessment System (MCAS) test in 2002.”<sup>214</sup> He also noted that in the same district, a large number of students begin middle school “reading two and one-half (or more) years below grade level,” and seventy percent of both seventh and tenth grade Springfield students “scored below the proficient level on the ELA MCAS test in 2003.”<sup>215</sup> Despite the clear student need, there was only one reading resource teacher available to serve all six of the middle schools in Springfield due to lack of funds.<sup>216</sup>

Additionally, at the time of the case, only two out of the six middle schools in Springfield had science laboratories, and those two laboratories had deficiencies in “running water [and] electrical outlets.”<sup>217</sup> To add to this, “only one-half of Springfield’s elementary schools” were staffed with a science teacher.<sup>218</sup> The insufficiency of the science supply budget for the district was also noted, having been “\$2 per student” for the fifteen years prior to the case.<sup>219</sup>

In the time since the dismissal of *Hancock*, the funding for the Springfield Public Schools has not dramatically improved.<sup>220</sup> Students in that district are still being denied their right to an adequate education, and the problem is made worse with the existence of charter schools and the funding that is diverted to them.<sup>221</sup> In September 2016, Springfield School Superintendent Daniel Warwick admitted that Springfield barely receives enough funding to meet “the minimum net school spending needed to educate each child” and fund each area of study.<sup>222</sup>

The Superintendent pointed out in particular that the impact of

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214. *Id.* at 1166 (Greaney, J., dissenting).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 1167.

220. See Shira Schoenberg, *Report: Massachusetts Underfunds Special Education, School Health Insurance Costs*, MASSLIVE (Nov. 2, 2015, 11:28 AM), [http://www.masslive.com/politics/index.ssf/2015/11/report\\_state\\_underfunding\\_spec.html](http://www.masslive.com/politics/index.ssf/2015/11/report_state_underfunding_spec.html) [<https://perma.cc/B3PU-FNAK>] (discussing how the existing school funding schematic in Massachusetts is inadequate and failing students, especially in low income areas such as Springfield); see also Anthony Fay & Tiffany Chan, *Advocates: 77,000 MA Students Stuck in Failing Schools*, WWLP (Nov. 13, 2014, 7:33 PM), <http://wwlp.com/2014/11/13/advocates-77000-ma-students-stuck-in-failing-schools/> [<https://perma.cc/73SR-9KBM>] (highlighting that 10,000 of the 77,000 students in failing school systems in Massachusetts are located in Springfield’s school district).

221. See *supra* Subpart IV.A.

222. Kathleen Mitchell, *Charter-School Debate Heats Up As Election Nears*, BUSINESSWEST.COM (Sept. 20, 2016), <http://businesswest.com/blog/charter-school-debate-heats-up-as-election-nears/> [<https://perma.cc/4Z2L-4L6N>].

charter schools on the district has been tremendous—and not in a positive way.<sup>223</sup> He stressed the fact that Springfield Public Schools lose approximately \$41 million to charters each year and are only reimbursed \$6 million by the state, despite the fact that they have an extremely diverse, and expensive, group of students to educate; this group includes refugees and a large number of students with special needs.<sup>224</sup> Springfield was forced to cut “\$13 million from a budget this year that was already underfunded by \$10 million,”<sup>225</sup> which was further exacerbated by “a \$3 million shortfall from the state’s failure to reimburse them appropriately for students lost to charter schools.”<sup>226</sup> Springfield remains one of the worst performing school districts in the state.<sup>227</sup>

The four poorest districts in the state, including Springfield, have the most money diverted to charter schools while also being the worst performing.<sup>228</sup> The connection is clear and undeniable. Lack of funding inhibits school districts from meeting the required prongs of the *McDuffy* standard and charter schools have become a direct link to that lack of funding.

## 2. Public School Students Are Being Denied Their Constitutional Right to Receive an Adequate Education at the Hands of the Legislature

The *Hancock* case was dismissed because the court determined that Massachusetts was working toward its goal of improving public education,<sup>229</sup> and that the hardships claimed by the plaintiffs could not be classified as an “egregious, [s]tatewide abandonment of . . . constitutional duty” that would warrant a holding of unconstitutionality.<sup>230</sup> Charter school funding, however, could be viewed as such an abandonment, and thus overtly in violation of the Massachusetts Constitution. Charter schools are institutions approved by the Legislature that divert millions of dollars from public school districts each year.<sup>231</sup> This diversion of funding is undeniably

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *See supra* Subpart IV.B.

228. *See supra* Part IV.

229. *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1139 (Mass. 2005).

230. *Id.* at 1138.

231. *See Public School District Losses to Charters Jump to \$450 Million*, *supra* note 172.

detrimental to public school districts; it drains their resources and inhibits school districts throughout the state from being able to provide the majority of students with an adequate education that meets the standard set forth in the *McDuffy* case.<sup>232</sup> Thus, thousands of children are being denied their constitutional right at the hands of the Legislature.

The *Hancock* court recognized that it remains “the responsibility of the Commonwealth to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate.”<sup>233</sup> The Commonwealth is clearly not living up to this duty as the state’s educational reform in general has been failing school districts for years.<sup>234</sup> The constitutional mandate is not being met in many districts across the state due to *lack* of funds and yet the Commonwealth has created and supports a second, and unequal,<sup>235</sup> system of schools that siphon money from already underfunded public school districts.

The *McDuffy* standard<sup>236</sup> is being consistently disregarded by the State Legislature. Educational funding in general throughout the Commonwealth, and most notably in poorer districts, is not sufficient to sustain an adequate education for children, and charter school funding horribly exacerbates this problem.<sup>237</sup> Failure to recognize this and remedy the problem that charter schools pose to public schools throughout the state constitutes a “[s]tatewide abandonment of . . . constitutional duty” by the Commonwealth.<sup>238</sup> School districts in Massachusetts will continue to fail until the state decides to put in the time and money necessary for reform. An alternative system of schools is not how Massachusetts will fix its ailing public school system; charter schools only hurt Massachusetts’ public schools, and by extension public school students, by draining their financial resources. It is clear that students are being denied their constitutional right to an adequate

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232. *See supra* Part IV.

233. *Hancock*, 822 N.E.2d at 1140 (quoting *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516, 555–56 (Mass. 1993)).

234. Linda Enerson, *Not Adding Up: Two Decades After Ed Reform Promised a Level Playing Field Among Poor and Affluent Communities, Massachusetts is Again a State of Haves and Have-Nots*, COMMONWEALTH (July 10, 2012), <http://commonwealthmagazine.org/education/003-not-adding-up/> [<https://perma.cc/EP3C-8CJN>] (discussing the fact that the 1993 Education Reform Act has not funded school districts sufficiently in quite some time).

235. *See supra* Subpart I.A.

236. *See McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993).

237. *See supra* Subpart IV.A.

238. *Hancock*, 822 N.E.2d at 1138.

education as a result of charter school funding;<sup>239</sup> therefore, if argued under the precedent of *McDuffy*, a challenge to charter school funding in Massachusetts under the state Constitution by underserved public school students would have merit.

#### CONCLUSION

The charter school experiment throughout the United States has been nothing but a detriment to public school systems across the country. Many charter school advocates are of the opinion that “perils” exist within “the complex tangle of rules” that sustain the public school system; perils that “include the potential to sap creativity and innovation, thwart accountability[,] and undermine the effective education of” children.<sup>240</sup> Charter schools are not a solution to this. Public schools, and public school students, will not thrive unless the state gives them the ability and resources to do so. Charter schools are not the answer to the problems in education that plague Massachusetts, or the nation. Diverting more money from already underfunded public schools does not bolster education, but instead, only hurts the majority of students who must remain in the state’s public schools.

Although courts across the country have been hesitant to hold charter school funding unconstitutional in the past, this trend was broken in 2015 when the Washington Supreme Court held that the funding of charter schools within the state through public educational funds was unconstitutional under Washington’s state constitution.<sup>241</sup> This case was the first of its kind, and may serve as a roadmap for similar constitutional challenges to charter school funding in other states across the country. Nevertheless, because the decision was based primarily on the unique language of the Washington Constitution, these challenges will be limited to states with similar constitutional language. Due to this, the case has no applicability in Massachusetts specifically.

However, charter school funding in Massachusetts does not escape a constitutional inquiry. The diversion of charter school funding from public school districts has rippling negative effects that directly impact public school students. Due to the direct losses in funding as a result of charter school funding, public schools are unable to provide students in Massachusetts the quality of education that they are entitled to receive

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239. See *supra* Subpart IV.A.

240. *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 748 (Cal. Ct. App. 1999).

241. See *League of Women Voters of Wash. v. State*, 355 P.3d 1131, 1141 (Wash. 2015).

under the state's constitution. As a result, a constitutional challenge to charter school funding could be brought under the *McDuffy* case by affected public school districts and students in Massachusetts. The recent case out of Washington demonstrates that court attitudes may be shifting with regard to charter school challenges, increasing the likelihood of success for such a challenge in Massachusetts.