

APPENDIX

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Opinion of the United States Court of Appeals
for the First Circuit

March 20, 2026

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**United States Court of Appeals
For the First Circuit**

No. 25-1417

ARIELLA HELLMAN, on their own behalf and as next friend of their child, E.H.; DAVID HELLMAN, on their own behalf and as next friend of their child, E.H.; JOSH HARRISON, on their own behalf and as next friend of their child, H.H.; MIRIAM SEGURA-HARRISON, on their own behalf and as next friend of their child, H.H.,

Plaintiffs, Appellants,

v.

MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION; KATHERINE CRAVEN, in the official capacity as Chair of the Board; MATTHEW B. HILLS, in the official capacity as Vice-Chair of the Board; DR. ERICKA FISHER, in the official capacity as a member of the Board; ISABELLA CHAMBERLAIN, in the official capacity as a member of the Board; FARZANA MOHAMED, in the official capacity as a member of the Board; DR. ERICKA FISHER, in the official capacity as a member of the Board; DÁLIDA ROCHA, in the official capacity as a member of the Board; KRISTEN SMIDY, in the official capacity as a member of the Board; MARY ANN STEWART, in the official capacity as a member of the Board; DR. AMY KERSHAW, in the official capacity as a member of the Board; DR. MARTIN WEST, in the official capacity as a member of the Board; PEDRO MARTINEZ, in

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the official capacity as Acting Secretary of the Board
and Commissioner of DESE; MASSACHUSETTS
BOARD OF ELEMENTARY AND SECONDARY
EDUCATION,*

Defendants, Appellees.

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Russell D. Johnston has been substituted by Pedro Martinez, Dr. Patrick Tutwiler has been substituted by Dr. Amy Kershaw, and Board of Elementary and Secondary Education Members Ela Gardiner, Michael Moriarity, and Paymoun Rouhanifard have been substituted by Isabella Chamberlain, Ericka Fisher, and Kristen Smidy.

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APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
[Hon. Nathaniel M. Gorton, U.S. District Judge]

Before

Gelpí, Thompson, and Montecalvo.
Circuit Judges.

David G. Hodges, with whom Renée D. Flaherty, Institute for Justice, John C. La Liberte, Pioneer Public Interest Law Center, Tiffany Stichel, and Schlossberg, LLC, were on brief for appellants.

Timothy J. Casey, Assistant Attorney General, with whom Andrea Joy Campbell, Attorney General of Massachusetts, was on brief, for appellees.

Donald A. Daugherty, Jr., Martha A. Astor, and Defense of Freedom Institute on brief for amicus curiae Defense of Freedom Institute.

March 20, 2026

GELPI, Circuit Judge. Massachusetts grants all of the state’s students with disabilities an individual entitlement to publicly funded special education services. But state regulations distinguish between public and private school students when determining where those services may be provided. While public school students may generally receive services at their schools of enrollment, private school students may receive services only at a public school or another public or neutral location. This distinction reflects, in part, a provision of the Massachusetts Constitution that prohibits the state from providing direct aid to private schools.

The parents of E.H. and H.H. -- two children with disabilities enrolled in private schools -- challenge this regulation under the Fourteenth Amendment. They claim it violates the Due Process, Equal Protection, and Privileges or Immunities Clauses by interfering with their fundamental constitutional right to enroll their children in private school. The district court dismissed their complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). We now affirm.

I.

A. Statutory and Regulatory Background

We begin with an overview of the relevant statutory and regulatory schemes. The Individuals with Disabilities Education Act (“IDEA”) is a federal grant program that supports states in providing special education services for children with disabilities. 20

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U.S.C. §§ 1400 *et seq.* In exchange for federal funding, participating states commit to providing all such students “within their jurisdiction ‘a free appropriate public education (‘FAPE’) in the least restrictive environment possible.” Johnson v. Bos. Pub. Schs., 906 F.3d 182, 185 (1st Cir. 2018) (quoting Sebastian M. v. King Philip Reg’l Sch. Dist., 685 F.3d 79, 81 (1st Cir. 2012)).

A FAPE includes “both ‘specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability’ and ‘such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education.’” Id. (quoting 20 U.S.C. § 1401(9), (26)(A), (29)). A FAPE is primarily delivered according to an Individualized Education Program (“IEP”) -- a written plan developed by a team that includes the child’s parents, teachers, and school officials that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Id. (quoting Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 (2017)); 20 U.S.C. § 1414(d)(1)(A), (B).

The “[l]east restrictive environment” is defined as the educational placement that assures:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the

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regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A).

The IDEA does not require identical treatment for students in public schools and students in private schools. As to special education specifically, students with disabilities enrolled in private schools do not have “an individually enforceable right to receive special education and related services.” See Gary S. v. Manchester Sch. Dist., 241 F. Supp. 2d 111, 114 (D.N.H. 2003), aff’d, 374 F.3d 15 (1st Cir. 2004); 20 U.S.C. § 1412(a)(10)(C)(i). Instead, the IDEA requires that private schools receive a proportionate share of a state’s IDEA funds. 20 U.S.C. § 1412(a)(10)(A)(i).

As a recipient of IDEA funds, Massachusetts maintains a plan for the provision of special education services. But Massachusetts state law goes beyond the federal baseline by providing all children with disabilities -- including children in private schools -- an individually enforceable right to special education services.¹ Mass. Gen. Laws ch. 71B (“M.G.L. c. 71B”),

¹ Before Congress enacted the IDEA Amendments of 1997, it was unclear whether states were required to make a FAPE available to students with disabilities voluntarily placed in private school. Gary S., 241 F. Supp. 2d at 114-15. Massachusetts had done so. In 2020, the state legislature decided to continue that practice, though it was then clear that it was not required under the IDEA. See 1999 Mass. Acts 941.

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§§ 1, 3. To implement that right, the Massachusetts Board of Elementary and Secondary Education (the “Board”) must “promulgate” regulations to ensure that children with disabilities receive a “[FAPE] in the least restrictive environment . . .” *Id.* § 2.²

Pursuant to Chapter 71B, the Board promulgated regulations governing publicly funded special education services for students in private school at private expense.³ Those regulations require “[e]ach school district . . . [to] provide special education designed to meet the needs of eligible students” who are enrolled in private schools, 603 Mass. Code Regs. § 28.03(1)(e)(1), which includes developing an IEP and delivering the services recommended therein, *id.* § 28.03(1) (e) (2), (3). The regulations further require that the special education provided to private school students be “comparable in quality, scope, and opportunity for participation to that provided to public

² Massachusetts state law defines “[FAPE]” and “[l]east restrictive environment” substantially the same way as the IDEA. See M.G.L. c. 71B, § 1.

³ The relevant regulations only govern students enrolled in private schools by their parents. They do not, however, apply to children that the government places in private schools when it determines a public school is unable to educate them. M.G.L. c. 71B, § 4; see also id. § 10. When enrolled in private school under these circumstances, the child is considered a “publicly funded student[]” under the IDEA, 603 Mass. Code Regs. § 28.06, which entitles the child to “all the rights the child[] would have if served by” the public school district, 20 U.S.C. § 1412(a)(10)(B).

Unless otherwise specified, we use “students in private school” or “private school students” interchangeably to refer only to students enrolled in private school by their parents.

school students with needs of equal importance.” *Id.* § 28.03(1)(e)(4).

Central to this appeal, the regulations require that “special education services funded with state or local funds [be] provided in a public school facility or other public or neutral site” (the “Place Regulation”). *Id.* § 28.03 (1) (e) (3) (emphasis added). In practice, this provision means that private school students must leave their schools to receive special education services, while public school students receive services on site.

The Board promulgated the Place Regulation because Massachusetts’s state constitution restricts the use of public funds to support private schools (“the Anti-Aid Amendment”). The constitutional provision reads: “No grant, appropriation or use of public money . . . shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any . . . primary or secondary school . . . which is not publicly owned.” Mass. Const. amend. art. XVIII, § 2. Thus, Massachusetts’s statutory and regulatory scheme governing the provision of special education services seeks to (1) extend those services to students enrolled in private schools, without (2) running afoul of the state consti-

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tution. With this necessary background, we now turn to the facts underlying this appeal.

B. Factual Background⁴

Appellants Ariella and David Hellman have a son, E.H., who attends a private elementary school in Massachusetts. E.H. has attention-deficit/hyperactivity disorder (ADHD), and so he is eligible for publicly funded special education services under state law. The Hellmans pursued these services and obtained an IEP, which recommends that E.H. receive two hours of academic support and thirty minutes of counseling and learning center time per week. The Hellmans are working parents, and their jobs prevent them from transporting their son to and from school multiple times per week, so they had decided to enroll E.H. in public school. But because the Hellmans “observe Jewish law and want their children to receive an education informed by Judaism,” they later withdrew E.H. from public school and enrolled him at a private Jewish school.

Because E.H. cannot receive services at his private school, and the Hellmans consider transporting E.H. several times per week to be “unduly burdensome, disruptive, stigmatizing, stressful, inefficient,” and a “detract[ion] from the education at . . . religious

⁴ Because this appeal follows a motion to dismiss, we pull our facts from the Hellmans’ and the Harrisons’ complaint. *Shash v. Biogen, Inc.*, 84 F.4th 1, 6 (1st Cir. 2023) (“When reviewing a motion to dismiss, we recount the underlying facts as alleged in the complaint . . .”).

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school[],” they have elected to forgo the state’s publicly funded services.

Appellants Josh Harrison and Miriam Segura-Harrison’s son, H.H., also attends a private elementary school in Massachusetts. H.H. has ADHD, developmental coordination disorder, and dyslexia. Like E.H., H.H. is eligible for publicly funded special education services. The Harrisons pursued the state’s services and obtained an IEP, which recommends that H.H. receive four hours of self-regulation instruction, along with nearly two hours each of reading instruction, occupational therapy, and psychological services per week. Like the Hellmans, the Harrisons have forgone the state’s publicly funded services because they are Jewish and believe such education would be best for their son and because the only way H.H. could receive the services is if they transport him to and from his private school. They too believe doing so would be “unduly burdensome, disruptive, stigmatizing, stressful, inefficient,” and a “detract[ion] from the education at . . . religious school[].”

E.H. and H.H. receive some special education services through a nonprofit student service group, but it does not provide the full panoply of support that could be received in a public school or -- absent the Place Regulation -- could be provided by Massachusetts in their private schools.

C. Procedural Background

E.H. and H.H.’s parents (the “Parents”) sued the Board, its individual members in their official capaci-

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ties, the Massachusetts Department of Elementary and Secondary Education, and its commissioner in his official capacity (collectively, the “State Appellees”) pursuant to 42 U.S.C. § 1983.⁵ They claimed the Place Regulation violates the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment to the United States Constitution.⁶ The State Appellees moved to dismiss all claims for failure to state a claim, and the district court granted the motion. The Parents timely appealed.

II.

The Parents raise several arguments on appeal. First, they assert the district court erred in both its interpretation of the Place Regulation and its application of Supreme Court precedent. They maintain that a true reading of the Place Regulation conditions their access to the state’s services on their relinquishment of their fundamental right to direct the upbringing of their children and penalizes them by making it extremely difficult or impossible for them to exercise the right. Next, they assert that the Place Regulation dis-

⁵ The district court dismissed the Board and the Department of Elementary and Secondary Education after the Parents agreed that the Eleventh Amendment barred claims against those state agencies.

⁶ We note that there are two versions of the Privileges and Immunities Clause, the first in Article IV § 2 (Privileges and Immunities Clause) and the second in the Fourteenth Amendment (Privileges or Immunities Clause), with distinct applications. (Note the use of “and” instead of “or.”) The Parents’ claims arise from the Clause in the Fourteenth Amendment, to wit, the Privileges or Immunities Clause.

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criminate against parents who choose to exercise their fundamental right to direct the upbringing of their children. Lastly, they argue that, to the extent that substantive protection for parental rights lies in the Privileges or Immunities Clause, rather than the Due Process Clause, they preserve a Privileges or Immunities Clause claim for appeal. We address each argument *seriatim*.

Because this appeal comes to us from a grant of a motion to dismiss, we review each claim de novo and may affirm on any ground supported by the record. Analog Techs., Inc. v. Analog Devices, Inc., 105 F.4th 13, 17 (1st Cir. 2024). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Mehta v. Ocular Therapeutix, Inc., 955 F.3d 194, 205 (1st Cir. 2020) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)); see also Fed. R. Civ. P. 12(b)(6).

A. Substantive Due Process Claim

The Parents’ first claim arises under the substantive component of the Due Process Clause of the Fourteenth Amendment, which provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. At its core, substantive due process asks whether the government has a good enough reason to deprive a person of life, liberty, or property. See Erwin Chemerinsky, Substantive Due Process, 15 Touro L. Rev. 1501, 1501 (1999). Some liberties are considered especially important, or “fundamental,” and the gov-

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ernment faces a higher bar before it can interfere with them. See Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

Consistent with that principle, we employ a three-step⁷ framework to evaluate substantive due process claims. “First, we ask whether a party has adequately alleged a right recognized as fundamental.” Foote v. Ludlow Sch. Comm., 128 F.4th 336, 347 n.14 (1st Cir. 2025), petition for cert. filed., No. 25-77 (U.S. July 18, 2025).⁸ Next, “we assess whether the government conduct at issue is alleged to have restricted that right.” Id. “[I]f the answer is yes, the conduct is alleged to have restricted a fundamental right, then we examine whether the restriction satisfies the appropriate level of heightened scrutiny.” Id. If the answer is no, we ex-

⁷ Substantive due process claims challenging executive actions ordinarily have a preceding analytical step, considering whether the behavior of the governmental officer “shocks the conscience.” Foote v. Ludlow Sch. Comm., 128 F.4th 336, 346 (1st Cir. 2025), petition for cert. filed., No. 25-77. The parties agree that because the Place Regulation is “legislative,” not “executive” in nature, we need not also consider whether the Place Regulation “shocks the conscience.”

⁸ There is a petition for certiorari pending before the Supreme Court in Foote. See Pet. for a Writ of Cert. at i, Foote v. Ludlow Sch. Comm., No. 25-77 (U.S. July 18, 2025). And the Supreme Court recently reinstated an injunction blocking a law that, “in critical respects, is a carbon copy” of the one we held was valid in Foote. See Mirabelli v. Bonta, 607 U.S. __, __ (2026) (Kagan, J., dissenting). We nonetheless rely on Foote only insofar as it provides a framework for assessing a substantive due process claim, not for the merits analysis in this case.

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amine whether the government conduct survives rational basis review. Id.

1.

We begin at step one: whether the Parents have adequately alleged a right recognized as fundamental. The Supreme Court has been very careful in defining fundamental rights, recognizing only those rights that are “objectively, deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” Glucksberg, 521 U.S. at 720-21 (citations omitted). Applying that standard, the Court has long recognized that parents have a fundamental liberty interest in directing the upbringing and education of children under their control. See id. at 720; Pierce v. Soc’y of Sisters, 268 U.S. 510, 534-35 (1925). This liberty interest is commonly referred to as the Meyer or Pierce right because it finds its origin in two Supreme Court cases, Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925). Meyer struck down a state law prohibiting the teaching of any subject except in English. 262 U.S. at 400, 403. Pierce struck down a law mandating public school education. 268 U.S. at 535 (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”).

The Parents claim that the Place Regulation infringes on their Pierce right to send their children to

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private school because it conditions a state benefit on the non-exercise of that right. The State Appellees attempt to frame the Parents’ asserted right more narrowly, as a nonexistent constitutional “right to state-funded special-education services” at the location of one’s choosing. Thus, according to the State Appellees, the Parents have failed to assert infringement of a fundamental right, as required to bring a substantive due process claim.

We think the Parents have the better argument on this point. Although parties must carefully define asserted fundamental rights, Glucksberg, 521 U.S. at 721, in its parental rights cases, the Court has not defined the right by focusing narrowly on the particular conduct challenged. See, e.g., Meyer, 262 U.S. at 400, 403 (not defining the parents’ right as the right to allow their child to learn German); Pierce, 268 U.S. at 534-35 (not defining the right as the right to send their child to religious school); Troxel v. Granville, 530 U.S. 57, 72-73 (2000) (not defining the right as the right to prevent a grandparent from visiting their grandchild). Instead, it has asked “whether the [governmental] conduct at issue f[alls] within the broader, well-established parental right to direct the upbringing of one’s child.” Foote, 128 F.4th at 348. That includes the right to choose private schooling.

We understand the complaint to allege that the denial of a state statutory right (access to publicly funded special education services) burdens the Parents’ Pierce right to enroll their children in private school. This allegation is enough to get past step one.

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See *id.* at 348-49 (declining to require “microscopic granularity” in defining parental rights).

2.

Onto step two: whether the Parents have alleged that “the government conduct at issue . . . restricted that [fundamental] right.” *Id.* at 347 n.14. On this point, the Parents argue that the Place Regulation conditions access to special education services on their “non-exercise” of the right to enroll their children in private school. But that framing does not carry their claim past step two. The Place Regulation does not bar parents from choosing private school. Nor does it penalize that choice. It merely defines the terms on which the state will provide publicly funded services to students whose parents choose to send their children to private school.

That distinction matters under Supreme Court precedent. The Court has repeatedly distinguished state interference with a protected activity from a decision to fund an alternative activity. See *Maier v. Roe*, 432 U.S. 464, 474–77 (1977); *Harris v. McRae*, 448 U.S. 297, 315–18 (1980). In *Maier v. Roe* and *Harris v. McRae*, the Court held that federal and state restrictions on funding for abortion did not infringe on the then-recognized fundamental right to an abortion.⁹ *Roe*, 432 U.S. at 474; *McRae*, 448 U.S. at 318.

⁹ Even though *McRae* and *Roe*’s holdings are no longer existing law, see *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022), we rely on them insofar as they can still shed light

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The Court explained that the government may leave a constitutional choice available while declining to finance, facilitate, or administer that choice on the claimant's preferred terms. See Roe, 432 U.S. at 474; McRae, 448 U.S. at 318.

That principle applies with full force to the Pierce right. In Norwood v. Harrison, the Court addressed a challenge to a Mississippi program providing “free textbooks to all the children of the State,” including those in segregated private schools. 413 U.S. 455, 457-58 (1973). The plaintiffs alleged that, “by supplying textbooks to students [in segregated private schools],” the state unconstitutionally aided racially segregated education. Id. at 457. In its defense, the state argued that denying textbooks to private schools would contravene the Pierce right. Id. at 461-62. But the Court rejected that argument, reasoning that while the Pierce right protects the choice of educational forum from meaningful state interference, Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1207 (9th Cir. 2005), it does not constitutionalize equal access to public benefits for students whose parents opted for private schooling, Norwood, 413 U.S. at 462 (“[Pierce] said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise.”).¹⁰

on how we analyze fundamental rights under substantive due process doctrine.

¹⁰ The Parents think Norwood stands only for the proposition that the state need not grant equal aid to private schools when it has competing constitutionally mandated standards forbid-

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Indeed, the Court has expressly rejected the inference that because parents may choose private school, the state must therefore ensure they have equal financial or programmatic access to support that choice. It has explained:

It cannot be that because [the] government may not . . . prevent parents from sending their child to a private school, [the] government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to . . . send their children to private schools.

McRae, 448 U.S. at 318 (citing Pierce, 268 U.S. 510); see also Roe, 432 U.S. at 477 (“Pierce casts no shadow over a State’s power to favor public education by funding it -- a policy choice pursued in some States for more than a century.”).¹¹

ding state-sponsored discrimination. But that reads Norwood too narrowly. Norwood squarely rejected the premise that a parental right to choose private education carries with it a right to public aid. See Norwood, 413 U.S. at 461 (“Appellees fail to recognize the limited scope of Pierce”); see also id. at 462.

¹¹ The Parents seek to distinguish McRae and Roe by claiming that they do not argue that the state “must fund their rights.” Rather, “[t]hey only argue that when the [state] legislature chooses to provide a generally available benefit, as it has done here, [the state] cannot deny that benefit simply because would-be recipients exercise their Pierce right in a way [the state] disfavor[s].” But that argument relies on a set of free exercise cases that do not apply here. We explain that point below.

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Naturally, that is what we held in Gary S. when the parents of private school students challenged federal and state special education schemes under the Due Process and Equal Protection Clauses. 374 F.3d at 17, 23. The federal law at issue was the IDEA, which did not grant private school children an individually enforceable right to special education services. Id. And the state law at issue entitled only parents of children in public school to a hearing if they were dissatisfied with the state's services. Id. The parents of private school students argued these laws impermissibly "condition[ed] access to a government benefit on the relinquishment of a constitutional right." Id. at 23. We rejected their argument and held that the "non-funding" of private school programs "d[id] not significantly interfere with the [parents'] fundamental right to direct the upbringing and education of children under their control." Id. At 22. In doing so, we relied on the same non-subsidy line of Supreme Court cases described above.

All of these cases demonstrate that, while parents have a protected right to choose private education, the state does not "restrict" that right merely by declining to subsidize the private school option or by offering public services to privately enrolled students on different logistical terms than to publicly enrolled students. Measured against this principle, the Parents' allegations do not hold up. The complaint does not plausibly allege that Massachusetts has barred private education, which the Court held unconstitutional in Meyer, 262 U.S. at 403, or that Massachusetts has compelled public education, which the Court held unconstitutional in Pierce, 268 U.S. at 534-35. It does not

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allege that Massachusetts has deprived parents of meaningful access to the private school option. Foote, 128 F.4th at 354 (“A cognizable parental rights claim under the Due Process Clause . . . generally requires restraining conduct by the government.” (citing Anspach v. City of Phila., 503 F.3d 256, 266 (3d Cir. 2007))). Nor does it allege that the state structured the special education regime to penalize those exercising their right to enroll their children in private school, rather than to administer publicly funded services through public infrastructure. Cf. Gary S., 241 F. Supp. 2d at 118-19 (suggesting a different result if the program was designed to penalize private school students); Alston v. Spiegel, 988 F.3d 564, 571 (1st Cir. 2021) (explaining that conclusory statements need not be credited at the motion to dismiss stage).

What the complaint alleges, at most, is an increased logistical burden: privately enrolled students must receive publicly funded services at a neutral or public location rather than on the private school campus. That is a consequence of how the state chooses to deliver public benefits -- not a meaningful intrusion on the underlying forum choice protected by Meyer and Pierce.

The structure of the regime underscores the point. As pleaded, the Parents retain three options. They may (1) enroll their children in public school and receive the full range of publicly funded services on site; (2) enroll their children in private school and access those same publicly funded services at a neutral or public location; or (3) enroll their children in private school and opt out of publicly funded services alto-

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gether. Those options preserve the constitutionally protected choice -- public or private schooling -- while setting permissible conditions on the administration of public services. If anything, the asserted burden here is more attenuated than in Gary S.: Massachusetts does provide publicly funded services to privately enrolled students; it simply provides them at locations the state selects. That does not infringe on the Pierce right within the meaning of step two.

The Parents offer two reasons Gary S. should not control: (1) Massachusetts law, unlike the IDEA, creates an individually enforceable entitlement to services for private school students; and (2) the line of cases underscoring the Supreme Court’s application of the Free Exercise Clause (regarding “equal benefits”) supports reversal in the present matter. Neither argument prevails.

First, the fact that state law grants private school students an individually enforceable right does not alter our conclusion. Statutes may create broader statutory rights, but in doing so, they do not redefine the scope of the federal fundamental right. Parents for Priv. v. Barr, 949 F.3d 1210, 1232 (9th Cir. 2020) (“Although state and federal statutes may expand upon constitutional protections by creating new statutory rights, statutes do not alter the protections afforded by the Constitution itself.”). Put simply, “[s]tate-specific policies do not augment fundamental rights.” St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist., 919 F.3d 1003, 1009 (7th Cir. 2019). The Due Process inquiry remains whether a state’s action restricts the constitutional right itself. And for

the reasons expressed above and in Gary S., no such restriction is plausibly alleged.

Second, the Parents' attempt to analogize this case to the Free Exercise "equal benefits" cases does not work. At the threshold level, the argument depends on the premise that state law guarantees private school students' access to on-site special education services. The State Appellees dispute that premise, and we think they are right.

Recall that Chapter 71B requires that "to the maximum extent appropriate" children with disabilities be "educated with children who are not disabled" and that "removal of children with disabilities from the regular educational environment [shall] occur[] only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved satisfactorily." M.G.L. c. 71B, § 1. In the Parents' view, given this statutory entitlement, the Place Regulation cannot require private school students to categorically receive services outside of their regular classroom.

But that reading misconstrues the statute. Although the statute discourages removal from the "regular educational environment," it defines that phrase in programmatic terms: "the school program and pupil assignment which normally leads to college preparatory or technical education or to a career." Id. The definition says nothing about where the program must be delivered. Properly understood, then, the "least restrictive environment" requires that schools,

to the maximum extent appropriate, educate students with disabilities alongside nondisabled peers in a program that normally leads to college, technical education, or a career. But it does not mandate that those services be delivered in any particular classroom or physical location.

That understanding resolves the Parents' claim. Because the statute does not guarantee on-site delivery of services, there is no "equally available benefit" that the Place Regulation denies children whose parents choose to place them in private school. So this case is indistinguishable from Gary S., and our prior analysis is sufficient to affirm the dismissal of the Parents' claim.

Nonetheless, the Parents argue that even under our reading of state law, their children are still denied the otherwise "equally available benefit" of being educated with other children who are not disabled. They argue the Place Regulation requires their children, and only their children, to receive services in isolation or alongside other students with disabilities. So we proceed to consider the Parents' argument that relies on the Free Exercise line of cases and ultimately conclude the argument fails.

The crux of the Parents' argument is that once the state establishes an otherwise generally available benefit, it may not deny that benefit to a student simply because their parents exercise their fundamental right to enroll their child in private school. But every case they cite arises under the Free Exercise Clause, not the parental rights doctrine involved

here. (The Parents did not bring a Free Exercise claim; the Place Regulation applies to all private schools, secular and religious alike.) And those holdings have no bearing on their parental rights claim. They rest on a distinct, First Amendment principle that prohibits the state from imposing even indirect coercion or penalties on religious exercise. See, e.g., Carson v. Makin, 596 U.S. 767, 778 (2022) (“The Free Exercise Clause of the First Amendment protects against ‘indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.’” (quoting Lyng v. Nw. Indian Cemetery Protective Ass’n, 485 U.S. 439, 450 (1988))); see also Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 463 (2017) (same); Espinoza v. Mont. Dep’t of Revenue, 591 U.S. 464, 478, 484 (2020) (same).

That principle does not apply to the parental right. See St. Joan Antida High Sch. Inc., 919 F.3d at 1008 (“A direct and substantial interference [with the Pierce right] is required [to trigger heightened scrutiny].”). As we said, the fundamental parental right protects the right of parents to send their children to private school, such that a state cannot ban private schooling, Meyer, 262 U.S. at 403, or mandate attendance at public schools, Pierce, 268 U.S. at 535. But it does not require the state to extend public benefits on identical terms to private and public school students to protect the parents’ choice of forum. Norwood, 413 U.S. at 462 (“It is one thing to say that a State may not prohibit the maintenance of private schools [under Pierce] and quite another to say that such schools must . . . receive state aid.”); cf. Carson, 596 U.S. at 781 (holding that a state program limiting generally

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available tuition assistance program to students seeking to enroll in non-secular schools “discriminat[es] against religion”). To the contrary, the Pierce right does not limit the state’s authority to maintain and support a public school system -- even where doing so creates practical incentives favoring public education.¹² See, e.g., Meyer, 262 U.S. at 402; Cornerstone Christian Schs. v. Univ. Interscholastic League, 563 F.3d 127, 138 n.12 (5th Cir. 2009). So we cannot follow the Parents’ attempt to apply free exercise reasoning to the parental right context.

To wrap up, the Parents’ claim is foreclosed by Gary S., and their attempts to distinguish the case are unpersuasive. Hence, the district court correctly dismissed this claim.

3.

Because the Place Regulation does not restrict the Parents’ right to enroll their children in private school, we proceed to step three of the substantive due process analysis and apply rational basis review. See Foote, 128 F.4th at 347 n.14. “A law survives rational basis review so long as the law is rationally related to a legitimate governmental interest,” Cook v. Gates, 528 F.3d 42, 55 (1st Cir. 2008), and it “is neither arbitrary, unreasonable nor irrational.” D’Angelo v. N.H. Sup. Ct., 740 F.3d 802, 806 (1st Cir. 2014) (quoting LCM Enters., Inc. v. Town of Dartmouth, 14 F.3d 675,

¹² For the same reasons, the Parents’ reliance on Loffman v. Cal. Dep’t of Educ., 119 F.4th 1147 (9th Cir. 2024), is misplaced.

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679 (1st Cir. 1994)).¹³ Massachusetts identifies its interests as providing special education services to private school students while complying with the Anti-Aid Amendment. And because Massachusetts has identified a legitimate government interest, the Parents bear the burden of “negati[ng] every conceivable basis” for the law. Heller v. Doe, 509 U.S. 312, 320 (1993) (citation omitted). To that end, they have three retorts.

First, the Parents counter that the state’s services aid students, not schools, and so it would not contravene the Massachusetts Constitution to provide special education services on site in private schools. They cite Zobrest v. Catalina Foothills School District, 509 U.S. 1, 13 (1993), to support that proposition. Zobrest, however, arose in the context of an Establishment Clause challenge where the Supreme Court considered whether neutral government aid to individuals could be attributed to the state as support for religion. Id. at 3. The Court’s description of the aid as flowing to students -- rather than to schools -- served the limited purpose of denying that claim. Id. at 13-14.

By contrast, in more analogous cases, the Supreme Court has recognized that similar arrangements “are a form of financial assistance inuring to the benefit of

¹³ We note that D’Angelo concerned an Equal Protection challenge. But “[b]ecause the analysis of whether a law passes rational basis review is the same under the Equal Protection Clause and the Due Process Clause, we draw our understanding of the rational-basis standard from cases examining challenges brought under both provisions.” Ass’n to Pres. and Protect Loc. Livelihoods v. Sidman, 147 F.4th 40, 55 n.7 (1st Cir. 2025).

the private schools themselves.” Norwood, 413 U.S. at 463-64. That makes sense because, as the State Appellees explain: “If public schools had to send their own special-education teachers and other resources to private schools, then those expenses would not have to be borne by the private schools, making it easier for them to fund their operations.” In any case, even if the Place Regulation swept more broadly than necessary in trying to avoid aiding private schools, “[r]ational basis review tolerates classifications that may be overinclusive or underinclusive.” Hope v. Comm’r of Ind. Dep’t of Corr., 66 F.4th 647, 651 (7th Cir. 2023) (citing St. Joan Antida High Sch. Inc., 919 F.3d at 1010). We therefore are not convinced by this first argument.

Next, the Parents argue that it is irrational for the Place Regulation to distinguish between students placed in private school by their parents and those placed in private school by the state. See supra note 3. But this contention ignores that Massachusetts treats those groups differently because they are in private schools for different reasons. When Massachusetts places a child in private school, it has already determined that the public system cannot provide the services required for a FAPE. M.G.L. c. 71B, § 4. Funding that placement is therefore part of the state’s obligation to educate the child. See Doucette v. Georgetown Pub. Schs., 936 F.3d 16, 29 (1st Cir. 2019) (“[T]he right to a school placement outside of the normal public-school system when an appropriate education is not otherwise possible arises from the IDEA’s guarantee of a FAPE.”). And, under Massachusetts law, that scheme does not violate the Anti-Aid

Amendment. Commonwealth v. Sch. Comm. of Springfield, 417 N.E.2d 408, 418 (Mass. 1981) (holding that this scheme does not violate the Anti-Aid Amendment because it “does not, in any way, support the on-going maintenance of private schools by lessening the financial burden of those who have elected a private school education”).

Lastly, the Parents claim the Place Regulation is irrational because it allegedly contravenes the statute it implements. But as we explained in Part II.A.2, nothing in the statutory text requires that the services be provided on-site at the student’s school.

Thus, we conclude that the Place Regulation at issue here, which provides publicly funded special education services to private school students only at public schools or other public or neutral locations, is a reasonable means of advancing Massachusetts’s legitimate interests. That is, the Place Regulation allows Massachusetts to extend special education services to all students while complying with its constitution. Accordingly, we affirm the district court’s decision to dismiss this claim.

B. Equal Protection Claim

For much the same reasons that the Parents lack substantive due process claim, they do not have a viable Equal Protection claim. The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Any government action that

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discriminates against a person on the basis of a suspect classification, or for “the exercise of a fundamental right,” must stand up to heightened scrutiny. Zablocki v. Redhail, 434 U.S. 374, 388 (1978). But where government action does not discriminate on either basis, equal protection review, like substantive due process, is “limited to a deferential, rational basis standard.” A.C. v. McKee, 23 F.4th 37, 46 (1st Cir. 2022) (quoting D’Angelo, 740 F.3d at 806).

Here, the Parents again invoke Pierce’s fundamental parental right as the basis for their Equal Protection claim. But as we have already explained, the Place Regulation does not burden their parental right as recognized in Pierce. So rational basis review applies to this claim as well. Massachusetts claims the same state interests as before: the extension of special education services to private school students, without running afoul of its constitution. On this issue, the Parents claim that Romer v. Evans, 517 U.S. 620 (1996), precludes the Place Regulation from surviving rational basis review.¹⁴ We disagree.

In Romer, the Supreme Court held that an amendment to the Colorado Constitution, which broadly prohibited state and local governments from adopting or enforcing measures that treated sexual orientation as a basis for legal protection, did not pass rational basis. Id. at 624, 632. In arguing that Romer applies here,

¹⁴ The Parents also argue that the history of the Fourteenth Amendment precludes us from holding that the Place Regulation survives rational basis review. Because the Parents did not present this argument in the district court, it is waived. White v. Hewlett Packard Enter. Co., 985 F.3d 61, 68 n.6 (1st Cir. 2021).

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the Parents point to the following observation from the Court: “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” *Id.* at 633. They think this statement resolves their claim.

But *Romer* turned on features absent here: the “unprecedented” character of a law “disqualif[ying] a class of persons from the right to seek specific protection from the law,” *id.* at 633, and the fact that the “breadth [of the amendment] [wa]s so discontinuous with the reasons offered for it that [it] seem[ed] inexplicable by anything but animus,” *id.* at 632. Massachusetts’s Place Regulation bears none of those hallmarks. Far from withdrawing protection, it extends special education services to private school students - - which it is not required to do under federal law. And there is no allegation that the Place Regulation resulted from animus towards private school students.

With the Parents’ arguments dealt with, our conclusion is straightforward. Massachusetts may classify public and private school students for the delivery of publicly funded special education services. That classification is a rational -- and permissible -- means of administering public resources in compliance with the Massachusetts Constitution. Once again, we affirm the district court’s decision to dismiss this claim.

C. Privileges or Immunities Claim

The Parents’ third and final claim, which the district court also dismissed, arises under the Privileges or Immunities Clause of the Fourteenth Amendment. The Privileges or Immunities Clause provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. Const. amend. XIV, § 1. The Clause has long been interpreted narrowly and does not operate as a general repository for unenumerated substantive rights. McDonald v. City of Chi., 561 U.S. 742, 754 (2010). Instead, it protects only the rights of national citizenship.¹⁵ See id. at 755; Gattineri v. Town of Lynnfield, 58 F.4th 512, 516 (1st Cir. 2023) (“[The Privileges or Immunities Clause] provides a citizen of one State ‘with the same rights as other citizens of that State.’” (quoting Saenz v. Roe, 526 U.S. 489, 503 (1999))). Because the Parents do not allege that Massachusetts has infringed on any of those

¹⁵ The rights of national citizenship include the right

to come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions . . . [and to] become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State.

McDonald, 561 U.S. at 755 (alterations in original) (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79-80 (1872)).

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rights, they fail to state a claim under the Privileges or Immunities Clause. See id.

Still, the Parents invoke a concurring opinion in McDonald to note that “[a]t least one current justice views the Due Process Clause as a ‘curious place’ to be a ‘fount’ of rights since it refers to ‘due process’ whereas the Privileges or Immunities Clause refers to rights.” (quoting 561 U.S. at 809–15 (Thomas, J., concurring)). And allege that “whatever the source of its protection, their right to direct the upbringing of their children is fundamental and has been infringed by [the state].”

The Parents themselves “acknowledge that this claim may be foreclosed under current law,” and they provide no further argument. So their allegation does not carry them far. Justice Thomas’s concurrence notwithstanding, McDonald reaffirmed that the Due Process Clause is the constitutional source of protection for fundamental rights; as such, like the Supreme Court, we “decline to disturb” the traditional doctrinal framework. McDonald, 561 U.S. at 758 (plurality) (“For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the Slaughter-House holding.”).

III.

Having concluded that the Parents fail to plausibly allege that the Place Regulation infringes on their

fundamental parental right to direct the education of their children, and it otherwise survives rational basis review, we **affirm** the district court's order dismissing their case.

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Memorandum Opinion and Order of the
United States District Court for the
District of Massachusetts

March 31, 2025

United States District Court
District of Massachusetts

ARIELLA HELLMAN,	)	
ET AL.	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action No.
	)	24-11200-NMG
DEPARTMENT OF	)	
ELEMENTARY AND	)	
SECONDARY EDUCA-	)	
TION, ET AL.	)	
Defendants.	)	

MEMORANDUM & ORDER

GORTON, J.

Plaintiffs in this case challenge the constitutionality of a state regulation governing the provision of special education services in Massachusetts. The regulation requires that publicly funded, special education services for students enrolled in private schools be provided “in a public-school facility or other public or neutral site.” Thus, parents who have placed their children in private schools are responsible for transporting for their children off-site if they wish to take advantage of those free services. Plaintiffs allege that this regulation is unconstitutional because it deprives them of their right to direct the upbringing of their children.

Plaintiffs have brought suit against defendants Massachusetts Board of Elementary and Secondary Education (“the Board”), its individual members in

their official capacities, the Department of Elementary and Secondary Education (“DESE”) and its commissioner in his official capacity (collectively, “defendants”) for their roles in promulgating and implementing the purported unconstitutional regulation.

Pending before the Court is defendants’ motion to dismiss all counts for failure to state a claim under Fed. R. Civ. P. 12 (b) (6) (Docket No. 13).

I. Background

A. Statutory Backdrop

The Individuals with Disabilities Education Act (“IDEA”) is a federal grant program to support states in providing special education services. 20 U.S.C. § 1412(a). Among other statutory prerequisites to receive funding, a participating state must create a plan for providing a “free appropriate public education (“FAPE”) in the least restrictive environment possible” for any child in the state who has a qualifying disability. Johnson v. Boston Pub. Schs., 906 F.3d 182, 185 (1st Cir. 2018) (internal quotation marks omitted) (quoting 20 U.S.C. § 1412(a) (10)). These comprehensive plans, called Individualized Education Programs (“IEPs”), are tailored to each child’s needs, in consultation with the child’s parents, teachers, and school officials. See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 400 (2017) (internal quotation marks omitted).

The IDEA does not require identical treatment for disabled students in public schools and those placed voluntarily in private schools. The 1997 Amendments

to the IDEA clarified that disabled children who have been voluntarily placed in private schools do not have “an individually enforceable right to receive special education and related services.” Gary S. v. Manchester Sch. Dist., 241 F. Supp. 2d 111, 114 (D.N.H. 2003), *aff’d* 374 F.3d 15 (1st Cir. 2004). Rather, a school district is required only to spend a proportionate amount of its IDEA funding on special education services in private schools. Id. At 114-15.

IDEA specifies that only students who attend public schools are to receive this benefit; private school students are not entitled “the panoply of services available to disabled public school students under the rubric of [FAPE].” Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 17 (1st Cir. 2002).

Massachusetts, like all state recipients of IDEA funds, must provide services to students at least as comprehensive as those outlined in IDEA. The state goes above and beyond its federally-mandated obligations by guaranteeing to all children, regardless of whether they are enrolled in public or private school, an individual right to special education. M.G.L.c. 71B, § 3.

At the same time, Massachusetts is also subject to a provision of its state constitution which restricts the use of public funds to support private schools (“the Anti-Aid Amendment”). The provision reads, in relevant part,

No grant, appropriation or use of public money . . . shall be made or authorized by the commonwealth

or any political subdivision thereof for the purpose of founding, maintain or aiding any . . . primary or secondary school . . . which is not publicly owned.

Mass Const. art. 18, § 2.

To comport with its obligations under the Anti-Aid Amendment, the Board promulgated a regulation which, among other things, requires that school districts to ensure that publicly funded special education services “are provided in a public-school facility or other public or neutral site.” 603 C.M.R. § 28. 03 (1) (e) (1).

B. Facts

According to the complaint, plaintiffs Ariella and David Hellman (“the Hellmans”) are the parents of E.H., a student who attends a private elementary school in Brookline, Massachusetts. E.H. has attention deficit hyperactivity disorder (“ADHD”) and is eligible for publicly-funded special education services through the Public Schools of Brookline (“PSB”). The Hellmans initially enrolled their son with PSB for preschool, where he received special needs education pursuant to Massachusetts law. Once the Hellmans transferred E.H. to a private school, they were required to transport E.H. to a “public or neutral site” if they wished to continue taking advantage of the free special needs educational services.

Plaintiffs Josh Harrison and Miriam Segura-Harrison (the “Harrisons”) allege an almost identical set of facts. Similar to the Hellmans, they have a son with

special needs. They have decided to send their son, H.H. to Shaloh House, a private Jewish elementary school in Brighton. Because H.H. attends a private school, he is not able to receive the special needs educational services to which he is entitled at his school.

Both the Hellmans and Harrisons (collectively, “plaintiffs”) claim that they have effectively been barred from services to which they are entitled. They assert that the additional transportation requirements imposed by the state would force them to leave work several times a day, several days each week, to take their son to a place where such services are available. Moreover, the travel would be unduly disruptive and burdensome for their children. As such, plaintiffs contend, they were faced with the choice of relinquishing either 1) their son’s statutorily conferred right to special education services or 2) their fundamental right, protected by the U.S. Constitution, to enroll their child in private school. Faced with that choice, the parents have chosen to forego the free special education because it is impracticable, unduly burdensome, disruptive, stigmatizing, stressful, inefficient and counterproductive.

Plaintiffs receive some special needs education for their children through Gateway, a nonprofit student service group in the Jewish community, but Gateway does not provide as many services as plaintiffs are entitled to under Massachusetts law.

C. Procedural History

Plaintiffs filed their three-count complaint in this Court in May, 2024. The complaint names the Massachusetts Department of Education and several individual city officials as defendants.

Count I alleges a violation of plaintiffs' rights under the Substantive Due Process Clause of the Fourteenth Amendment. Plaintiffs contend that the state limits the exercise of their fundamental right to direct the upbringing of their children.

Count II alleges a violation of the Equal Protection Clause of the Fourteenth Amendment because the state law discriminates against parents who choose to exercise their fundamental constitutional right to direct the upbringing of their children.

Count III alleges a violation of the Privileges or Immunities Clause, raising the same substantive arguments as in Count I but asserting that

some Supreme Court justices have opined that this Clause, rather than (or in addition to) the Due Process Clause, is the source of protection for substantive rights – including unenumerated rights – against the states.

Defendants now move to dismiss all claims pursuant to Fed. Rs. Civ. P. 12(b) (1) and (b) (6). Plaintiffs assent to the dismissal of their claims against the Board and the Department on Eleventh Amendment grounds and therefore this Court will dismiss those

defendants from this action without further analysis of the jurisdictional issues in the claims against them.

II. Motion to Dismiss

A. Legal Standard

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (6), the subject pleading must state a claim for relief that is actionable as a matter of law and “plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible if, after accepting as true all non-conclusory factual allegations, the “court [can] draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 12 (1st Cir. 2011) (quoting Iqbal, 556 U.S. at 678). The reviewing court “may not disregard properly pleaded factual allegations even if actual proof of those facts is improbable.” Ocasio-Hernandez, 640 F.3d at 12.

When rendering that determination, a court may not look beyond the facts alleged in the complaint, documents incorporated by reference therein and facts susceptible to judicial notice. Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011). A court also may not disregard properly pled factual allegations even if “actual proof of those facts is improbable.” Ocasio-Hernandez, 640 F.3d at 12 (quoting Twombly, 550 U.S. at 556). Rather, the necessary “inquiry focuses on the reasonableness of the inference of liabil-

ity that the plaintiff is asking the court to draw.” *Id.* at 13. The assessment is holistic:

the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible.

Hernandez-Cuevas v. Taylor, 723 F.3d 91, 103 (1st Cir. 2013) (quoting Ocasio-Hernandez, 640 F.3d at 14).

B. Application

1. Substantive Due Process

Count I alleges a violation of the Due Process Clause of the Fourteenth Amendment, in that the regulation unlawfully conditions receipt of a benefit on the non-exercise of a constitutional right.

A substantive due process claim requires plaintiffs to show that they were deprived of a protected life, liberty or property interest. Rivera v. Rhode Island, 402 F.3d 27, 33–36 (1st Cir. 2005). The kinds of liberty and property interests protected by substantive due process are “much narrower” than those protected under the procedural due process framework. Gonzalez-Fuentes v. Molina, 607 F.3d 864, 880 n.13 (1st Cir. 2010). Plaintiffs must specifically name “fundamental” rights and liberties which are “deeply rooted in this Nation’s history and tradition,” Washington v. Glucksberg, 521 U.S. 702, 720 (1997), or “implicit in the concept of ordered liberty.” Palko v. Connecticut, 302 U.S. 319, 325 (1937).

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The parties diverge substantially in their framing of the “fundamental right” of which plaintiffs are allegedly deprived.

Defendants do not dispute that the Supreme Court has expressly recognized the right of parents to send their children to private school, Pierce v. Soc’y of Sisters, 268 U.S. 510, 534–35 (1925), but they contend that the right asserted in the complaint goes much farther, encompassing a

right to receive special education services at the state’s expense ... at the location of one’s choosing.

Defendants argue that neither the Supreme Court nor the First Circuit has ever recognized such a right.

Plaintiffs insist that defendants’ characterization of the fundamental right asserted is overly broad and that their children have a statutory right to state-funded special education services, pursuant to Massachusetts law. The constitutional violation arises, they say, from the fact that their children are being deprived of their statutory right by virtue of the parent-plaintiffs’ exercise of their constitutional right, established in Pierce, to enroll their children in private school.

A decision of the United States District Court for the District of New Hampshire in Gary S. v. Manchester School District, affirmed by the First Circuit, is directly on point. There, as in this case, the court faced the question of whether the state’s special education law violated plaintiff-parents’ Fourteenth Amend-

ment rights. The state law in question entitled parents who had enrolled their children in public school only to a hearing if the parents were dissatisfied with the services rendered to their child, pursuant to IDEA. 241 F. Supp. 2d at 113. Parents of children enrolled in private school brought suit alleging that the state law impermissibly conditioned their right to a hearing on relinquishing their right to send their children to private school. Id. (cleaned up).

The district court concluded, and the First Circuit affirmed, that the case fit “comfortably” within the longstanding caselaw from the Supreme Court and First Circuit which

consistently refused to invalidate laws which condition a parent’s ability to obtain educational benefits on the parent’s relinquishment of her right to send her child to private school.

374 F.3d 15, 23 (2004) (citing Norwood v. Harrison, 413 U.S. 455, 462 (1973); Strout v. Albanese, 178 F.3d 57, 66 (1st Cir. 1999); Harris v. McRae, 448 U.S. 297, 318 (1980); Maher v. Roe, 432 U.S. 464, 477 (1977)).

This Court concludes that the case at bar is controlled by that precedent.

Plaintiffs seek to distinguish the ruling in Gary S. by asserting that it was contingent on the fact that private school students in New Hampshire have no statutory entitlement to special needs education services. By contrast, plaintiffs contend, all Massachusetts children are entitled by state statute to receive special education services in the “least restrictive en-

vironment” under M.G.L.c. 71B, § 1. Regulations promulgated by the School Board define the

“least restrictive environment” [to mean] to the maximum extent appropriate [in their] regular education environment.

603 C.M.R. 28.02.

That distinction does not alter the substantive due process analysis. The “equally available” benefits to which the First Circuit refers in Gary S., by comparison, are federally guaranteed unemployment benefits. Plaintiff’s framing of their claim removes it from the realm of federal substantive due process entirely because the right being deprived is one conferred by state statute, as opposed to a “fundamental right” protected by the U.S. Constitution. See St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist., 919 F.3d 1003, 1009 (7th Cir. 2019) (“State-specific policies do not augment fundamental rights.”). Plaintiffs’ claim thus relates only to state law, i.e., whether the state regulation requiring private school students to receive publicly-funded special education services off-site denies plaintiffs’ children (not the plaintiffs themselves) of their state statutory rights to receive special education services in the “least restrictive environment.”

Furthermore, the state statute does not define the “least restrictive environment” in the way plaintiff claims, i.e., to require the provision of special education services on the premises of the school that the

child attends. The Court replicates the entire provision for the sake of clarity:

Least Restrictive Environment (LRE) shall mean the educational placement assures that, to the maximum extent appropriate, students with disabilities, including students in public or private institutions or other care facilities, are educated with students who are not disabled, and that special classes, separate school, or other removal of students with disabilities from the general education environment occurs only when the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

603 C.M.R. § 28.02(12) (emphasis added). The term “regular school environment” does not appear in the regulation. To the extent plaintiffs rely on the phrase “general school environment,” it is clear that, when viewed in the full context of the provision, the phrase means only that students requiring special needs services ought to be integrated, to the maximum extent appropriate, with students not requiring those services.¹ The “general school environment” to which the regulation refers is not “the schools that [children] attend,” as plaintiffs assert. As such, defendants do not

¹ The federal statute, 20 U.S.C. § 1412, similarly states, “[D]isabled children should be educated with nondisabled children to the maximum extent appropriate,” thus “embod[y]ing a statutory preference for ‘mainstreaming,’ or the maximum possible integration of handicapped children with nonhandicapped children.” Doe v. Brookline Sch. Comm., 722 F.2d 910 (1st Cir. 1983).

deny “benefits equally available to all” so long as they seek to ensure that private school students, just like public school students, are integrated into learning environments with nondisabled students “to the maximum extent appropriate.”

Therefore, any distinction between the fact pattern here and that in Gary S. is without a difference. There is no fundamental right that the state law burdens. At most, just as in Gary S., plaintiffs allege no more than burdened access to publicly-funded benefits. The Court finds, consistent with Supreme Court and First Circuit precedent, that plaintiffs fail to state a violation of their substantive due process rights.

2 . Equal Protection

To state a claim an equal protection violation, the plaintiff must allege that

compared to others, similarly situated, [he] was selectively treated ... based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

Marrero-Gutierrez v. Molina, 491 F.3d 1, 9 (1st Cir. 2007); Rubinovitz v. Rogato, 60 F.3d 906, 909-10 (1st Cir. 1995). Selective treatment aimed at fundamental interests must withstand strict scrutiny. Mills v. State of Maine, 118 F.3d37, 46 (1st Cir. 1997). Otherwise, the classification may stand so long as “there is any reasonably conceivable state of facts that could provide a rational basis.” Heller, 509 U.S. at 320.

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The same deficiency that doomed plaintiffs' substantive due process claim undermines their equal protection claim: the complaint does not demonstrate that the regulation restricts a constitutionally protected fundamental right. See supra. Plaintiffs do not demonstrate that the regulation was "inten[ded] to inhibit or punish" parent-plaintiffs for exercising a constitutionally protected fundamental right. Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortg. Fin. Corp., 246 F.3d 1, 7 (1st Cir. 2001).

As such, the state law is subject to rational basis review, wherein

[the] statute is presumed constitutional, and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.

Heller v. Doe, 509 U.S. 312, 320-21 (1993) (citations and internal quotation marks omitted).

Plaintiffs do not overcome their heavy burden. It is axiomatic that a state has a legitimate and neutral interest in promoting compliance with its valid laws. See Lorillard Tobacco Co. v. Reilly, 84 F. Supp. 2d 180, 186 (D. Mass. 2000), rev'd, in part, on other grounds, Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (finding that the state has an interest in ensuring its legitimate laws are followed). Defendants aver that the challenged regulation was promulgated for the pur-

pose of complying with the Anti-Aid Amendment and this Court finds that is a legitimate interest to survive rational basis review.

3. Privileges or Immunities

Finally, plaintiffs assert the same substantive arguments but lodge them instead under the auspices of the Privileges or Immunities Clause of the Fourteenth Amendment. That clause provides,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

U.S. Cons. amend. XIV.

Defendants cite “longstanding Supreme Court precedent” starting with the Slaughter-House Cases, 83 U.S. 36 (1872), which refuse to expand the rights protected under the Privileges or Immunities clause to unenumerated rights guaranteed by the states.

Plaintiffs make no attempt to resuscitate their claim, conceding that it “may be foreclosed under current law.” They suggest only that they seek to “preserve [the claim] for appeal” to the Supreme Court, where

one currently serving justice views the Due Process Clause as a “curious place” to be a “fount” of rights since it refers to “due process” whereas the Privileges or Immunities clause refers to rights.

(Quoting McDonald v. City of Chicago, 561 U.S. 742, 809-15 (2010) (Thomas, J., concurring)).

Whether or not plaintiffs disagree with current law, this Court is bound to follow it. Hutto v. Davis, 454 U.S. 370, 375 (1982) (“[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme Court] must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”). This Court will not “jump the gun” by invalidating a centuries-old precedent when a majority of the Supreme Court declined to do so in the very decision cited by plaintiffs:

For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the Slaughter-House holding.

McDonald, 561 U.S. at 758.

Plaintiffs are welcome to exercise their right of appeal and try their hand at overturning Slaughter-House, but this judicial officer lacks the pay grade, especially when plaintiffs provide the Court with no justification to do so beyond the suggestion by some that treating the Due Process Clause as the “fount” of rights is “curious.” *Id.* at 809 (Thomas, J., concurring).

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Appendix B

ORDER

For the foregoing reasons, defendant's motion to dismiss (Docket No. 13) is **ALLOWED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: March 31, 2025

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Appendix C

Appendix C
Individuals with Disabilities Education Act,
20 U.S.C. § 1412

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Appendix C

20 U.S.C.A. § 1412

§ 1412. State eligibility

Effective: October 1, 2016

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children--

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility--

(I) were not actually identified as being a child with a disability under section 1401 of this title; or

(II) did not have an individualized education program under this subchapter.

(C) State flexibility

A State that provides early intervention services in accordance with subchapter III to a child who is eligible for services under section 1419 of this title, is not required to provide such child with a free appropriate public education.

(2) Full educational opportunity goal

The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

(3) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) Construction

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

(4) Individualized education program

An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

(5) Least restrictive environment**(A) In general**

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(B) Additional requirement**(i) In general**

A State funding mechanism shall not result in placements that violate the requirements of subparagraph (A), and a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP.

(ii) Assurance

If the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements.

(6) Procedural safeguards**(A) In general**

Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

(B) Additional procedural safeguards

Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities for services under this chapter will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(7) Evaluation

Children with disabilities are evaluated in accordance with subsections (a) through (c) of section 1414 of this title.

(8) Confidentiality

Agencies in the State comply with section 1417(c) of this title (relating to the confidentiality of records and information).

(9) Transition from subchapter III to preschool programs

Children participating in early intervention programs assisted under subchapter III, and who will participate in preschool programs assisted under this subchapter, experience a smooth and effective transition to those preschool programs in a manner consistent with section 1437(a)(9) of this title. By the third birthday of such a child, an individualized education program or, if consistent with sections 1414(d)(2)(B) and 1436(d) of this title, an individualized family service plan, has been developed and is being implemented for the child. The local educational agency will participate in transition planning conferences arranged by the designated lead agency under section 1435(a)(10) of this title.

(10) Children in private schools**(A) Children enrolled in private schools
by their parents****(i) In general**

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and com-

plete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.

(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.

(V) Each local educational agency shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph.

(ii) Child find requirement

(I) In general

The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the

State who are enrolled in private, including religious, elementary schools and secondary schools.

(II) Equitable participation

The child find process shall be designed to ensure the equitable participation of parentally placed private school children with disabilities and an accurate count of such children.

(III) Activities

In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.

(IV) Cost

The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).

(V) Completion period

Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.

(iii) Consultation

To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding--

(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;

(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;

(III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disa-

bilities identified through the child find process can meaningfully participate in special education and related services;

(IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and

(V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.

(iv) Written affirmation

When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation signed by the representa-

tives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the State educational agency.

(v) Compliance

(I) In general

A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official.

(II) Procedure

If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational

agency to the Secretary, and the State educational agency shall forward the appropriate documentation to the Secretary.

(vi) Provision of equitable services

(I) Directly or through contracts

The provision of services pursuant to this subparagraph shall be provided--

(aa) by employees of a public agency;
or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

(II) Secular, neutral, nonideological

Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

(vii) Public control of funds

The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the

uses and purposes provided in this chapter, and a public agency shall administer the funds and property.

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) Standards

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if--

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable),

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but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement--

(I) shall not be reduced or denied for failure to provide such notice if--

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if--

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

(11) State educational agency responsible for general supervision

(A) In general

The State educational agency is responsible for ensuring that--

(i) the requirements of this subchapter are met;

(ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State agency or local agency--

(I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

(II) meet the educational standards of the State educational agency; and

(iii) in carrying out this subchapter with respect to homeless children, the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) are met.

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(B) Limitation

Subparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State.

(C) Exception

Notwithstanding subparagraphs (A) and (B), the Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that the requirements of this subchapter are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

(12) Obligations related to and methods of ensuring services

(A) Establishing responsibility for services

The Chief Executive Officer of a State or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (B) and the State educational agency, in order to ensure that all services described in subparagraph (B)(i) that are needed to ensure a free

appropriate public education are provided, including the provision of such services during the pendency of any dispute under clause (iii). Such agreement or mechanism shall include the following:

(i) Agency financial responsibility

An identification of, or a method for defining, the financial responsibility of each agency for providing services described in subparagraph (B)(i) to ensure a free appropriate public education to children with disabilities, provided that the financial responsibility of each public agency described in subparagraph (B), including the State medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child's IEP).

(ii) Conditions and terms of reimbursement

The conditions, terms, and procedures under which a local educational agency shall be reimbursed by other agencies.

(iii) Interagency disputes

Procedures for resolving interagency disputes (including procedures under which local educational agencies may initiate proceedings) under the agreement or other

mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism.

(iv) Coordination of services procedures

Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in subparagraph (B)(i).

(B) Obligation of public agency

(i) In general

If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy pursuant to subparagraph (A), to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in section 1401(1) relating to assistive technology devices, 1401(2) relating to assistive technology services, 1401(26) relating to related services, 1401(33) relating to supplementary aids and services, and 1401(34) of this title relating to transition services) that are necessary for ensuring a free appropriate public education to children with disabilities within the State, such public agency shall

fulfill that obligation or responsibility, either directly or through contract or other arrangement pursuant to subparagraph (A) or an agreement pursuant to subparagraph (C).

(ii) Reimbursement for services by public agency

If a public agency other than an educational agency fails to provide or pay for the special education and related services described in clause (i), the local educational agency (or State agency responsible for developing the child's IEP) shall provide or pay for such services to the child. Such local educational agency or State agency is authorized to claim reimbursement for the services from the public agency that failed to provide or pay for such services and such public agency shall reimburse the local educational agency or State agency pursuant to the terms of the interagency agreement or other mechanism described in subparagraph (A)(i) according to the procedures established in such agreement pursuant to subparagraph (A)(ii).

(C) Special rule

The requirements of subparagraph (A) may be met through--

- (i)** State statute or regulation;

(ii) signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

(iii) other appropriate written methods as determined by the Chief Executive Officer of the State or designee of the officer and approved by the Secretary.

(13) Procedural requirements relating to local educational agency eligibility

The State educational agency will not make a final determination that a local educational agency is not eligible for assistance under this subchapter without first affording that agency reasonable notice and an opportunity for a hearing.

(14) Personnel qualifications

(A) In general

The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(B) Related services personnel and paraprofessionals

The qualifications under subparagraph (A) include qualifications for related services personnel and paraprofessionals that--

- (i) are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;
- (ii) ensure that related services personnel who deliver services in their discipline or profession meet the requirements of clause (i) and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and
- (iii) allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this subchapter to be used to assist in the provision of special education and related services under this subchapter to children with disabilities.

(C) Qualifications for special education teachers

The qualifications described in subparagraph (A) shall ensure that each person employed as

a special education teacher in the State who teaches elementary school, middle school, or secondary school--

(i) has obtained full State certification as a special education teacher (including participating in an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in section 2005.56(a)(2)(ii)¹ of title 34, Code of Federal Regulations, as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except with respect to any teacher teaching in a public charter school who shall meet the requirements set forth in the State's public charter school law;

(ii) has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) holds at least a bachelor's degree..²

(D) Policy

In implementing this section, a State shall adopt a policy that includes a requirement that local educational agencies in the State take

¹ So in original. Probably should be "200.56(a)(2)(ii)".

² So in original.

measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described in this paragraph to provide special education and related services under this subchapter to children with disabilities.

(E) Rule of construction

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this paragraph shall be construed to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to meet the applicable requirements described in this paragraph, or to prevent a parent from filing a complaint about staff qualifications with the State educational agency as provided for under this subchapter.

(15) Performance goals and indicators

The State--

(A) has established goals for the performance of children with disabilities in the State that--

(i) promote the purposes of this chapter, as stated in section 1400(d) of this title;

(ii) are the same as the State's long-term goals and measurements of interim pro-

gress for children with disabilities under section 6311(c)(4)(A)(i) of this title;

(iii) address graduation rates and dropout rates, as well as such other factors as the State may determine; and

(iv) are consistent, to the extent appropriate, with any other goals and standards for children established by the State;

(B) has established performance indicators the State will use to assess progress toward achieving the goals described in subparagraph (A), including measurements of interim progress for children with disabilities under section 6311(c)(4)(A)(i) of this title; and

(C) will annually report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under subparagraph (A), which may include elements of the reports required under section 6311(h) of this title.

(16) Participation in assessments

(A) In general

All children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 6311 of this title, with appropriate accommodations and alternate assessments

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where necessary and as indicated in their respective individualized education programs.

(B) Accommodation guidelines

The State (or, in the case of a districtwide assessment, the local educational agency) has developed guidelines for the provision of appropriate accommodations.

(C) Alternate assessments

(i) In general

The State (or, in the case of a districtwide assessment, the local educational agency) has developed and implemented guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments under subparagraph (A) with accommodations as indicated in their respective individualized education programs.

(ii) Requirements for alternate assessments

The guidelines under clause (i) shall provide for alternate assessments that--

(I) are aligned with the challenging State academic content standards under section 6311(b)(1) of this title and alternate academic achievement standards

under section 6311(b)(1)(E) of this title;
and

(II) if the State has adopted alternate academic achievement standards permitted under section 6311(b)(1)(E) of this title, measure the achievement of children with disabilities against those standards.

(iii) Conduct of alternate assessments

The State conducts the alternate assessments described in this subparagraph.

(D) Reports

The State educational agency (or, in the case of a districtwide assessment, the local educational agency) makes available to the public, and reports to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

(i) The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations in order to participate in those assessments.

(ii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(I).

(iii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(II).

(iv) The performance of children with disabilities on regular assessments and on alternate assessments (if the number of children with disabilities participating in those assessments is sufficient to yield statistically reliable information and reporting that information will not reveal personally identifiable information about an individual student), compared with the achievement of all children, including children with disabilities, on those assessments.

(E) Universal design

The State educational agency (or, in the case of a districtwide assessment, the local educational agency) shall, to the extent feasible, use universal design principles in developing and administering any assessments under this paragraph.

(17) Supplementation of State, local, and other Federal funds

(A) Expenditures

Funds paid to a State under this subchapter will be expended in accordance with all the provisions of this subchapter.

(B) Prohibition against commingling

Funds paid to a State under this subchapter will not be commingled with State funds.

(C) Prohibition against supplantation and conditions for waiver by Secretary

Except as provided in section 1413 of this title, funds paid to a State under this subchapter will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

(18) Maintenance of State financial support**(A) In general**

The State does not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the

amount of that support for the preceding fiscal year.

(B) Reduction of funds for failure to maintain support

The Secretary shall reduce the allocation of funds under section 1411 of this title for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.

(C) Waivers for exceptional or uncontrollable circumstances

The Secretary may waive the requirement of subparagraph (A) for a State, for 1 fiscal year at a time, if the Secretary determines that—

(i) granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or

(ii) the State meets the standard in paragraph (17)(C) for a waiver of the requirement to supplement, and not to supplant, funds received under this subchapter.

(D) Subsequent years

If, for any year, a State fails to meet the requirement of subparagraph (A), including any

year for which the State is granted a waiver under subparagraph (C), the financial support required of the State in future years under subparagraph (A) shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

(19) Public participation

Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

(20) Rule of construction

In complying with paragraphs (17) and (18), a State may not use funds paid to it under this subchapter to satisfy State-law mandated funding obligations to local educational agencies, including funding based on student attendance or enrollment, or inflation.

(21) State advisory panel**(A) In general**

The State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education

and related services for children with disabilities in the State.

(B) Membership

Such advisory panel shall consist of members appointed by the Governor, or any other official authorized under State law to make such appointments, be representative of the State population, and be composed of individuals involved in, or concerned with, the education of children with disabilities, including--

- (i) parents of children with disabilities (ages birth through 26);
- (ii) individuals with disabilities;
- (iii) teachers;
- (iv) representatives of institutions of higher education that prepare special education and related services personnel;
- (v) State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.);
- (vi) administrators of programs for children with disabilities;

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(vii) representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;

(viii) representatives of private schools and public charter schools;

(ix) not less than 1 representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;

(x) a representative from the State child welfare agency responsible for foster care; and

(xi) representatives from the State juvenile and adult corrections agencies.

(C) Special rule

A majority of the members of the panel shall be individuals with disabilities or parents of children with disabilities (ages birth through 26).

(D) Duties

The advisory panel shall--

(i) advise the State educational agency of unmet needs within the State in the education of children with disabilities;

(ii) comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

(iii) advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 1418 of this title;

(iv) advise the State educational agency in developing corrective action plans to address findings identified in Federal monitoring reports under this subchapter; and

(v) advise the State educational agency in developing and implementing policies relating to the coordination of services for children with disabilities.

(22) Suspension and expulsion rates

(A) In general

The State educational agency examines data, including data disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities--

(i) among local educational agencies in the State; or

(ii) compared to such rates for nondisabled children within such agencies.

(B) Review and revision of policies

If such discrepancies are occurring, the State educational agency reviews and, if appropriate, revises (or requires the affected State or local educational agency to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that such policies, procedures, and practices comply with this chapter.

(23) Access to instructional materials**(A) In general**

The State adopts the National Instructional Materials Accessibility Standard for the purposes of providing instructional materials to blind persons or other persons with print disabilities, in a timely manner after the publication of the National Instructional Materials Accessibility Standard in the Federal Register.

(B) Rights of State educational agency

Nothing in this paragraph shall be construed to require any State educational agency to coordinate with the National Instructional Materials Access Center. If a State educational agency chooses not to coordinate with the National Instructional Materials Access Center, such agency shall provide an assurance to the Secretary that the agency will provide instructional

materials to blind persons or other persons with print disabilities in a timely manner.

(C) Preparation and delivery of files

If a State educational agency chooses to coordinate with the National Instructional Materials Access Center, not later than 2 years after December 3, 2004, the agency, as part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for purchase of print instructional materials, shall enter into a written contract with the publisher of the print instructional materials to--

(i) require the publisher to prepare and, on or before delivery of the print instructional materials, provide to the National Instructional Materials Access Center electronic files containing the contents of the print instructional materials using the National Instructional Materials Accessibility Standard; or

(ii) purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats.

(D) Assistive technology

In carrying out this paragraph, the State educational agency, to the maximum extent possible, shall work collaboratively with the State

agency responsible for assistive technology programs.

(E) Definitions

In this paragraph:

(i) National Instructional Materials Access Center

The term “National Instructional Materials Access Center” means the center established pursuant to section 1474(e) of this title.

(ii) National Instructional Materials Accessibility Standard

The term “National Instructional Materials Accessibility Standard” has the meaning given the term in section 1474(e)(3)(A) of this title.

(iii) Specialized formats

The term “specialized formats” has the meaning given the term in section 1474(e)(3)(D) of this title.

(24) Overidentification and disproportionality

The State has in effect, consistent with the purposes of this chapter and with section 1418(d) of this title, policies and procedures designed to pre-

vent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in section 1401 of this title.

(25) Prohibition on mandatory medication

(A) In general

The State educational agency shall prohibit State and local educational agency personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. 801 et seq.) as a condition of attending school, receiving an evaluation under subsection (a) or (c) of section 1414 of this title, or receiving services under this chapter.

(B) Rule of construction

Nothing in subparagraph (A) shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under paragraph (3).

(b) State educational agency as provider of free appropriate public education or direct services

If the State educational agency provides free appropriate public education to children with disabilities, or provides direct services to such children, such agency--

(1) shall comply with any additional requirements of section 1413(a) of this title, as if such agency were a local educational agency; and

(2) may use amounts that are otherwise available to such agency under this subchapter to serve those children without regard to section 1413(a)(2)(A)(i) of this title (relating to excess costs).

(c) Exception for prior State plans

(1) In general

If a State has on file with the Secretary policies and procedures that demonstrate that such State meets any requirement of subsection (a), including any policies and procedures filed under this subchapter as in effect before the effective date of the Individuals with Disabilities Education Improvement Act of 2004, the Secretary shall consider such State to have met such requirement for purposes of receiving a grant under this subchapter.

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(2) Modifications made by State

Subject to paragraph (3), an application submitted by a State in accordance with this section shall remain in effect until the State submits to the Secretary such modifications as the State determines necessary. This section shall apply to a modification to an application to the same extent and in the same manner as this section applies to the original plan.

(3) Modifications required by the Secretary

If, after the effective date of the Individuals with Disabilities Education Improvement Act of 2004, the provisions of this chapter are amended (or the regulations developed to carry out this chapter are amended), there is a new interpretation of this chapter by a Federal court or a State's highest court, or there is an official finding of noncompliance with Federal law or regulations, then the Secretary may require a State to modify its application only to the extent necessary to ensure the State's compliance with this subchapter.

(d) Approval by the Secretary

(1) In general

If the Secretary determines that a State is eligible to receive a grant under this subchapter, the Secretary shall notify the State of that determination.

(2) Notice and hearing

The Secretary shall not make a final determination that a State is not eligible to receive a grant under this subchapter until after providing the State--

(A) with reasonable notice; and

(B) with an opportunity for a hearing.

(e) Assistance under other Federal programs

Nothing in this chapter permits a State to reduce medical and other assistance available, or to alter eligibility, under titles V and XIX of the Social Security Act with respect to the provision of a free appropriate public education for children with disabilities in the State.

(f) By-pass for children in private schools

(1) In general

If, on December 2, 1983, a State educational agency was prohibited by law from providing for the equitable participation in special programs of children with disabilities enrolled in private elementary schools and secondary schools as required by subsection (a)(10)(A), or if the Secretary determines that a State educational agency, local educational agency, or other entity has substantially failed or is unwilling to provide for such equitable participation, then the Secretary shall, notwithstanding such provision of law, arrange for

the provision of services to such children through arrangements that shall be subject to the requirements of such subsection.

(2) Payments

(A) Determination of amounts

If the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services for a fiscal year an amount per child that does not exceed the amount determined by dividing--

(i) the total amount received by the State under this subchapter for such fiscal year; by

(ii) the number of children with disabilities served in the prior year, as reported to the Secretary by the State under section 1418 of this title.

(B) Withholding of certain amounts

Pending final resolution of any investigation or complaint that may result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates will be necessary to pay the cost of services described in subparagraph (A).

(C) Period of payments

The period under which payments are made under subparagraph (A) shall continue until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(10)(A).

(3) Notice and hearing**(A) In general**

The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for not less than 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) Review of action

If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A), such agency may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secre-

tary based the Secretary's action, as provided in section 2112 of Title 28.

(C) Review of findings of fact

The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Jurisdiction of court of appeals; review by United States Supreme Court

Upon the filing of a petition under subparagraph (B), the United States court of appeals shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

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Massachusetts Const. amend. art. XVIII, § 2

M.G.L.A. Const. Amend. Art. 18

Art. XVIII. Free exercise of religion; support of public schools; use of public money or credit for schools and institutions

SECTION 1. No law shall be passed prohibiting the free exercise of religion.

SEC. 2. No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which 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, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions.

SEC. 3. Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

SEC. 4. Nothing herein contained shall be construed to deprive any inmate of a publicly controlled reformatory, penal or charitable institution of the opportunity of religious exercises therein of his own faith; but no inmate of such institution shall be compelled to attend religious services or receive religious instruction against his will, or, if a minor, without the consent of his parent or guardian.

SEC. 5. This amendment shall not take effect until the October first next succeeding its ratification and adoption by the people.

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28.03: School District Administration and Personnel

Effective: October 28, 2022

(1) General Responsibilities of the School District.

(a) General. Each school district shall provide or arrange for the provision of special education and related services for eligible students in accordance with the provisions of state and federal law and regulation.

1. The school district shall provide training to all school district staff, including general and special educators, administrators, and paraprofessionals, on the requirements of special education.

2. The school district shall provide such staff training in analyzing and accommodating diverse learning needs of all students in the general education classroom.

3. The school district shall provide such staff training in methods of collaboration among teachers, paraprofessionals, and teacher assistants to accommodate diverse learning needs.

4. The district shall conduct, in cooperation with the parent advisory council, at least one workshop annually within the school district on the rights of students and their parents and

guardians under state and federal special education laws.

(b) Facilities. The school district shall provide facilities and classrooms for eligible students to maximize the inclusion of such students into the life of the school. Facilities and classrooms serving only students with disabilities shall be at least equal in all physical respects to the average standards of general education facilities and classrooms. Resource rooms and separate classrooms for students with disabilities shall be given the same priority as general education programs for access to and use of instructional and other space in public schools in order to minimize the separation or stigmatization of eligible students.

1. All eligible students shall have access to school facilities including, but not limited to, those areas necessary to implement the student's IEP.

2. School districts shall provide whatever equipment and make whatever physical adaptations are necessary to comply with 603 CMR 28.03(1)(b), including acoustical and lighting treatments to remove physical communication barriers for students who are deaf or hard of hearing.

3. The Department may make unannounced inspections of facilities.

4. The following examples illustrate aspects of this requirement and shall not be construed as limiting or defining its scope:

a. Placing a classroom serving only older students with disabilities in a part of the school building in which all the classrooms are occupied by elementary school students would violate the requirements of 603 CMR 28.03(1)(b).

b. Placing a sign saying “special class” on the front of a substantially separate classroom would violate the requirements of 603 CMR 28.03(1)(b).

c. Placing all special education facilities together in one part of a school building would violate the requirements of 603 CMR 28.03(1)(b).

d. Moving classrooms of students with disabilities to locations apart from the general education program because of financial or construction considerations violates the requirements of 603 CMR 28.03(1)(b).

(c) Change of Residence.

1. When an eligible student or student’s family changes residence from one Massachusetts school district to another, the last IEP written by the former school district and accepted by the parent shall be provided in a comparable

setting without delay until a new IEP is developed and accepted.

2. If a student found eligible in another state moves to Massachusetts, the new Massachusetts district of residence shall provide the student with a free appropriate public education, including special education services comparable to those in the IEP from the former state, in consultation with the parents, until the Massachusetts district determines if it will accept the finding of eligibility and/or the current IEP developed for the student in the former state of residence. If the Massachusetts district determines that the finding of eligibility and the IEP developed for the student continues to accurately represent the needs of the student, then the Massachusetts district shall continue to implement the IEP. If the Massachusetts district determines that a new evaluation is necessary to determine continued eligibility or services, or a parent or another person concerned with the child's development requests an evaluation, the district shall immediately provide written notice to the parents as required under 603 CMR 28.04(1).

(d) Preschool Screening. Each school district shall conduct screening for three and four year olds and for all children who are of age to enter kindergarten. Such screening shall be designed to review a child's development and to assist in identification of those children who should be referred for an

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evaluation to determine eligibility for special education services.

1. The school district shall submit information to the Department describing the screening program and its elements as part of the local special education plan, when so requested.
2. Participation in the screening program for three and four year olds shall be optional on the part of the parents.

(e) Private Schools at Private Expense. Nothing in 603 CMR 28.00 shall be construed to limit the rights of parents to have their children educated at private schools, completely at private expense. To the extent that public school districts provide and pay for special education services for eligible students enrolled in private schools at private expense, the following requirements shall apply:

1. Each school district shall provide special education designed to meet the needs of eligible students who are attending private schools at private expense and whose parents reside in the jurisdiction of the school district. The school district shall provide to such students genuine opportunities to participate in the public school special education program consistent with state constitutional limitations.
2. The school district shall provide or arrange for the provision of evaluation services and an IEP for any eligible private school student whose parent resides in the jurisdiction of the

school district. The evaluation may take place in the public school, the private school, or an appropriate contracted facility, provided that the school district shall ensure that a representative of the student's private school is invited to participate as a member of the Team pursuant to 603 CMR 28.05.

3. The school district shall provide or arrange for the provision of the special education described by the student's IEP provided that school districts shall ensure that special education services funded with state or local funds are provided in a public school facility or other public or neutral site. When services are provided using only federal funds, services may be provided on private school grounds.

4. Special education provided by the school district to a private school student shall be comparable in quality, scope, and opportunity for participation to that provided to public school students with needs of equal importance. Programs in which both public and private school students participate may not include classes that are separated on the basis of school enrollment or the religious affiliation of the students.

(f) Early Literacy Screening. Effective July 1, 2023, each school district shall at least twice per year assess each student's reading ability and progress in literacy skills, from kindergarten through at least third grade, using a valid, developmentally appropriate screening instrument approved

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by the Department. Consistent with M.G.L. c. 71B, § 2 and the Department's dyslexia and literacy guidelines, if such screenings determine that a student is significantly below relevant benchmarks for age-typical development in specific literacy skills, the school shall determine which actions within the general education program will meet the student's needs, including differentiated or supplementary evidence-based reading instruction and ongoing monitoring of progress. Within 30 school days of a screening result that is significantly below the relevant benchmarks, the school shall inform the student's parent or guardian of the screening results and the school's response and shall offer them the opportunity for a follow-up discussion.

(2) Administrator of Special Education. Each school district shall appoint a person to be its Administrator of Special Education. The Administrator shall supervise all special education for the school district and shall ensure compliance with all federal and state special education laws. As appropriate, and in accordance with the requirements of M.G.L. c. 71B, § 3A, the Administrator may designate other school district personnel to carry out some of the duties of the Administrator.

(3) Responsibilities of the School Principal.

(a) Instructional Support. The principal shall implement the plan developed and adopted by the district to ensure that efforts have been made or will be made to meet the needs of diverse learners

in the general education program. As part of his/her responsibilities, the principal shall promote instructional practices responsive to student needs and shall ensure that adequate instructional support is available for students and teachers. Instructional support shall include remedial instruction for students, consultative services for teachers, availability of reading instruction at the elementary level, appropriate services for linguistic minority students, and other services consistent with effective educational practices and the requirements of M.G.L. c. 71B, § 2. The principal may consult with the Administrator of Special Education regarding accommodations and interventions for students. Such efforts and their results shall be documented and placed in the student record. Additionally, if an individual student is referred for an evaluation to determine eligibility for special education, the principal shall ensure that documentation on the use of instructional support services for the student is provided as part of the evaluation information reviewed by the Team when determining eligibility.

(b) Coordination with Special Education. The principal with the assistance of the Administrator of Special Education shall coordinate the delivery and supervision of special education services within each school building.

(c) Educational Services in Home or Hospital. Upon receipt of a physician's written order verifying that any student enrolled in a public school or placed by the public school in a private setting

must remain at home or in a hospital on a day or overnight basis, or any combination of both, for medical reasons and for a period of not less than 14 school days in any school year, the principal shall arrange for provision of educational services in the home or hospital. Such services shall be provided with sufficient frequency to allow the student to continue his or her educational program, as long as such services do not interfere with the medical needs of the student. The principal shall coordinate such services with the Administrator of Special Education for eligible students. Such educational services shall not be considered special education unless the student has been determined eligible for such services, and the services include services on the student's IEP.

(4) Standard Procedures and Forms. The Department may prepare standard forms to assist school districts in meeting state and federal special education requirements.

(a) The school district shall use forms that, at a minimum, contain the elements of those forms issued by the Department.

(b) School districts shall maintain required data on eligible students receiving special education services, shall ensure that such data remains current and accurate, and, on request, shall report such data in the form required by the Department and in accordance with 603 CMR 10.00: *School Finance and Accountability* and the guidelines for reporting student and financial data.

(5) Waivers. A school district, collaborative, or approved special education school program may submit in writing a proposal for approval by the Department for the satisfaction of any requirement in 603 CMR 28.00 in a manner different from that specified in 603 CMR 28.00. The Department may approve such proposal if it shows substantial promise of contributing to improvements in the methods for meeting the goals of 603 CMR 28.00 and if such proposal does not conflict with any provision of law. No such proposal shall be implemented until approved by the Department.

(6) Enforcement: Withholding of Funds. The Department may withhold funds for special education from cities, towns, school districts, or private schools or agencies that do not comply with regulations or statutes related to special education or do not carry out plans for such compliance within a reasonable period of time; provided, however, that nothing in 603 CMR 28.03(6) shall be construed to prevent the Department from withholding state and federal funds to the extent it deems necessary consistent with state and federal law, or from taking such other enforcement action as may be authorized by law.

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Chapter 71B, §§ 1, 3, 4, 5

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Part I	ADMINISTRATION OF THE GOVERNMENT
Title XII	EDUCATION
Chapter 71B	CHILDREN WITH SPECIAL NEEDS
Section 1	DEFINITIONS

Section 1. The following words as used in this chapter shall have the following meanings, unless the context clearly requires otherwise:

“Department”, the department of education.

“Free appropriate public education”, special education and related services as consistent with the provisions set for in the 20 U.S.C. 1400 et seq., its accompanying regulations, and which meet the education standards established by statute or established by regulations promulgated by the board of education.

“Least restrictive environment”, the educational placement that assures that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplemen-

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tary aids and services, cannot be achieved satisfactorily.

“Regular education”, the school program and pupil assignment which normally leads to college preparatory or technical education or to a career.

“School age child”, any person of ages three through twenty-one who has not attained a high school diploma or its equivalent.

“School age child with a disability”, a school age child in a public or non-public school setting who, because of a disability consisting of a developmental delay or any intellectual, sensory, neurological, emotional, communication, physical, specific learning or health impairment or combination thereof, is unable to progress effectively in regular education and requires special education services, including a school age child who requires only a related service or related services if said service or services are required to ensure access of the child with a disability to the general education curriculum. The term “specific learning impairment” shall be defined pursuant to 24 CFR 300.7(c)(10), the definition of specific learning disability contained in federal regulations implementing the Individual with Disabilities Education Act in effect on January 1, 2000. The term “emotional impairment” shall be defined pursuant to 34CFR 300.7(c)(4), the definition of “emotional disturbance” contained in federal regulations implementing the Individual with Disabilities Education Act in effect on January 1, 2000. No child shall be determined to be a student with a disability solely because such child’s behavior

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violates the school's disciplinary code and no child shall be determined to be a student with a disability solely because such child shall have failed the statewide assessment tests authorized pursuant to section 11 of chapter 69. The use of the word disability in this section shall not be used to provide a basis for labeling or stigmatizing the child or defining the needs of the child and shall in no way limit the services, programs, and integration opportunities provided to such child.

"School age child requiring special education", a child with a disability who requires special education as determined in accordance with the provisions of this chapter and the regulations set forth by the board.

"Special education", educational programs and assignments including, special classes and programs or services designed to develop the educational potential of children with disabilities including, but not limited to, educational placements of children by school committees, the departments of public health, mental health, developmental services, youth services and children and families in accordance with the provisions of this chapter and the regulations set forth by the board.

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Part I	ADMINISTRATOIN OF THE GOVERNMENT
Title XII	EDUCATION
Chapter 71B	CHILDREN WITH SPECIAL NEEDS
Section 3	IDENTIFICATION OF SCHOOL AGE CHILDREN WITH A DISA- BILITY; DIAGNOSIS OF DISABIL- ITY; PROPOSAL OF PROGRAM; EVALUATIONS AND ASSESS- MENTS OF CHILD AND PRO- GRAM

Section 3. In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health, developmental services, public health, youth services, and the commission for the blind and the commission for the deaf and hard of hearing and with assistance of the department, the school committee of every city, town or school district shall identify the school age children residing therein who have a disability, as defined in section 2, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise, every child shall be presumed to be appropriately assigned

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to a regular education program and presumed not to be a school age child with a disability or a school age child requiring special education.

The department shall take all steps necessary to monitor and enforce compliance with this section no less than every three years, including but not limited to investigations, on-site visits and public hearings, and shall provide assistance in planning and implementing any necessary corrective actions to ensure that no school committee provides special education services to a child pursuant to this chapter unless an evaluation conducted pursuant to this section determines that the child has a disability, as defined in section 1. The department shall further take any and all steps necessary to monitor and enforce compliance with all other provisions of this chapter, including but not limited to the requirement that school committees educate children in the least restrictive environment, as defined in section 1. The department shall also ensure that teachers and administrators are fully informed about their responsibilities for implementing the provisions of this chapter and are provided with technical assistance and training necessary to assist them in such effort.

No school committee shall refuse a school age child with a disability admission to or continued attendance in public school without the prior written approval of the department, and without complying with state and federal requirements for disciplining students with disabilities, where applicable. During the pendency of administrative or judicial proceedings, a court of competent jurisdiction shall have the author-

ity to change a child's educational placement, including removing the child from school, in any circumstances when the school committee shows that the child's behavior poses a substantial likelihood of injury to himself or others; provided, however, that the foregoing shall not be construed to abrogate any authority concerning discipline for such a child which is available to a school committee under said regulations and procedures or any other law. No child who is so refused or removed shall be denied an alternative form of education approved by the department, as provided for in section 10, through a tutoring program at home, through enrollment in an institution operated by a state agency, or through any other program which is approved for the child by the department.

No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department. To insure that parents can participate fully and effectively with school personnel in the consideration and development of appropriate educational programs for their child, a school committee shall, upon request by a parent, provide timely access to parents and parent-designated independent evaluators and educational consultants for observations of a child's current program and of any program proposed for the child, including both academic and non-academic components of any such program. Parents and their designees shall be afforded access of sufficient duration and extent to enable them to evaluate a child's performance in a current program and the ability of a proposed program to enable such child to make effective progress. School

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committees shall impose no conditions or restrictions on such observations except those necessary to ensure the safety of children in a program or the integrity of the program while under observation or to protect children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation by a parent or a designee.

Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining whether such child requires special education, the school committee shall notify the parents or guardians of such child in writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the department and the departments of mental health, developmental services and public health and the right to appeal from any evaluation, first to the department, and then to the courts; provided, however, that a school district shall not be required to refer a child for an evaluation solely because the child presents a risk of or fails to be promoted at the end of the school year; and provided further, that a school district shall not be required to refer a child for an evaluation solely because such child failed the statewide assessment tests authorized pursuant to section 1I of chapter 69.

[Sixth paragraph effective until August 5, 2025. For text effective August 5, 2025, see below.]

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. The parents or guardians of such child shall be consulted about the content of such evaluation and the evaluators being used. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist. Whenever the evaluation of the Individualized Education Program team indicates that the child has a disability that affects social skills development or that the child is vulnerable to bullying, harassment or teasing because of the child's disability, the Individualized Education Program shall address the skills and proficiencies needed to avoid and respond to bullying, harassment or teasing. Whenever an evaluation indicates that a child is blind, as defined in section one hundred and thirty-six of chapter six, said evaluation shall also include an assessment of the appropriateness of Braille instruction for the child. Such assess-

ment shall include (i) the child's efficiency in reading and writing print as compared with children who do not have a disability; (ii) the child's stamina in using print before fatigue occurs; (iii) the child's prognosis for further sight loss; and (iv) the child's present competence in Braille and a detailed explanation as to whether instruction is appropriate, conducted by a certified teacher of students with visual impairments. Any such instruction found to be essential to meet such child's disability shall be available at a frequency and duration sufficient to meet fully the educational needs of the child. Braille instruction may be used in combination with other special education services appropriate to the child's educational needs. Whenever an evaluation indicates that a child has a disability on the autism spectrum, which includes autistic disorder, Asperger's disorder, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, or Rhett's Syndrome, as defined in the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association, the Individualized Education Program (IEP) team, as defined by regulations of the department, shall consider and shall specifically address the following: the verbal and nonverbal communication needs of the child; the need to develop social interaction skills and proficiencies; the skills and proficiencies needed to avoid and respond to bullying, harassment or teasing; the needs resulting from the child's unusual responses to sensory experiences; the needs resulting from resistance to environmental change or change in daily routines; the needs resulting from engagement in repetitive activities and stereotyped movements; the need for any positive behavioral in-

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terventions, strategies, and supports to address any behavioral difficulties resulting from autism spectrum disorder; and other needs resulting from the child's disability that impact progress in the general curriculum, including social and emotional development. A child's Individualized Education Program, as defined in 20 USC § 1401 (14), shall include a statement of measurable annual goals, including academic and functional goals, and a description of benchmarks or short-term objectives.

[Sixth paragraph as amended by 2025, 14, Sec. 29 effective August 5, 2025. For text effective until August 5, 2025, see above.]

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. The parents or guardians of such child shall be consulted about the content of such evaluation and the evaluators being used. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist. Whenever

the evaluation of the Individualized Education Program team indicates that the child has a disability that affects social skills development or that the child is vulnerable to bullying, harassment or teasing because of the child's disability, the Individualized Education Program shall address the skills and proficiencies needed to avoid and respond to bullying, harassment or teasing. Whenever an evaluation indicates that a child is blind, as defined in section one hundred and thirty-six of chapter six, said evaluation shall also include an assessment of the appropriateness of Braille instruction for the child. Such assessment shall include (i) the child's efficiency in reading and writing print as compared with children who do not have a disability; (ii) the child's stamina in using print before fatigue occurs; (iii) the child's prognosis for further sight loss; and (iv) the child's present competence in Braille and a detailed explanation as to whether instruction is appropriate, conducted by a certified teacher of students with visual impairments. Any such instruction found to be essential to meet such child's disability shall be available at a frequency and duration sufficient to meet fully the educational needs of the child. Braille instruction may be used in combination with other special education services appropriate to the child's educational needs. Whenever an evaluation indicates that a child has a disability on the autism spectrum, which includes autistic disorder, Asperger's disorder, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, or Rhett's Syndrome, as defined in the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association, the Individualized Education Program (IEP)

team, as defined by regulations of the department, shall consider and shall specifically address the following: the verbal and nonverbal communication needs of the child; the need to develop social interaction skills and proficiencies; the skills and proficiencies needed to avoid and respond to bullying, harassment or teasing; the needs resulting from the child's unusual responses to sensory experiences; the needs resulting from resistance to environmental change or change in daily routines; the needs resulting from engagement in repetitive activities and stereotyped movements; the need for any positive behavioral interventions, strategies, and supports to address any behavioral difficulties resulting from autism spectrum disorder; and other needs resulting from the child's disability that impact progress in the general curriculum, including social and emotional development. When conducting an evaluation for a student who is an English learner as defined in section 2 of chapter 71A, school committees shall consider the English language proficiency of the student. Assessments and other evaluation materials used to evaluate said student shall be provided and administered in the student's primary language and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally. The individualized education program team shall consider the language needs of a student who is an English learner as those needs relate to such individualized education program with the participation of 1 or more individuals with the following: (i) requisite knowledge of the student's language needs (ii) training and expertise in second language acquisition; and (iii) an understanding of how

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to differentiate between the student's limited English proficiency and the student's disability. To satisfy this participation requirement, such individuals may participate in the individualized education program meeting by either attending the individualized education program team meeting or by submitting in writing to the individualized education program team and parent or legal guardian, input into the development of the individualized education program prior to the meeting. A child's Individualized Education Program, as defined in 20 USC § 1401 (14), shall include a statement of measurable annual goals, including academic and functional goals, and a description of benchmarks or short-term objectives.

The department jointly with the departments of mental health, developmental services and public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the educational needs of the child is provided. Those persons assessing said child shall maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education best suited to the child's educational needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counseling services. When the suggested course of study is other than regular education those persons assessing

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said child shall present a method of monitoring the benefits of such special education and conditions that would indicate that the child should return to regular classes, and a comparison of expected outcomes in regular class placement.

[Ninth paragraph effective until August 5, 2025. For text effective August 5, 2025, see below.]

If a child with a disability requires special education and related services in accordance with the provisions of the federal Individuals with Disabilities Education Act of 1975, the provisions of this chapter, and federal and state regulations promulgated pursuant thereto, such services shall be made available.

[Ninth paragraph as amended by 2025, 14, Sec. 30 effective August 5, 2025. For text effective until August 5, 2025, see above.]

If a child with a disability requires special education and related services in accordance with the provisions of the federal Individuals with Disabilities Education Act of 1975, the provisions of this chapter, and federal and state regulations promulgated pursuant thereto, such services shall be made available. The department shall promulgate regulations to continue in effect and enforce the provisions of 20 U.S.C. 1415(k) in effect on January 1, 2025.

Upon completion of said evaluation, the child's parents may obtain an independent evaluation at school committee expense, from child evaluation clinics or facilities approved by the department jointly with the departments of mental health, mental retar-

dation and public health, provided that the school committee may initiate within five school working days of the request, a hearing with the bureau of special education appeals to show that its evaluation is appropriate, in accordance with the provisions of the Individuals with Disabilities Education Act and regulations promulgated pursuant thereto; provided, however, that the parents may choose, on a voluntary basis, to share the costs of the independent evaluation with the school committee pursuant to a sliding fee scale established in regulations issued by the department pursuant to this section, in which case the school committee shall pay its share of the costs in accordance with the scale; provided, that, if the child's family income does not exceed 400 per cent of the federal poverty level established by the United States department of health and human services, parents shall pay no cost; provided, however, that the secretary of health and human services under section 13C of chapter 118E shall establish rates for educational assessments conducted or performed by psychologists and other trained certified educational personnel notwithstanding the provisions of any general or special law or rule or regulation to the contrary. A parent may obtain an independent evaluation at private expense from any specialist.

The written record and clinical history from both the evaluation provided by the school committee and independent evaluation, if any, shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly con-

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cerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings through the bureau of special education appeals regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate education program. The hearing officer shall order such educational placement and services as he deems appropriate and consistent with this chapter to assure the child receives a free and appropriate public education in the least restrictive environment; provided, however, that a presumption shall exist to direct such placement to the regular educational environment. The hearing officer may determine, in accordance with the rules, regulations and policies of the respective agencies, that services shall be provided by the department of children and families, the department of mental retardation, the department of mental health, the department of public health, or any other state agency or program, in addition to the program and related services to be provided by the school committee. Such order may provide for: the placement or services requested by the school committee, the placement or services requested by the parent, either of those placements or services with modifications, or such alternative programs or services as may be required to assure such development of such child. Said parents, guardians or persons with custody may either consent to or reject such placement, program or

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services. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parent, guardian or persons with custody except where such placement would seriously endanger the health or safety of the child, substantially disrupt the program for other students or, if the child is currently placed in a special education program, deny the child a free appropriate public education. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

At any time, school committees and parents, guardians, or persons with custody of a student may voluntarily agree to seek resolution of any dispute through mediation provided by the bureau of special education appeals, provided, that the mediation process may not be used to deny or delay a parent's right to a due process hearing or to delay or deny any other rights afforded under this chapter and the federal Individuals with Disabilities Education Act of 1975, as so amended and shall be scheduled as soon as practicable after such agreement.

If the parents, guardians or persons with custody reject the educational placement recommended by the department and desire a program other than a regular education program, they may proceed to the superior court with jurisdiction over the residence of the

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child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child shall be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

The educational progress of any child placed in a special education program shall be reviewed at least annually as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not provide educational benefit to the child in the least restrictive environment, then such child shall be reassigned. If the evaluation shows that the child no longer needs special education services, the team shall recommend that the child no longer be considered a school age child with disabilities for the purposes of this chapter.

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Evaluations and assessments of children and special education programs shall remain confidential and be used solely for the administration of special education in the commonwealth, including, but not limited to, inspection by the department and regional and state advisory councils to insure that every special education program does benefit the children there assigned.

The school committee of any city, town, or school district shall establish a parent advisory council on special education. Membership shall be offered to all parents of children with disabilities and other interested parties. The parent advisory council duties shall include but not be limited to: advising the school committee on matters that pertain to the education and safety of students with disabilities; meeting regularly with school officials to participate in the planning, development, and evaluation of the school committee's special education programs. The parent advisory council shall establish by-laws regarding officers and operational procedures. In the course of its duties under this section, the parent advisory council shall receive assistance from the school committee without charge, upon reasonable notice, and subject to the availability of staff and resources.

If a student's individual education plan necessitates special education services in a day or residential facility or an educational collaborative, the IEP team shall consider whether the child requires special education services and supports to promote the student's transition to placement in a less restrictive program. If the student requires such services, then the IEP

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shall include a statement of any special education services and supports necessary to promote the child's transition to placement in a less restrictive program.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title XII	EDUCATION
Chapter 71B	CHILDREN WITH SPECIAL NEEDS
Section 4	AGREEMENTS BETWEEN SCHOOL COMMITTEES OR WITH PUBLIC OR PRIVATE SCHOOLS

Section 4. The school committee of any city, town or school district may, to meet its obligations under section three, with the approval of the department enter into an agreement with any other school committee to jointly provide special education or, subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, may enter into an agreement with any public or private school, agency, or institution to provide the necessary special education within the city, town or school district; provided, however, that every school committee, where feasible, shall be associated with an educational collaborative providing services to children with a disability which disability occurs in a low incidence in the population of children requiring special education.

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In the case of an agreement between school committees to jointly provide special education, said agreement shall designate one city, town or school district as the operating agent. Funds received by such operating agent from other cities, towns or school districts or appropriated by such operating agent for the purposes of such agreement, in addition to gifts and grants shall be deposited with and held as a separate account by its treasurer. The school committee may apply said funds to the costs of programs operated pursuant to the agreement without further appropriation.

Part I	ADMINISTRATOIN OF THE GOVERNMENT
Title XII	EDUCATION
Chapter 71B	CHILDREN WITH SPECIAL NEEDS
Section 5	COSTS OR OBLIGATIONS; PAYMENT; BUDGET

Section 5. Any school committee which provides or arranges for the provision of special education pursuant to the provisions of section three shall pay for such special education personnel, materials and equipment, tuition, room and board, transportation, rent and consultant services as are necessary for the provision of special education; provided, however, that the school committee shall not be obligated to pay for health care goods or services to the extent that such

goods or services constitute medically necessary treatment for disease, illness, injury, or bodily dysfunction which would be covered by a third party payor but for a school-aged child's eligibility for such goods and services under this chapter; provided, further, that the determination of medical necessity shall be made by the third party payor under its standard program of utilization review, that the school-aged child with a disability or his parent or guardian if he is a minor shall have the right to freedom of choice in the election of the provider of health care goods and services, and that the provider of health care goods and services does not have a direct or indirect financial relationship to the school committee; and provided, further, that school committees may accept payment for healthcare goods and services provided by certified school committee employees from third party payors other than the program of medical care and assistance established under chapter one hundred and eighteen E except as provided under section seventy-two of chapter forty-four. Where no such third party payor is available, school committees are not relieved of their responsibilities under this chapter.

Notwithstanding the provisions of section 27C of chapter 29 or any other general or special law to the contrary, if a child with a disability for whom a school committee currently provides or arranges for the provision of special education in an approved private day or residential school placement, including placement in a pediatric nursing home pursuant to the provisions of section 3, or his parent or guardian moves to a different school district on or after July 1 of any fiscal

year, such school committee of the former community of residence shall pay the approved budgeted costs, including necessary transportation costs, of such day or residential placement, including placement in a pediatric nursing home, of such child for the balance of such fiscal year; provided, however, that if such move occurs between April 1 and June 30, such school committee of the former community of residence shall pay such costs for the balance of the fiscal year in which the move occurred as well as for the subsequent fiscal year. The school committee of the new community of residence shall assume all responsibilities for reviewing the child's progress, monitoring the effectiveness of the placement, and reevaluating the child's needs from the date of new residence; provided, however, that during the period when the financial obligation of the former community of residence for such day or residential placement continues pursuant to this section, the school committee of such new community of residence shall provide the school committee of the former community of residence with notice of any such review, monitoring, and reevaluation, and an opportunity to participate; and provided, further, that the school committee of such new community of residence shall be financially responsive for any increase, and the obligation of the school committee of such former community of residence shall be reduced by any decrease, in the costs of such day or residential placement during such period which results from any such review, monitoring or reevaluation.

A school committee which incurs costs or obligations under the provision of this section shall include within its annual budget an amount of money to com-

ply with said provisions. Said amount shall be added to the annual budget appropriation for school purposes in each city or town for the support of public schools for the purposes of, and enforceable pursuant to, section thirty-four of chapter seventy-one, notwithstanding any general or special laws or charter provisions which limit the amount of money that may be appropriated in any city or town for school purposes.

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Plaintiffs' Complaint
United States District Court for the
District of Massachusetts
May 6, 2024

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ARIELLA and **DAVID
HELLMAN**, on their own
behalf and as next friends
of their child, **E.H.**; and
JOSH HARRISON and
**MIRIAM SEGURA-
HARRISON**, on their own
behalf and as next friends
of their child, **H.H.**,

Plaintiffs,

v.

**MASSACHUSETTS
BOARD OF ELEMEN-
TARY AND SECOND-
ARY EDUCATION;
KATHERINE CRAVEN**,
in her official capacity as
Chair of the Board; **MATT
HILLS**, in his official ca-
pacity as Vice-Chair of the
Board; **DR. ERICKA
FISHER**, in her official
capacity as a member of
the Board; **ELA GARDI-
NER**, in her official capac-
ity as a member of the
Board; **FARZANA MO-
HAMED**, in her official

Case No. _____

COMPLAINT

capacity as a member of the Board; **MICHAEL MORIARTY**, in his official capacity as a member of the Board; **DÁLIDA ROCHA**, in her official capacity as a member of the Board; **PAYMON ROUHANIFARD**, in his official capacity as a member of the Board; **MARY ANN STEWART**, in her official capacity as a member of the Board; **DR. PATRICK TUTWILER**, in his official capacity as a member of the Board; **DR. MARTIN WEST**, in his official capacity as a member of the Board; **RUSSELL D. JOHNSTON**, in his official capacity as Acting Secretary of the Board and Commissioner of DESE; and **MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**,

Defendants.

NATURE OF THE ACTION

1. School committees in Massachusetts have a statutory obligation to provide special education services to *all* children with special needs. Unfortunately, this obligation has been subverted by a regulation promulgated by the Defendant Massachusetts Board of Elementary and Secondary Education (“Board”) and enforced by the Defendant Massachusetts Department of Elementary and Secondary Education (“DESE”). This regulation harms children whom the law requires the government to help by barring children whose parents enroll them in private schools from receiving services financed with state and local funds at their schools.

2. Defendants’ regulation undermines Massachusetts’ guarantee that all students with special needs can receive special education services. But it also discriminates against children whose parents place them in private school. Unlike other children in Massachusetts, these children must leave their school and travel off-site to a public or “neutral” location just so they can access special education services. The effect of this regulation is that school districts can provide special education services throughout the Commonwealth except one place: the schools that these private school students actually attend.

3. This regulation unconstitutionally discriminates against these children. It singles them out by requiring them—and only them—to access services outside of their schools. The regulation mandates this even as it permits children in public school—and even

children that *the government* places in private schools—to receive services inside of their schools. Because this regulation infringes on the rights of parents to direct the upbringing of their children, including by placing them in private school, it is unconstitutional.

4. It is also irrational: Traveling off-site to access special education services is impracticable in many, maybe even most, circumstances. In addition, since many services are required *at the point of learning*, they are effectively useless if the student is required to travel off-site to access them.

5. But even where it is technically possible to travel off-site, doing so is unduly burdensome for students and their parents. Bouncing back and forth between school and some “neutral” location is incredibly difficult for children with special needs, for many of whom structure and consistency is important. Being removed from class to access services is also stigmatizing for these children, who already face physical or emotional challenges. Time spent traveling rather than learning results in the children falling even further behind in their academics. Furthermore, many parents work outside the home, so they cannot spend time during the workday shuttling their children from location to location. Consequently, many students are forced to forgo special education altogether, despite their legal entitlement to it.

6. The ban on services at private schools is unconstitutional for three reasons. First, it penalizes parents who exercise their constitutional right to direct

the upbringing and education of their children by enrolling them in a private school, making it more difficult (and sometimes impossible) to access the services (and, in many instances, rendering the services useless), in violation of the Due Process Clause of the Fourteenth Amendment. Second, it treats similarly situated parents and children differently because of how some parents direct the upbringing of their children, in violation of the Equal Protection Clause of the Fourteenth Amendment. Third, to the extent that the source of substantive protection for the right of parents to direct the upbringing of their children by enrolling them in a private school is the Privileges or Immunities Clause, rather than the Due Process Clause, the ban abridges a privilege or immunity of citizenship.

JURISDICTION AND VENUE

7. Plaintiffs' action, filed pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201(a) and 2202, seeks injunctive relief and a declaration that Defendants' regulation barring students with special needs from receiving state- or locally funded special education services while inside private schools and Defendants' denial of state- or locally funded special education services in private schools that parents have chosen for their children is unconstitutional on its face and as applied to Plaintiffs.

8. This Court possesses jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343(a)(3).

9. Pursuant to 28 U.S.C. § 1391(b)(1) and (2), venue is proper in this judicial district because Defendants reside within it and the events giving rise to Plaintiffs' claims occurred within it.

PARTIES

10. Plaintiffs Ariella and David Hellman live in Brookline, Massachusetts with their family. They send their child, E.H., to a private school. Ariella and David bring this action on their own and E.H.'s behalf.

11. Plaintiffs Josh Harrison and Miriam Segura-Harrison live in Brighton, Massachusetts with their family. They send their child, H.H., to a private school. Josh and Miriam bring this action on their own and H.H.'s behalf.

12. Defendants are the Board, as well as its officers and members in their official capacities, and the DESE and its commissioner, in his official capacity.

13. By law, the Board "shall promulgate . . . regulations regarding educational programs for children with disabilities." M.G.L. c. 71B, § 2.

14. With 603 Code Mass. Regs. ("CMR") 28.00, the Board promulgated a regulatory scheme that "governs the provision by Massachusetts public schools of special education and related services to eligible students and the approval of public or private day and residential schools seeking to provide special education services to publicly funded eligible students." 603 CMR 28.01(2). It did so pursuant to its authority un-

der M.G.L. c. 69, § 1B and c. 71-B, § 2. See 603 CMR 28.01(1) (explaining its sources of authority).

15. The Defendant Board and its members have the responsibility and practical ability to ensure that the Board's regulations, policies, and powers are implemented in accordance with the U.S. Constitution.

16. Defendant Katherine Craven is Chair of the Board and is sued only in her official capacity.

17. Defendant Matt Hills is Vice-Chair of the Board and is sued only in his official capacity.

18. Defendant Dr. Ericka Fisher is a member of the Board and is sued only in her official capacity.

19. Defendant Ela Gardiner is a member of the Board and is sued only in her official capacity.

20. Defendant Farzana Mohamed is a member of the Board and is sued only in her official capacity.

21. Defendant Michael Moriarty is a member of the Board and is sued only in his official capacity.

22. Defendant Dálida Rocha is a member of the Board and is sued only in her official capacity.

23. Defendant Paymon Rouhanifard is a member of the Board and is sued only in his official capacity.

24. Defendant Mary Ann Stewart is a member of the Board and is sued only in her official capacity.

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25. Defendant Dr. Patrick Tutwiler is a member of the Board and is sued only in his official capacity.

26. Defendant Dr. Martin West is a member of the Board and is sued only in his official capacity.

27. Defendant Russell Johnston is Secretary to the Board and is sued only in his official capacity. Defendant Johnston is also the Acting Commissioner of DESE and is sued in that official capacity, as well.

28. Defendant DESE has the power to enforce regulations promulgated by the Board. 603 CMR 28.03(6).

29. DESE “may withhold funds for special education from cities, towns, school districts, or private schools or agencies that do not comply with regulations or statutes related to special education.” *Id.*

30. DESE has the responsibility and practical ability to ensure that the Board’s regulations, policies, and powers are implemented in accordance with the U.S. Constitution.

31. By law, DESE is “under the supervision and management of” Defendant Johnston. M.G.L. c. 69, § 1A.

32. Defendant Johnston receives a salary set by the Board and acts as “secretary to the board, its chief executive officer and the chief state school officer for elementary and secondary education.” Defendant Johnston may also “exercise” the authority of the board “whenever in its judgment such delegation may

be necessary or desirable.” The Board also has the power to “recommend[]” and “remove” Defendant Johnston. M.G.L. c. 15, § 1F.

33. With the approval of the Board, Defendant Johnston is required to “establish such bureaus and other offices and employ such staff and consultants as may be necessary for the proper and efficient administration of the department.” M.G.L. c. 69, § 1A.

34. Defendant Johnston’s responsibilities include the mandate to “monitor the implementation of independent evaluations of students with disabilities” and “assess the effectiveness of special education programs developed by school districts and charter schools.” *Id.*

FACTUAL ALLEGATIONS

Massachusetts lawmakers have guaranteed all students with special needs an individual entitlement to special education and related services.

35. Massachusetts guarantees students with special needs that no matter where they attend school, their local school committee will provide them with special education services. M.G.L. c. 71B, § 3. Massachusetts effectuates this guarantee by requiring “the school committee of every city, town or school district” in the Commonwealth to “identify the school age children residing therein who have a disability.” *Id.* A school age child with a disability is a child who is aged 3–21, is “in a public or non-public school setting,” has not earned a high school diploma, and, because of a

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disability or combination of disabilities, “is unable to progress effectively in regular education and requires special education services.” M.G.L. c. 71B, § 1.

36. Once a student has been identified as having a disability, the committee must “diagnose and evaluate” the child’s special needs, “propose a special education program to meet those needs,” and “provide or arrange for the provision of such special education program.” M.G.L. c. 71B, § 3. In providing or arranging for a special education program, the school committee must “pay for such special education personnel, materials and equipment, tuition, room and board, transportation, rent and consultant services as are necessary for the provision of special education.” M.G.L. c. 71B, § 5.

37. Massachusetts also requires that students with disabilities be educated in the “least restrictive environment.” M.G.L. c. 71B, § 1. This means that “to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled.” *Id.* It is “**only when the nature or severity of the disability of a child** is such that education in regular classes . . . cannot be achieved satisfactorily” that the child can be removed “from the regular educational environment,” attend “special classes,” or receive “separate schooling.” *Id.* (emphasis added).

38. Taken as a whole, Massachusetts disability law is more generous than its federal counterpart, the Individuals with Disabilities Education Act, (“IDEA”)

Act, 20 U.S.C. §§ 1400 *et seq.* Federal law sets a baseline, or “minimum,” standard that a child’s special education be “reasonably calculated to enable the child to receive educational benefits.” *Frank S. v. Sch. Comm. of the Dennis–Yarmouth Reg’l Sch. Dist.*, 26 F. Supp. 2d 219, 226 (D. Mass. 1998) (citing cases). By contrast, Massachusetts law requires that a child’s special education “must be reasonably calculated to assure the child’s *maximum* possible development in the least restrictive environment.” *Id.* (emphasis in original).

39. Also unlike federal law, Massachusetts law provides all children with disabilities—including children whose parents enroll them in private schools—with an individual right to special education services. M.G.L. c. 71B, § 3. By contrast, federal law provides no such individual right for children with disabilities whose parents enroll them in private schools. Instead, federal law requires local education agencies to use a proportionate share of federal funds received under Part B of the IDEA, 20 U.S.C. § 1412(a)(10)(A), to provide special education and related services for the *group* of children with disabilities who are enrolled by their parents in private schools. Which of the children in that group receive services, and what services they receive, are decisions left to the discretion of local education agencies; thus, no child parentally placed in a private school has an *individual* right to a particular level—or to any—special education services under the IDEA. *Id.* Under Massachusetts law, by contrast, such children do have an individual entitlement. M.G.L. c. 71B, § 3.

Massachusetts regulators have made it all but impossible for certain students to receive the entitlement that Massachusetts law guarantees.

40. Despite the generous nature of Massachusetts disability law, the Board has promulgated regulations—and DESE enforces those regulations—that single out and impose a blanket “place” restriction that bars children whose parents enroll them in private schools from receiving state- or locally funded special education services at their private schools. 603 CMR 28.03(1)(e)(3). By contrast, the Board has not mandated a similar restriction for children whom school committees have placed in private schools, such as when school committees provide for a child’s “special education in an approved private day or residential school,” M.G.L. c. 71B, § 5, or “enter into an agreement with any . . . private school, agency, or institution to provide the necessary special education within the city, town or school district.” M.G.L. c. 71B, § 4.

41. The “place” restriction uniquely applies to children whose *parents* enroll them in private schools. Again, there is no similar restriction on children in public schools or children who have been enrolled in a private school by their school committee. Thus, if the government—via a school committee—decides to send a child to a private school, the child gets all the benefits to which she is entitled. But if a parent decides to send a child to a private school—that is, if a parent exercises her constitutional right to enroll her child in a private school—then those benefits are severely restricted.

42. The Board effectuates the “place” restriction by requiring that, in the case of parentally placed private school students, “school districts shall ensure that special education services funded with state or local funds are provided in a public school facility or other public or neutral site.” 603 CMR 28.03(1)(e)(3). By contrast, “[w]hen services are provided using only federal funds, services may be provided on private school grounds.” *Id.* Practically speaking, this means that parentally placed private school students can receive state- or locally funded special education throughout the Commonwealth so long as it is not in one place: the school that they attend.

43. Upon information and belief, the Board promulgated these regulations to comply with the state constitutional bar on “aiding any . . . primary or secondary school . . . not publicly owned and under the exclusive control” of the Commonwealth. Massachusetts Const. amend. art. XVIII, § 2. *See also* 603 CMR 28.03(1)(e)(1) (“The school district shall provide to such students genuine opportunities to participate in the public school special education program consistent with state constitutional limitations.”).

44. Because of Defendants’ regulation, children whose parents enroll them in private school are barred from receiving state- or locally funded special education to which they are entitled by law within the private school their children attend.

45. Because Defendants impose and/or enforce this regulation, parents who enroll their children in private school face irrational obstacles to obtaining spe-

cial education for their children, pay out of pocket for special education their children are entitled to by law, and/or entirely forgo the special education that their children require and to which they are lawfully entitled.

INJURIES

The impact of the regulation on Ariella and David Hellman.

46. Plaintiffs Ariella and David Hellman have chosen to send their son, E.H., to the Maimonides School, a private elementary school, in Brookline. Because Ariella and David have elected to send E.H. to a private school, he may not receive state- or locally funded special education services at school. Ariella and David have thus been penalized by Defendants for exercising their constitutional right to direct the upbringing and education of their child by enrolling him in a private school.

47. Ariella and David's son has required special education services for years. When E.H. was four years old, Ariella and David noticed that E.H. had trouble with anxiety and concentrating and took him to get tested. Those tests—followed by later tests—revealed that E.H. has ADHD. Although E.H. is a bright and friendly boy, ADHD affects his ability to learn. For example, ADHD makes it challenging for him to complete his tasks at hand and to work independently. These issues make life harder for him and he will need services for the foreseeable future.

48. The Public Schools of Brookline (“PSB”) have provided E.H. with an Individualized Education Program (“IEP”) since he was in preschool. An IEP provides children and their parents with a program of special education services and the services that the child needs to thrive that are specifically designed to meet the child’s needs. 600 CMR 28.02.

49. In his latest IEP, PSB recommended E.H. receive three services with varying frequencies. For example, PSB determined he needs two hours of academic support throughout each week of school, as well as thirty minutes of counseling and learning-center time each week. In total, over the course of a single week of school, PSB recommends he receive three hours of special education and related services.

50. Because of Defendants’ regulation, E.H. has been unable to get state- or locally funded services—to which he is entitled—at the private schools he has attended. For example, after E.H. received his first IEP, Ariella and David tried to get him the services that it prescribed. But Ariella and David are working parents. So, for E.H. to access his services, they would have to leave their jobs during the day and spend hours transporting E.H. from his preschool to the sites where services would be provided. This was not possible because their jobs did not enable them to cart their son to and from school multiple times per week. Thus, because it was impossible for E.H. to receive the services he needed at the private school Plaintiffs wanted him to attend, they made the difficult choice to enroll him in a public school so he could access services.

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51. Despite the fact that E.H. could receive his IEP services at his public school, Ariella and David knew it was not the best educational environment for him, so they later withdrew him from public school and enrolled him in Maimonides. Ariella and David chose to send E.H. to Maimonides, in part, because they are Jewish. They observe Jewish law and want their children to receive an education informed by Judaism. They do not wish to be penalized because they have chosen to educate him outside of the public school system. But the unfortunate truth is that their family has been penalized for years, and they are penalized now.

52. Today, the only way E.H. can receive the services to which he is entitled is if he is transported to and from his school multiple times per week.

53. Traveling to and from a public or “neutral” location multiple times per week would be unduly disruptive and burdensome for E.H., whose most recent evaluation emphasized that he is “easily overwhelmed by his workload.”

54. Being removed from Maimonides and transported to a public or “neutral” location multiple times per week would be stigmatizing and stressful for E.H., whose most recent evaluation identified his problems with “anxiety and frustration.”

55. Time spent traveling rather than learning and interacting with classmates would interfere with E.H.’s educational tasks and thereby detract from the

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educational benefit he would receive by continuing to attend school full-time at Maimonides.

56. Likewise, time spent at a public or “neutral” location rather than Maimonides would detract from the education at the religious school that was Ariella and David’s conviction—and right—to provide E.H.

57. Because parentally placed private school children are not entitled to receive state- or locally funded services at their schools, Ariella and David would have to incur significant out-of-pocket expenses to provide services at school for E.H. that are not provided through Gateways: Access to Jewish Education (“Gateways,” explained below in paragraph 60).

58. Because parentally placed private school kids are not entitled to receive transportation to their services, *see* 600 CMR 28.05(5)(a), Ariella and David would have to incur significant expenses shuttling E.H. to and from his school.

59. Ariella and David simply want E.H. to attend a school where he can access the special education services he is legally entitled to and receive an education that will shape his character in accordance with their family’s beliefs. Yet because of Defendants’ regulation, they are in a position where their son attends a school where he can only access one of those things.

60. Fortunately, over the years, E.H. has been able to receive some—but not all—of the services he requires through Gateways. This is a nonprofit organization that provides services to students in the Jewish community. Since Massachusetts regulations forbid

state and local public funds from financing special education services for parentally placed students at their private schools, Gateways frequently steps into the void and provides those services instead, financed through private donations and federal monies, or “proportionate share” funds, that have been disbursed by PSB, in accordance with the IDEA. However, as noted above, IDEA does not provide an individual right to parentally placed private school students. Consequently, E.H. does not receive all the special education services that PSB acknowledges he requires.

61. Thus, even though Gateways is helpful, it cannot do everything. Indeed, there is no guarantee that E.H. will receive any, let alone all, the services that are recommended by his IEP. Instead, each year Ariella and David hope that Gateways can generate enough money and then allocate a portion of it toward E.H.’s special education services. So far, Ariella and David have been fortunate because Gateways has been able to provide some of the services that E.H. needs. But that still means that he forgoes other services each year. Making matters more complicated, Ariella and David have learned that, in the future, Gateways may not be able to provide the same level of services that it currently provides.

62. In short, because of Defendants’ regulation, Ariella and David are forced to make a choice: Do we send E.H. to a public school, where he can receive all the services to which he is entitled but not get the education that is best for him, or do we provide him with the best education for him but forgo the services to which he is entitled?

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63. Because traveling to and from a public or “neutral” location would have been impracticable, unduly burdensome, disruptive, stigmatizing, stressful, inefficient, and counterproductive; and would have thwarted Ariella and David’s conviction to educate E.H. at a Jewish, rather than public, school, Ariella and David decided to forgo the services financed with state and local funds.

The impact of the regulation on Josh Harrison and Miriam Segura-Harrison.

64. Plaintiffs Josh Harrison and Miriam Segura-Harrison have chosen to send their son, H.H., to Shaloh House, a private elementary school, in Brighton. Like the Hellman Plaintiffs, Miriam and Josh have been penalized by Defendants for exercising their constitutional right to direct the upbringing and education of their child by enrolling him in a private school.

65. Miriam and Josh’s child has required special education services for years. When H.H. was five years old, Miriam and Josh took him to a specialist at Boston Public Schools (“BPS”) to get tested. He later received an IEP from BPS.

66. H.H.’s current IEP states that he has ADHD, developmental coordination disorder, and a reading impairment (dyslexia). ADHD makes it difficult for H.H. to concentrate and the developmental disorder means that his fine motor skills are not at the same level as most kids his age. That means that he sometimes has trouble doing things like getting dressed or

playing games with his friends. His social-emotional delays make it more challenging for him to respond appropriately in everyday situations. Despite these issues, H.H. is bright and motivated to overcome the challenges he faces.

67. In his most recent IEP, BPS recommended he receive four services with varying frequencies. For example, BPS determined he needs four hours of self-regulation instruction each week, along with nearly two hours of instruction in reading, occupational therapy, and psychological services. In total, BPS recommends he receive over nine hours of special education services each week.

68. Miriam and Josh have chosen to send H.H. to Shaloh House, in part, because they are Jewish. They observe Jewish law and want their child to receive an education informed by Judaism. But because Miriam and Josh chose to educate H.H. at Shaloh House, they have been penalized for educating him outside the public school system. They can send H.H. to a public school where he can receive all the services he requires but not get the education that is best for him, or they can provide him with the best education for him but forgo some of the services he needs.

69. Thus, because of Defendants' regulation, H.H. has been unable to get state- or locally funded services—to which he is entitled—at his school.

70. Indeed, the *only* way H.H. could receive the services to which he is entitled is if he were transported to and from his school multiple times per week.

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71. Traveling to and from a public or “neutral” location multiple times per week would be unduly disruptive and burdensome for H.H., whose most recent evaluation emphasized that “he needs constant redirection at school.”

72. Being removed from Shaloh House and transported to a public or “neutral” location multiple times per week would be stigmatizing and stressful for H.H., whose most recent evaluation identified his problems with anxiety and withdrawal.

73. Time spent traveling rather than learning and interacting with classmates would interfere with H.H.’s educational tasks and thereby detract from the educational benefit he would receive by continuing to attend school full-time at Shaloh House.

74. Likewise, time spent at a public or “neutral” location rather than Shaloh House would detract from the education at the religious school that was Miriam and Josh’s conviction—and right—to provide H.H.

75. Because parentally placed private school children are not entitled to receive state- or locally funded services at their schools, Miriam and Josh would have to incur significant out-of-pocket expenses to provide services at school for H.H. that are not provided through Gateways.

76. Because parentally placed private school children are not entitled to receive transportation to their services, *see* 600 CMR 28.05(5)(a), Miriam and Josh would have to incur significant expenses shuttling H.H. to and from his school.

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77. Like Ariella and David’s son, H.H. can receive some—but not all—of the services he requires through Gateways. But due to Defendants’ regulation, he is unable to receive all the services he requires, and Miriam and Josh must choose between a school where he can receive all the services to which he is entitled but not get the education that is best for him, or a school that provides the best education for him without all the services to which he is entitled.

78. Because traveling to and from a public or “neutral” location would have been impracticable, unduly burdensome, disruptive, stigmatizing, stressful, inefficient, and counterproductive; and would have thwarted Miriam and Josh’s conviction to educate H.H. at a Jewish, rather than public, school, Miriam and Josh decided to forgo the services financed with state and local funds.

***Defendants’ regulation injuries Plaintiffs by
infringing on their fundamental right to direct
the upbringing of their children.***

79. The United States Supreme Court has recognized the “fundamental” right of parents to “direct the education and upbringing of [their] children.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). That right includes, specifically, the right of parents to send their child to a private school. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

80. Because Defendants collectively impose and/or enforce the regulation barring the provision of state- or locally funded special education in private schools,

Plaintiffs must remove their children from school to obtain special education, pay out of pocket for the special education their children are entitled to by law or, in the alternative, entirely forgo special education.

81. But for 603 CMR 28.03(1)(e)(3), E.H.'s and H.H.'s school committees would be required to provide their IEP services in the "least restrictive environment," which means, "to the maximum extent appropriate," without "special classes, separate schooling, or other removal . . . from the regular educational environment." M.G.L. c. 71B, § 1; *see also* 603 CMR 28.02 (defining "Least Restrictive Environment").

82. For E.H. and H.H., the "regular educational environment[s]" are the schools that they attend, M.G.L. c. 71B, § 1, and but for 603 CMR 28.03(1)(e)(3), they would be able to receive their IEP services, "to the maximum extent appropriate," in their schools. Because of 603 CMR 28.03(1)(e)(3), E.H. and H.H. are unable to attain the services on the terms that Defendants mandate for all students who are entitled to special education services simply because their parents enrolled them in private schools. *See* 603 CMR 28.03(1)(e)(4) ("Special education provided by the school district to a private school student shall be comparable in quality, scope, and opportunity for participation to that provided to public school students with needs of equal importance.")

CLAIMS OF RELIEF**Count I: Substantive Due Process**

83. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1 through 82 of this Complaint as though fully set forth herein.

84. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides, “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend XIV.

85. The Due Process Clause applies to states and their subdivisions and municipalities.

86. Among the liberties protected by the Due Process Clause is the right of parents to control and direct the education and upbringing of the children under their control. This right is “fundamental.” *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

87. The government may not condition a benefit on a person’s non-exercise of a constitutional right, including the right to direct the upbringing of one’s child. *Cf. Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (“[T]he government may not deny a benefit to a person because he exercises a constitutional right.” (quoting *Regan v. Tax’n With Representation of Wash.*, 461 U.S. 540, 545 (1983))).

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88. On its face and as applied to Plaintiffs, 603 CMR 28.03(1)(e)(3)'s prohibition on the provision of special education services to parentally placed private school students at their private schools penalizes parents by making it extremely difficult—even impossible—for their children to access services. By making access to these services difficult or impossible for children whose parents enroll them in private schools, Defendants penalize parents for exercising their constitutional right to send their children to private school.

89. Defendants have no compelling, substantial, or even legitimate interest in making it more difficult for children whose parents enroll them in private school to receive state- or locally funded special education services while providing the same for children in public school, as well as for children that school committees place in private schools.

90. Defendants' regulation is not narrowly tailored to achieve, substantially related to, or rationally related to, any governmental interest Defendants purport to have.

91. On its face and as applied to Plaintiffs, 603 CMR 28.03(1)(e)(3) violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution insofar as it prohibits the provision of special education services based on how parents choose to educate their children and therefore violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution insofar as it penalizes parents who enroll their children in private schools.

Count II: Equal Protection of the Laws

92. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1 through 82 of this Complaint as though fully set forth herein.

93. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend XIV.

94. The Equal Protection Clause applies to states and their subdivisions and municipalities.

95. The Equal Protection Clause prohibits the government from discriminating against a person for “the exercise of a fundamental right.” *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

96. Parents have a “fundamental” right to “direct the education and upbringing of their children.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

97. The Equal Protection Clause prohibits government from making it “more difficult for one group of citizens than for all others to seek aid from the government.” *Romer v. Evans*, 517 U.S. 620, 633 (1996).

98. By denying children and their parents the ability to receive state- or locally funded special education services in private schools while allowing the same for children in public schools and children whom school committees place in private schools, 603 CMR

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28.03(1)(e)(3) discriminates against Plaintiffs based on how they choose to direct the education of their children.

99. By making it more difficult—sometimes impossible—for parentally placed private school students than all others to seek and obtain aid from the government, 603 CMR 28.03(1)(e)(3) discriminates against Plaintiffs based on how they choose to direct the education of their children.

100. Defendants have no compelling, substantial, or even legitimate interest in denying state- or locally funded special education services for children in private schools while providing the same for children in public schools, as well as for children whom school committees place in private schools.

101. Defendants' regulation is not narrowly tailored to achieve, nor is it substantially or even rationally related to, any governmental interest Defendants purport to have.

102. On its face and as applied to Plaintiffs, 603 CMR 28.03(1)(e)(3)'s prohibition on the provision of special education services to parentally placed private school students at their private schools discriminates based on how parents choose to educate their children and therefore violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Count III: Privileges or Immunities

103. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1

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through 82 of this Complaint as though fully set forth herein.

104. The Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution provides that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. Const. amend XIV.

105. The Privileges or Immunities Clause applies to states and their subdivisions and municipalities.

106. The Privilege or Immunities Clause protects “those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States.” *Snowden v. Hughes*, 321 U.S. 1, 6 (1944).

107. Some Supreme Court justices have opined that this Clause, rather than (or in addition to) the Due Process Clause, is the source of protection for substantive rights—including unenumerated rights—against the states.¹

¹ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 240, n.22 (2022) (“Some scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights.”); *Troxel v. Granville*, 530 U.S. at 80 (Thomas, J., concurring in the judgment) (explaining that the right of parents to direct the upbringing of their children is “fundamental,” but suggesting that the Privileges or Immunities Clause, rather than the Due Process Clause, is the right vehicle for recognizing the right), *McDonald v. City of Chicago*, 561 U.S. 742, 809–12, 851, n.20 (2010) (Thomas, J., concurring in part, and concurring in the judgment) (arguing that the Due Process Clause cannot “define

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108. Among the unenumerated substantive rights that citizens possess is the right of parents to control and direct the education and upbringing of the children under their control. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).²

109. By barring the provision of state- and locally funded special education services to parentally placed private school students at their private schools, 603 CMR 28.03(1)(e)(3) abridges the fundamental right of parents to direct the education of their children by sending them to private school.

110. Defendants have no compelling, substantial, or even legitimate interest in denying state- or locally funded special education services to children in private schools while providing the same for children in public schools, as well as for children that school committees place in private schools.

111. Defendants’ regulation is not narrowly tailored to achieve, nor is it substantially or even rationally related to, any governmental interest Defendants purport to have.

the substance” of a constitutional right, but the Privileges or Immunities Clause can).

² This claim may be foreclosed by current U.S. Supreme Court precedent, *see Slaughter-House Cases*, 83 U.S. 36 (1872), but Plaintiffs assert it to preserve it for eventual review by the Court.

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112. On its face and as applied to Plaintiffs, 603 CMR 28.03(1)(e)(3)'s prohibition on the provision of special education services to parentally placed private school students at their private schools abridges the right of parents to direct the education of their children in violation of the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution.

PRAYER FOR RELIEF

Plaintiffs respectfully request the following relief:

- A. A declaratory judgment by the Court that 603 CMR 28.03(1)(e)(3) violates the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment to the U.S. Constitution insofar as it requires that special education services funded with state or local funds be provided in a public school facility or other public or neutral site;
- B. A permanent injunction prohibiting Defendants from enforcing 603 CMR 28.03(1)(e)(3) insofar as it requires that special education services funded with state or local funds be provided in a public school facility or other public or neutral site;
- C. An award of attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988; and
- D. Any other legal and equitable relief the Court may deem appropriate and just.

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Dated: May 6, 2024

Respectfully submitted,

/s/ Tiffany Stichel

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