

**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 ELEMENTARY AND SECONDARY EDUCATION; KATHERINE CRAVEN, in her official capacity as Chair of the Board; **MATT HILLS**, in his official capacity as Vice-Chair of the Board; **DR. ERICKA FISHER**, in her official capacity as a member of the Board; **ELA GARDINER**, in her official capacity as a member of the Board; **FARZANA MOHAMED**, in her official 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.

Case No. 1:24-cv-11200-NMG

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

REQUEST FOR ORAL ARGUMENT

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INTRODUCTION

This case is about the fundamental, constitutional right of parents to direct the education and upbringing of their children and to not be penalized by the government when they exercise that right. Parents Ariella and David Hellman, and Josh Harrison and Miriam Segura-Harrison (“Plaintiffs”) have chosen to enroll their children in private school, a choice that is protected by the federal Constitution. And like all children with special needs, Plaintiffs’ children have a right under Massachusetts law to receive special education services in their “regular educational environment”—their schools.

But because Plaintiffs enroll their children in private school, they are subject to an unconstitutional condition—Defendants’ regulation that prohibits their children, and those like them, from receiving special education services at school. To receive services, their children must leave their schools multiple times per day, multiple times per week and travel to “public or neutral” locations whose sole characteristic is they are not private schools. It is difficult—even impossible—for working parents like Plaintiffs to transport their children to receive services, but even if they could manage it, traveling to and from these locations is stigmatizing and disruptive to their children, for whom structure and consistency are particularly important. Yet, if Plaintiffs had chosen to enroll their children in public school, they would not be subject to this requirement and their children could receive services at school. Likewise, if Plaintiffs had chosen to let the government enroll their children in private school, their children could receive services at school. It is *only* because Plaintiffs have chosen to enroll their children in private school—that is, only because they have exercised a right that Defendants themselves recognize to be fundamental, *see* MTD 1—that Defendants barred them from receiving services at school.

Plaintiffs brought this lawsuit to challenge Defendants’ regulation under the Fourteenth Amendment’s due process, equal protection, and privileges or immunities clauses. They have

plausibly alleged that the regulation violates their fundamental right to direct the education and upbringing of their children. Strict scrutiny applies to this right, but Plaintiffs have plausibly alleged that even under rational basis review, Defendants' regulation fails.

Defendants moved to dismiss under Rule 12(b)(6). In their motion, Defendants argue that Plaintiffs have failed to state a claim because there is no constitutional right to receive special education services. Plaintiffs, however, do not assert that they have such a right. Instead, they assert that they have a fundamental right to direct the education and upbringing of their children, including by enrolling them in private school. Because Massachusetts has chosen, by statute, to provide them with benefits, Plaintiffs allege that the government may neither condition Plaintiffs' benefits based on a constitutional right nor provide those benefits on different terms compared to others who are similarly situated—namely, every other student who has the *same* statutory right that they do. Defendants' only justification for their regulation is adhering to the state constitution's bar on "aiding" private schools. Plaintiffs have plausibly alleged that Defendants' regulation cannot survive any kind of scrutiny, including rational basis review. That is, denying aid to individuals is not a rational means of denying aid to institutions; indeed, it is as irrational as denying food stamps to poor people to avoid "aiding" grocery stores. For these reasons, and those below, Defendants' motion fails.

BACKGROUND

Massachusetts guarantees all school-aged children with special needs that no matter where they attend school, their local school committee will provide them with special education services to address their disabilities. Compl. ¶ 35. Massachusetts carries out this guarantee by requiring "the school committee of every city, town or school district" to "identify the school age children residing therein who have a disability." *Id.* (quoting M.G.L. c. 71B, § 3). Once a student has been identified as having special needs, 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.” *Id.* ¶ 36. 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.” *Id.* (quoting M.G.L. c. 71B, § 5).

To provide such services, Massachusetts requires that students with disabilities be educated in the “least restrictive environment.” *Id.* ¶ 37 (quoting 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 altered).

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.* *Id.* ¶ 38. Unlike IDEA, Massachusetts provides *all* children with disabilities—including children whose parents enroll them in private schools—with an individual statutory right to special education services. *Id.* ¶ 39 (citing M.G.L. c. 71B, § 3). By contrast, IDEA provides no such individual right for children with disabilities whose parents enroll them in private schools. *Id.* Instead, IDEA 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 of—or to any—special education services under the IDEA. *Id.* Under Massachusetts law, by contrast, such children do have an individual entitlement—the *same* entitlement as kids attending a public school. *Id.*

Despite the generous nature of the Massachusetts law, Defendants have promulgated and enforced a regulation that imposes a blanket “place” restriction solely on children whose parents enroll them in private schools that bars them from receiving state- or locally funded special education services at their private schools. *Id.* ¶ 40 (citing 603 CMR 28.03(1)(e)(3)). By contrast, Defendants have not mandated a similar restriction for children who attend public schools or 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,” 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.” *Id.* (quoting M.G.L. c. 71B, §§ 4, 5).

The “place” restriction uniquely applies to children whose *parents* enroll them in private schools. *Id.* ¶ 40. Again, there is no similar restriction on children whose parents enroll them in public schools or children who the government enrolls in a private school. Thus, if a parent enrolls her child in a public school, the child can receive services at school. Likewise, if the government enrolls a child in a private school, the child can receive services at school. 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. *Id.*

Defendants carry out this “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.” *Id.* ¶ 42 (quoting 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 they attend.

Defendants 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. *Id.* ¶ 43 (quoting Mass. Const. amend. art. XVIII, § 2). *See also id.* (“The school district shall provide to such students genuine opportunities to participate in the public school special education program consistent with state constitutional limitations.” (quoting 603 CMR 28.03(1)(e)(1))). *See also* MTD 1, 4, 13, 14, 18.

Plaintiffs and their children are just some of the people who are impacted by Defendants’ regulation. Plaintiffs want to provide their children with a Jewish education, and to that end, they have enrolled their children in Jewish day schools. Compl. ¶¶ 51, 68. But due to the regulation, the only way Plaintiffs’ children can access services is if they travel to and from a public or “neutral” location multiple times per week. *Id.* ¶¶ 50, 52–53, 58, 70–71, 75. And the only way their children can travel to these sites is if Plaintiffs leave their own busy jobs to drive their children to those sites or pay someone else to transport them.¹ *Id.* But even if they could leave their jobs multiple times per day and week, or afford the cost of transporting their children, it would be “stigmatizing and stressful” to their children, who are “anxi[ous]” and withdrawn, to be repeatedly removed from their classrooms in front of their classmates. *Id.* ¶¶ 54, 72. Moreover, for the Plaintiffs, it would

¹ Defendants point to several public locations that are within a couple miles of where Plaintiffs’ children attend school, presumably to imply that Plaintiffs’ transportation burden is insignificant. MTD 6–7 nn. 5, 6. Plaintiffs note that allegations that taking their children out of school would be expensive and stressful (even “impossible”) must be taken as true at the motion to dismiss stage. *Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). Plaintiffs also note that the fact that there are public locations near the children’s schools does not mean those locations are where their services would be provided. But regardless of where they are provided, Plaintiffs would still have to arrange for the transportation of their minor, special needs children either by leaving their own jobs or by paying someone else to transport their children multiple times per day and week.

defeat the purpose of enrolling their children in Jewish day schools if their children are constantly being shuttled in and out of their classrooms and not receiving the full benefits of the education that Plaintiffs have chosen for them. *Id.* ¶¶ 55–56, 72–73.

The regulation has forced a dilemma upon Plaintiffs. They “must choose between a school where [their children] can receive all the services to which [they are] entitled but not get the education that is best for [them], or a school that provides the best education for [them] without all the services to which [they are] entitled.” *Id.* ¶¶ 62, 77. Each of the Plaintiffs has made their choice: “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 [Plaintiffs’] conviction to educate [their children] at a Jewish, rather than public, school, [Plaintiffs] decided to forgo the services financed with state and local funds.” *Id.* ¶¶ 63, 78.

REQUEST FOR ORAL ARGUMENT

In accordance with Local Rule 7.1(d), Plaintiffs request oral argument.

STANDARD OF REVIEW

“In ruling on a motion to dismiss, a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs.” *Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). Plaintiffs survive a motion to dismiss if their complaint alleges “enough facts to state a claim to relief that is plausible on its face.” *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

In Part I, Plaintiffs show that they plausibly stated a claim for relief under the Fourteenth Amendment’s Due Process Clause. In Part II, Plaintiffs show the same for their Fourteenth Amendment Equal Protection claim. In Part III, Plaintiffs demonstrate that they properly preserved their claim under the Fourteenth Amendment Privileges or Immunities Clause for appeal.²

I. Plaintiffs plausibly stated a claim for relief under due process.

Defendants argue that Plaintiffs fail to adequately allege a Due Process claim because Defendants’ regulation does not violate an actual constitutional right and there is a rational basis for the regulation. MTD 9. Below, Plaintiffs demonstrate that Defendants are wrong. First, Plaintiffs have plausibly alleged that Defendants’ regulation is an unconstitutional condition on their fundamental right as parents to direct the upbringing of their children. Second, Plaintiffs show they have plausibly alleged that Defendants’ regulation cannot survive any kind of scrutiny.³

² Defendants argue that the Eleventh Amendments bars Plaintiffs’ claims against the Board of Elementary and Secondary Education and the Department of Elementary and Secondary Education. MTD 7–8. Plaintiffs assent to their dismissal, while maintaining their claims against the remaining defendants, who have been sued in their official capacities. *See* Compl. ¶¶ 16–27; *Lane v. First Nat’l Bank of Bos.*, 871 F.2d 166, 172 n.5 (1st Cir. 1989) (holding that a federal court may “enjoin state officials to conform future conduct to the requirements of federal law.”).

³ In a footnote, Defendants suggest that Plaintiffs may be required to allege that the government officials’ conduct in promulgating and enforcing the regulation violates Plaintiffs’ substantive due process rights in a manner that “shocks the conscience.” MTD 9 n.7 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). As should be evident from the cases cited by Defendants, this pleading requirement applies to executive actions, not to legislative actions like the ones in this case. *See, e.g., id.* (a police officer engaging in a high-speed chase); *DePoutot v. Raffaely*, 424 F.3d 112 (1st Cir. 2005) (a police officer wrongfully terminating a breathalyzer test); *Martínez v. Cui*, 608 F.3d 54 (1st Cir. 2010) (a state employee sexually assaulting a person); *Mongeau v. City of Marlborough*, 492 F.3d 14, 19 (1st Cir. 2007) (a city employee denying a building permit). By contrast, when government officials promulgate and enforce a regulation, as they do in this case, they are acting in their legislative capacities and the “shocks the conscience” requirement does not apply. *See Lewis*, 523 U.S. at 846 (explaining that the requirement does not apply to “what the government may do in [] its legislative . . . capacity[y]”); *Martínez*, 608 F.3d 54 at 65 (stating that the requirement applies to “substantive due process claims based on executive, as opposed to legislative, action”); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 245 (1st Cir. 1990) (“Enactment of a zoning ordinance is a legislative act[.]” (citation omitted)). *See also Hancock v. County of Rensselaer*, 882 F.3d 58, 66 (2d Cir. 2018) (“Some types of executive actions, such as regulations, are more akin to legislative action.”); *Reyes v. N. Tex. Tollway Auth.*, 861 F.3d 558, 562–63 (5th Cir. 2017) (holding that when an administrative agency’s user fees are broadly applicable, they “easily fit[] into the legislative box”).

A. Plaintiffs have properly alleged the regulation violates their due process rights.

Defendants argue that Plaintiffs' Complaint is insufficient because it rests on a nonexistent "federal constitutional right to state-funded special education benefits." MTD 10. But that is not Plaintiffs' claim. After all, their children already have a *statutory* right to public funding for special education services in their "regular educational environment." Compl. ¶¶ 81–82. Their due process claim simply challenges the denial of this statutory right based on their constitutional right to "direct the education and upbringing of [their] children," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), including by enrolling them in private school. Compl. ¶¶ 46, 64.

Plaintiffs alleged that Defendants infringed this right with a regulation that undermined a Massachusetts law providing special education services to every student in the state. *Id.* ¶¶ 1–2. Although the law requires services to be provided in a student's "regular educational environment"—their schools—"to the maximum extent appropriate," Defendants promulgated and enforce a regulation barring children whose parents enrolled them in private school from receiving services there. *Id.* ¶ 81 (quoting M.G.L. c. 71B, § 1; 603 CMR 28.02). This regulation penalizes these children—and only these children—by preventing them from receiving special education services in the schools they attend. *Id.* ¶ 37 (citing M.G.L. c. 71B, § 1). Put differently, if Plaintiffs exercised their "right to direct the education and upbringing of [their] children" in a different way, they would be unaffected by the regulation. That is, if Plaintiffs enrolled their children in public school—or if the government enrolled their children in private school—their children would not be subject to this condition. *Id.* ¶¶ 40–41, 62, 77. It is *only* because parents like Plaintiffs exercised their right to enroll their children in private school that their children cannot access special education services at the schools they attend—even though they have the same

statutory entitlement to receive the services at the schools they attend as any other child with disabilities. That is due entirely to Defendants' regulation.

Defendants' regulation is what is known as an unconstitutional condition. That is when the government makes a general benefit available only to people who give up a federal constitutional right. The U.S. Supreme Court has repeatedly held that a state may not condition the availability of public benefits on the surrender of a fundamental constitutional right; nor may it penalize someone because she has exercised such a right. *See 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.” (internal quotation marks and citation omitted)); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (“There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.”). For example, the Court has held a state may not:

- condition tuition benefits on a parent's surrender of her right to obtain a religious education for her child, *Carson v. Makin*, 596 U.S. 767, 789 (2022); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 488–89 (2020);
- deny otherwise available public resources, such as student activity funds or school facilities, based on the viewpoint of speakers who wish to use them, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (school facilities); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (student activity funds); *Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (school facilities);
- condition public employment on the surrender of one's right against self-incrimination, *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956);
- deny unemployment benefits because of a worker's adherence to the tenets of her religion, *Thomas v. Rev. Bd.*, 450 U.S. 707, 716 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963);

- deny the right to vote, or withhold welfare, medical, or dividend benefits, based on a resident’s exercise of her right to travel, *Saenz v. Roe*, 526 U.S. 489, 502–07 (1999) (welfare benefits); *Zobel v. Williams*, 457 U.S. 55, 58–61, 65 (1982) (dividend benefits); *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974) (medical benefits); *Dunn v. Blumstein*, 405 U.S. 330, 338–43, 360 (1972) (voting).

None of these cases mean the government is constitutionally required to establish a generally available public program. Nor do they suggest, as Defendants might put it, that people who object to these conditions are asserting a constitutional right to various state-funded benefits. MTD 10. They simply mean that once the government makes a benefit generally available, “a person may not be compelled to choose between the exercise of a [fundamental] right and participation in [the] otherwise available public program.” *Thomas*, 450 U.S. at 716. Yet that is what Defendants did when they barred children whose parents enrolled them in private school from receiving special education services in school.

Defendants try to get around this venerable principle of law by invoking an inapposite case. MTD 11. In *Gary S. v. Manchester School District*, the parents of a private school student alleged the IDEA was unconstitutional to the extent that disabled private school students were “not entitled by law to the panoply of services available to disabled public school students.” 374 F.3d 15, 17 (1st Cir. 2002). The First Circuit disagreed, noting that because private school students did not have a statutory “entitlement” to those services and were “not being deprived of a *generally available* public benefit,” they could not “lay claim” to “benefits the federal government has earmarked solely for students enrolled in the nation’s public schools.” *Id.* at 19–20.

Plaintiffs’ situation is plainly different. Unlike *Gary S.*, Plaintiffs *have* a statutory entitlement to receive special education services “to the maximum extent appropriate” in their

“regular educational environment” and, as Defendants concede, that entitlement is generally available to all students with special needs. Compl. ¶ 81. *See* MTD 2 (“Massachusetts’s state law . . . provides all school-aged children with disabilities—including children whose parents enroll them in private schools—with an individual right to special-education services.”). Thus, unlike *Gary S.*, Plaintiffs are not arguing that they are entitled to a benefit that the government has decided to provide “solely” to public school students. 374 F.3d at 19. They are arguing that since they have a statutory entitlement to a benefit—the same benefit as all other children with disabilities—Defendants may not deny them the benefit in their “regular educational environment” because they enrolled their children in private schools and for no other reason. Compl. ¶¶ 62, 77. Simply put, the government’s “mere failure to provide” a benefit in *Gary S.* is not comparable to the Defendants’ denial of “benefits equally available to all” in this case. 374 F.3d at 20. *See also Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (explaining that fundamental rights “are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference”). The parents in *Gary S.* were “not forced to [forgo] . . . their right to control their child’s education to obtain [] government benefits”; the ones here are. 374 F.3d at 23.

In sum, once Massachusetts chose to create a general benefit program for all students with special needs, it could not then condition access to those benefits on how beneficiaries exercised their constitutional rights. Contrary to Defendants’ arguments, Plaintiffs have plausibly alleged that Defendants’ regulation violates a fundamental constitutional right.

B. Defendants’ regulation fails strict scrutiny.

As noted above, Plaintiffs have a “fundamental” right to send their children to private school. A law that infringes this right, which has been likened by the Supreme Court to “the specific freedoms protected by the Bill of Rights,” is entitled to strict scrutiny. *Glucksberg*, 521 U.S. at

720. Under that standard, a law that burdens a constitutional right—here, by forcing a choice between the benefit and a right—must be “the least restrictive means of achieving a compelling state interest.” *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

As Plaintiffs alleged in their complaint, Defendants’ regulation fails that exacting test. Compl. ¶¶ 89–90. Defendants argue that they have an interest in adhering to the state constitution’s bar on “aiding any . . . primary or secondary school . . . which is not publicly owned.” MTD 4 (quoting Mass. Const. amend. art. XVIII, § 2). But as important as that interest may be, it “does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their” exercise of a federal constitutional right. *Carson*, 596 U.S. at 781. This is true specifically of interests that are rooted in a state constitution such as a no-aid amendment. *See, e.g., Espinoza*, 591 U.S. at 489 (holding that a state constitution’s no-aid amendment could not justify withholding or denying a benefit based on the would-be recipient’s free exercise right); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (“[T]he state interest . . . in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise . . . and Free Speech Clause[.]”).

So too here. Defendants’ regulation bars children “from receiving services financed with state and local funds at their schools” simply because their parents exercised their right to enroll them in private school. Compl. ¶ 1. As a result, “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.” *Id.* ¶ 80. Although Plaintiffs have a right to choose private school, Defendants have “penalize[d] that decision by cutting families off from otherwise available benefits if they choose” a private school rather than a public school. *Espinoza*, 591 U.S. at 486. But when a regulation “disqualif[ies] otherwise eligible recipients from

a public benefit” based on their exercise of a constitutional right, it “triggers the most exacting scrutiny.” *Id.* at 476 (citation omitted). Here, Plaintiffs have plausibly alleged that Defendants’ regulation fails strict scrutiny because it “expressly discriminates” against children whose parents enrolled them in private school “and for no other reason.” *Id.* at 486–87. Thus, *even if* Defendants were “called upon to apply a state law no-aid provision to exclude” Plaintiffs from obtaining special education services—something that is hardly clear, *infra* I.C— they were “obligated by the Federal Constitution to reject the invitation.” *Id.* at 488–89.

C. Defendants’ regulation fails rational basis review.

Plaintiffs have plausibly alleged that Defendants’ regulation fails strict scrutiny, but they also allege that it even fails rational basis scrutiny. A regulation fails rational basis when “the relationship of the classification to its goal is [] so attenuated as to render the distinction arbitrary or irrational.” *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012). Here, Defendants contend the regulation satisfies rational basis scrutiny because it “effect[s] the State Legislature’s policy judgment to provide special-education services to children in private school that are comparable to those provided to public school students, while simultaneously complying with the state constitutional Anti-Aid amendment.” MTD 14. This justification fails for several reasons.

First, Defendants’ argument is premised on adhering to the state constitution’s bar on aiding private schools. But it is far from clear that the constitution’s bar on aiding private schools applies to aiding private school students. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993) (holding that the IDEA provides “aid not to schools but to individual handicapped children.”)⁴ Indeed, even Defendants do not characterize Massachusetts’ provision of services as aiding private

⁴ See also *Bloom v. Sch. Comm. of Springfield*, 376 Mass. 35, 47–48 & n.23 (1978) (suggesting that—when it comes to private school students—services like busing, health services, “and subsidized school meals may fall into the same category” of constitutional “general benefits”).

schools. Instead, they describe it as providing “school-aged children . . . with an *individual* right to special-education services.” MTD 2 (emphasis added). When the legislature guaranteed children they would have a right to special education services in their “regular educational environment,” it was promising aid to them as individuals. *See* M.G.L. c. 71B, § 5 (requiring school committees to “pay for such special education personnel, materials and equipment . . . as are necessary for the provision of [the child’s] special education”). Defendants’ regulation neither advances that goal nor prevents the state from “aiding” private schools. It just makes it harder for some (but not all) private school students to receive aid while having no effect on whether private schools receive aid.⁵ Denying aid to individuals is not a rational means of denying aid to institutions.

Second, Defendants’ regulation is irrational because it is inconsistent. Defendants assert they have an interest in complying with the no-aid amendment’s bar on the government aiding private schools. MTD 14. Yet when the *government* places a child in a private school, Defendants allow a child to get services there; it is only when a *parent* places a child in private school that Defendants bar a child from getting services there. Compl. ¶ 40. Either Defendants have an interest in restricting this type of aid or they do not. But providing publicly funded services to children in private school when the *government* enrolls the child—but not when a parent enrolls the child—is not rationally related to Defendants’ purported goal of not providing aid to private schools.⁶ Relatedly, Defendants never explain why only private schools that *parents* select are “non-neutral” locations. *Id.* ¶ 42. The geographic location where a special education service is provided does not magically convert it from aid to a student into aid to an institution. If speech pathology is aid to a child, then it is aid to a child in a public school, in a library, or in a private school.

⁵ As noted above, neither Plaintiffs nor Defendants argue that providing special education services to children constitutes “aid” to schools, whether public or private.

⁶ Again, assuming that aid to individuals can be considered aid to schools, which is something neither party asserts.

Third, the regulation is irrational because it undermines the statute it implements. The statute says services can be provided outside the regular setting “*only* when the nature or severity of the disability of a child is such that education in regular classes . . . cannot be achieved satisfactorily.” M.G.L. c. 71B, § 1 (emphasis added). Yet, the regulation always and *as a rule* prohibits services from being provided to certain children, without regard to the “nature or severity of the disability.” *Id.* Plaintiffs justify this regulation by arguing it is necessary to “balance” the statute with the no-aid clause, but a statute cannot be “balanced” by contravening it. MTD 14.

II. Plaintiffs plausibly stated a claim for relief under equal protection.

Defendants argue that Plaintiffs fail to adequately allege an Equal Protection claim because they failed to allege a similarly situated comparator, did not demonstrate that Defendants intended to punish Plaintiffs with the regulation, and did not show that the regulation was irrational. MTD 15–18. Defendants are wrong on all counts. First, Plaintiffs demonstrate that they receive the same benefit on different terms from those who are like them in every relevant respect, and that the proper standard of review is strict scrutiny. Second, Plaintiffs show that Defendants intentionally discriminated against them (even though they do not have to show that). Third, Plaintiffs explain that Defendants do not have a rational basis (even assuming rational basis review applies, which it does not) for making it more difficult for parents who exercise a right to obtain a benefit.

A. Plaintiffs plausibly alleged that Defendants’ regulation treats similarly situated people differently based on the exercise of a constitutional right.

Defendants’ opening argument—that Plaintiffs failed to allege similar comparators to their children for equal protection purposes—is unavailing. MTD 16–17. To show that groups of people are similarly situated, a party must demonstrate that in “all relevant respects,” they are the same. *Barrington Cove Ltd. P’ship v. R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001). Thus,

if “a prudent person . . . would think them roughly equivalent,” a party has demonstrated that the groups are comparators. *Id.*

Plaintiffs easily meet this test. Plaintiffs have established that every child in Massachusetts has an equal, statutory right to services that “are necessary for the provision of special education” provided in their “regular educational environment.” Compl. ¶¶ 36–37 (quoting M.G.L. c. 71B, §§ 1, 5). In providing the benefit, Massachusetts law does not distinguish between public school and private school students. *Id.* ¶¶ 35–37. It does not say—like the IDEA—that the benefits are different for public and private school students. *Id.* ¶ 39. It does not say that children placed by a school committee receive different benefits. *Id.* ¶¶ 35–37. It does not say that children who have particularly severe needs receive different benefits. *Id.* It simply says that *all* children have a statutory right to receive special education benefits in their regular educational environment. *Id.*

Given these facts, Plaintiffs easily satisfy the “similarly situated” test for equal protection. Plaintiffs’ children qualify for special education services in their regular educational environments for the *sole* reason every other child qualifies for services: they have special needs. *Id.* ¶ 35. Thus, Plaintiffs’ comparators are not just “roughly equivalent” to their children—they are identical to them under the statute. *Barrington*, 246 F.3d at 8. Defendants do not reckon with the fact that these students all enjoy the same statutory right solely because they all have special needs. Instead, they observe that the state does not have to provide any benefits to private school students and that the process whereby school committees pay for private education is complicated. MTD 16–17. Neither observation shows that any of the children are unlike one another under the statute. Instead, they reveal that the *only* differences among the comparators are irrelevant for equal protection purposes.

So, Defendants are wrong about the comparators. But they are also mistaken in arguing that rational basis—not strict scrutiny—is the proper standard of review. MTD 15. As explained

above (at 12), the right of parents to “direct the education and upbringing” of their children is “fundamental.” *Glucksberg*, 521 U.S. at 720. And when a law burdens a “fundamental right” under equal protection, “a reviewing court will strictly scrutinize that statute, upholding it only if the government can clearly demonstrate a compelling interest incapable of being served by less intrusive means.” *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003).

Defendants’ regulation fails that test. Once Massachusetts made special education services generally available—*i.e.*, to all children with disabilities, on the same terms, without regard to what type of school they attend—Defendants were bound by the Equal Protection Clause to not discriminate among “similarly circumstanced” people, *especially* people defined by their exercise of a constitutional right. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Defendants do not have a “compelling interest” in making it more difficult for some (but not all) private school students to obtain aid from the government solely because their parents exercised a right. *Rowe*, 320 F.3d at 47. Further, Defendants do not act “less intrusive[ly]” in achieving their interest in the government not aiding private *schools* by making it harder for some private school *students* to get aid, particularly if they also permit the government to dispense the same aid to other private school students. *Id.*

In short, Defendants violated the Equal Protection Clause by restricting or denying those benefits based solely on the exercise of a constitutional right; namely, the right to direct the upbringing of one’s children by enrolling them in a private school. In this, Plaintiffs are simply invoking a principle that has been repeatedly affirmed by the U.S. Supreme Court in equal protection challenges to other benefit programs. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (welfare benefits); *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250, 261–63 (1974)

(medical benefits); *Zobel v. Williams*, 457 U.S. 55 (1982) (dividend benefits). There is no reason to doubt that the principle invoked in those benefit cases would apply to this case.

B. The “intent to inhibit or punish” test does not apply to this equal protection challenge, but even if it did, Plaintiffs would pass it.

Defendants argue that Plaintiffs do not allege facts that the regulation was promulgated with the “‘intent to inhibit or punish’ parents for exercising their fundamental right to choose a private education for their children.” MTD 17–18 (quoting *Barrington*, 246 F.3d at 7). That test does not apply here since this is not a “selective treatment” claim. *Barrington*, 246 F.3d at 7; see *Gary S.*, 374 F.3d at 22 (stating that strict scrutiny applies to a law significantly interfering with a fundamental right). But even if it did, Plaintiffs don’t allege that they were incidentally affected by a “neutral” regulation that randomly, or even disproportionately, impacted them; they allege that their rights have been infringed by a “written” regulation that “is discriminatory on its face” and that was promulgated to “appl[y] specifically” to Plaintiffs and not to others who are similarly situated. *Meléndez–García v. Sanchez*, 629 F.3d 25, 38 (1st Cir. 2010). See, e.g., Compl. ¶ 99 (The regulation “make[s] it more difficult—sometimes impossible—for parentally placed private school students than all others to seek and obtain aid from the government.”). Plaintiffs have plainly “adduce[d] competent evidence of ‘purposeful discrimination.’” *Sanchez*, 629 F.3d at 38.

C. Plaintiffs have plausibly alleged that the regulation has no rational basis.

Defendants’ last equal protection argument—that the regulation is rationally related to the state’s interest in complying with a constitutional amendment—is unavailing. MTD 18. As noted above, Plaintiffs have plausibly alleged that Defendants’ interest in not “aiding” private schools is not rationally related to making it harder for some (but not all) private school students to receive individual aid. Defendants again cite *Gary S.* to argue that it is rational for the government to provide different kinds of benefits to public and private students. And Plaintiffs again point out

that *Gary S.* concerned the government’s “mere failure to provide” a benefit, which is not comparable to the Defendants’ denial of “benefits that are equally available to all.” 374 F.3d at 20.

But Defendants’ argument fails for another, more fundamental reason that is particular to equal protection: “It is not within our constitutional tradition to enact laws . . . declaring that in general it shall be 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). In *Romer*, the U.S. Supreme Court applied rational basis scrutiny to invalidate an amendment to the Colorado Constitution that barred state and local governments from enacting quota preferences, anti-discrimination protections, or similar benefits for gays and lesbians. The Court explained the amendment imposed a “special disability” on a class of people by restricting the legislature’s power to provide them—and them alone—with benefits and protections enjoyed by everyone else. *Id.* at 631. For that reason, the amendment did not only fail rational basis; its “disqualification of a class of persons from the right to seek specific protection from the law [was] unprecedented” in American law. *Id.* at 633.

Defendants’ regulation is no different than what the Court condemned in *Romer*. In *Romer*, a state law defined a group of people by their sexuality and then denied them the ability to obtain certain benefits. *Id.* Here, a different state law identifies a group of people by how they raise their children and then denies them access to a generally available benefit. Compl. ¶ 102. Each law imposes a “special disability” on a group of people that makes it harder for them to obtain aid from the government—thus ensuring that each law, in turn, does not bear “a rational relationship to legitimate state interests.” *Romer*, 517 U.S. at 632. Further, even if Defendants are correct that the regulation is necessary to comply with the Massachusetts Constitution, then, per *Romer*, “singling out a certain class of citizens” for unequal treatment is not a rational basis for a law. *Id.* at 633. Such an exclusion—especially when it is based on the exercise of a federal constitutional right—

is not merely an equal protection violation but is virtually “unprecedented.” *Id.* Consequently, because Plaintiffs have plausibly alleged that Defendants do not have a rational basis for the regulation, they have properly stated a claim.

III. Plaintiffs have properly preserved their claim for relief under the Privileges or Immunities Clause for appeal.

Defendants argue that Plaintiffs’ last claim—that the regulation violates the Privileges or Immunities Clause—does not state a plausible claim for relief. MTD 19. Plaintiffs brought this claim to preserve it for appeal due to an ongoing debate at the U.S. Supreme Court about whether the Due Process or “Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights,” such as the right to direct the upbringing of one’s children Compl. ¶ 107 & n.1 (quoting *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 240 n.22 (2022)). At least 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. *See McDonald v. City of Chicago*, 561 U.S. 742, 809–15 (2010) (Thomas, J., concurring). For their part, Plaintiffs argue that whatever its source, Plaintiffs’ right to direct the upbringing of their children is fundamental and that it has been infringed by Defendants’ regulation for the reasons stated in their complaint. *See generally* Compl. ¶¶ 103–12. Plaintiffs acknowledge that this claim may be foreclosed under current law. However, even “if it appears ‘that a recovery is very remote and unlikely’” on this theory, *Twombly*, 550 U.S. at 556 (citation omitted), they have properly preserved their claim for appeal. *See B & T Masonry Constr. Co., v. Pub. Serv. Mut. Ins. Co.*, 382 F.3d 36, 40 (1st Cir. 2004).

CONCLUSION

For all the reasons above, Defendants’ motion to dismiss should be denied.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2024, a true and correct copy of the foregoing document was served via CM/ECF system upon all counsel of record.

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