

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2011

6
7
8 (Argued: October 21, 2011 Decided: August 20, 2012)

9
10 Docket No. 10-4029-cv

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12 - - - - - X
13
14 CHARLES BRYANT, individually and as next friend
15 and guardian of D.B., AVA GEORGE, individually
16 and as next friend and guardian of B.G., CHANIN
17 HOUSTON-JOSEPHAT, individually and as next
18 friend and guardian of A.J., LISA HUGHES,
19 individually and as next friend and guardian of
20 J.R., CARMEN PENA, individually and as next
21 friend and guardian of G.T., VIVIAN PRESLEY,
22 individually and as next friend and guardian of
23 D.P., JAMIE TAM, individually and as next
24 friend and guardian of S.T.,

25
26 PLAINTIFFS-APPELLANTS,

27
28 - v. -

29
30 NEW YORK STATE EDUCATION DEPARTMENT, DAVID M.
31 STEINER, in his capacity as Commissioner of the
32 New York State Education Department, THE NEW
33 YORK STATE BOARD OF REGENTS,

34
35 DEFENDANTS-APPELLEES.

36
37 - - - - - X
38 Before: JACOBS, Chief Judge, WESLEY, Circuit
39 Judge, and SULLIVAN, District Judge.¹

¹ The Honorable Richard J. Sullivan, United States District Judge for the Southern District of New York, sitting by designation.

1 Plaintiffs--the parents and/or legal guardians of seven
2 children with disabilities, who bring this suit on behalf of
3 themselves and the children--appeal the judgment of the
4 United States District Court for the Northern District of
5 New York (Sharpe, J.), dismissing their suit for failure to
6 state a claim upon which relief can be granted, and denying
7 their motion for a preliminary injunction. Plaintiffs seek
8 equitable relief preventing New York from enforcing a
9 prohibition on the use of aversive interventions, which are
10 negative consequences or stimuli administered if a child's
11 disruptive behavior impedes the child's education.

12 We conclude that prohibiting one possible method of
13 dealing with disorders in behavior, such as aversive
14 intervention, does not undermine a child's right to an
15 individualized, free and appropriate public education, and
16 that New York's law represents the State's considered
17 judgment regarding the education and safety of its children
18 that is consistent with federal education policy and the
19 United States Constitution.

20 The judgment of the district court is affirmed. Judge
21 Sullivan has filed a separate opinion in which he concurs in
22 part and in part dissents.

1 Michael P. Flammia, Eckert Seamans
2 Cherin & Mellott, LLC, Boston, MA.
3 (Jeffrey J. Sherrin, O'Connell and
4 Aronowitz, P.C., Albany, NY, and
5 Meredith H. Savitt, Law Office of
6 Meredith Savitt, P.C., Delmar, NY, on
7 the brief), for Plaintiffs-
8 Appellants.
9

10 Andrew B. Ayers, Assistant Solicitor
11 General (Barbara D. Underwood,
12 Solicitor General, Benjamin N.
13 Gutman, Deputy Solicitor General, on
14 the brief), for Eric T. Schneiderman,
15 Attorney General of the State of New
16 York, for Defendants-Appellees.
17

18 DENNIS JACOBS, Chief Judge:
19

20 Plaintiffs--the parents and/or legal guardians of seven
21 children with disabilities, who bring this suit on behalf of
22 themselves and the children--appeal a judgment of the United
23 States District Court for the Northern District of New York
24 (Sharpe, J.), dismissing their suit for failure to state a
25 claim upon which relief can be granted, and denying their
26 motion for a preliminary injunction. Plaintiffs seek
27 equitable relief preventing the New York Board of Regents
28 ("Board of Regents"), the New York State Education
29 Department ("Education Department"), and the Commissioner of
30 the Education Department (David M. Steiner, in his official
31 capacity) from enforcing a prohibition on the use of
32 aversive interventions. Aversive interventions are negative
33 consequences or stimuli administered to children who exhibit

1 problematic and disruptive behavior that impedes their
2 education.

3 Plaintiffs contend that New York's prohibition of
4 aversive interventions undermines their children's right to
5 a free and appropriate public education ("FAPE"), which is
6 guaranteed by federal law. We conclude that the State's
7 prohibition of one possible method of reducing the
8 consequences of a child's behavioral disability does not
9 undermine the child's right to a FAPE or prevent
10 administrators from enacting an individualized plan for the
11 child's education.

12 Plaintiffs also contend that the State's prohibition
13 violates the children's constitutional rights and the
14 Rehabilitation Act of 1973 because the prohibition is
15 arbitrary and oppressive, the product of gross misjudgment
16 by State policymakers, and an infringement on the
17 individualized assessment and treatment of students with
18 disabilities. We conclude that New York's law represents a
19 considered judgment by the State of New York regarding the
20 education and safety of its children that is consistent with
21 federal education policy and the United States Constitution.

22 Affirmed.

1 **BACKGROUND**

2 **I**

3 The Individuals with Disabilities Education Act ("the
4 IDEA") "is the most recent Congressional enactment in 'an
5 ambitious federal effort to promote the education of
6 handicapped children.'" Walczak v. Fla. Union Free Sch.
7 Dist., 142 F.3d 119, 122 (2d. Cir. 1998) (quoting Bd. of
8 Educ. v. Rowley, 458 U.S. 176, 179 (1982) (interpreting the
9 Education for All Handicapped Children Act, which was
10 subsequently amended and renamed the IDEA)). The IDEA
11 provides federal funds to states that "develop plans to
12 assure all children with disabilities the right to a free
13 appropriate public education." Id. (internal quotation
14 marks omitted). The IDEA requires that each child receive,
15 at least annually, an individualized education program
16 ("IEP")² detailing "special education and related services"
17 tailored for the particular needs of the child, 20 U.S.C.
18 § 1401(9), that are "reasonably calculated to enable the

² The IEP is "a written statement that [inter alia]
'sets out the child's present educational performance,
establishes annual and short-term objectives for
improvements in that performance, and describes the
specially designed instruction and services that will enable
the child to meet those objectives.'" D.D. v. N.Y.C. Bd. of
Educ., 465 F.3d 503, 507-08 (2d Cir. 2006) (quoting Honig v.
Doe, 484 U.S. 305, 311 (1988)); accord 20 U.S.C.
§ 1414(d)(1)(A) (defining IEP).

1 child to receive educational benefits," Rowley, 458 U.S. at
2 207.

4 II

5 The facts are taken from the well-pleaded factual
6 allegations of the complaint, Bell Atl. Corp. v. Twombly,
7 550 U.S. 544, 555, 570 (2007), and from information of which
8 this Court can take judicial notice, see Taylor v. Vt. Dep't
9 of Educ., 313 F.3d 768, 776 (2d Cir. 2002) (determining that
10 a reviewing court can consider the complaint, documents
11 attached to the complaint, documents incorporated by
12 reference in the complaint, and public records when
13 considering a motion to dismiss).

14 Plaintiffs are the parents or legal guardians of seven
15 children, each of whom has a long history of severe behavior
16 problems, including aggressive, self-injurious, destructive,
17 and non-compliant behavior. These behavioral disabilities
18 cause the children to engage in behaviors such as: yanking
19 out their own teeth, attempting to stab themselves, tying
20 ropes around their necks, scratching themselves, banging
21 their heads on walls and other things, and assaulting
22 teachers and staff members. These behaviors have impeded
23 their education and development.

24 Plaintiffs have tried a number of measures to treat and
25 educate these children, including: special education, day

1 and residential programs, psychiatric hospitalization,
2 counseling, physical restraints, paraprofessional support,
3 home instruction, sensory tents, positive-only programs of
4 behavioral modification, and anti-psychotic and other
5 psychotropic medications. None has been successful, and the
6 children continue to pose physical risks to themselves and
7 others. As a result, they have been foreclosed from public
8 schools and private institutions or confined in psychiatric
9 wards and detention centers. Each child's IEP now suggests
10 they receive residential special-education services.

11 Accordingly, each child is enrolled at the Judge Rotenberg
12 Educational Center, Inc. ("JRC") in Massachusetts.

13 JRC provides residential, educational, and behavioral
14 services to individuals with severe behavioral disorders,
15 and is often a placement of last resort for those who have
16 proven resistant to other forms of psychological and
17 psychiatric treatment. Although JRC is out of state, the
18 children are permitted to attend under a New York law that
19 allows New York students with disabilities who are unable to
20 obtain an appropriate education in-state to attend an out-
21 of-state facility that, in the judgment of the Education
22 Department, can meet the needs of the child. N.Y. Educ. Law
23 §§ 4407(1)(a), 4401(2)(f), (h).

24 At JRC, each student starts with a non-intrusive,
25 positive-only, treatment program in which students receive

1 rewards (e.g., treats, video games, music, field trips) for
2 maintaining positive behaviors, including learning. The
3 complaint alleges that these positive-only measures are
4 effective for most of JRC's school-age students. For other
5 students, JRC may also employ negative-consequence
6 interventions known as aversives or aversive interventions.

7 According to the complaint, aversive interventions have
8 been used to deal with behaviors that pose significant
9 dangers to the student or others, or significantly interfere
10 with a student's education, development, or appropriate
11 behavior. The techniques aim to stop the behavior and
12 thereby enable the student to receive an appropriate
13 education, to enjoy safety and well-being, and to develop
14 basic skills for learning and daily living. The complaint
15 alleges that aversive interventions have helped many JRC
16 students to participate in activities with peers and helped
17 some to attend college, join the armed forces, obtain
18 employment, and go on extended family visits.

19 The types of aversive interventions used by JRC include
20 helmets with safeguards that prevent removal, manual and
21 mechanical restraints, and food-control programs. But,
22 according to the complaint, JRC's "principal form" of
23 aversive intervention is electric skin shock, in which a
24 low-level electrical current is applied to a small area of
25 the student's skin (usually an arm or a leg). The shock

1 lasts approximately two seconds, and is administered, on
2 average, less than once a week. The complaint alleges that
3 severe problematic behavior decreases with this regime, thus
4 alleviating an impediment to academic progress. Possible
5 side effects include temporary redness or marking, which
6 clears up within a few minutes (or a few days at most), and
7 a rare occurrence of blistering.

8 Clinicians have opined that it is necessary to
9 supplement these children's ongoing educational and
10 treatment programs with aversives. However, none of the
11 children has yet received an IEP that authorizes such
12 interventions.

14 **III**

15 The Education Department, which is governed by the
16 Board of Regents, regulates educational services and
17 programs for New York residents. See N.Y. Educ. Law
18 § 4403(3). It promulgates "regulations concerning standards
19 for the protection of children in residential care from
20 abuse and maltreatment," id. § 4403(11), and periodically
21 inspects, reports on, and "make[s] recommendations
22 concerning instructional programs or special services for
23 all children with handicapping conditions who reside in or
24 attend any . . . state financed . . . social service
25 facilities, youth facilities, health facilities, [or] mental

1 health, mental retardation and developmental disabilities
2 facilities," id. § 4403(4).

3 In 2006, the Board of Regents promulgated a regulation
4 prohibiting schools, including "approved out-of-state day or
5 residential schools" (such as JRC), from using aversive
6 interventions. N.Y. Comp. Codes R. & Regs. tit. 8,
7 § 19.5(b)(1) (2012). The regulation defines an "aversive
8 intervention" as an intervention "intended to induce pain or
9 discomfort to a student for the purpose of eliminating or
10 reducing maladaptive behaviors," such as the contingent
11 application of painful, intrusive, or similar stimuli or
12 activity. Id. § 19.5(b)(2).³

³ In full, the regulation defines "aversive intervention" as
an intervention that is intended to induce pain or
discomfort to a student for the purpose of eliminating
or reducing maladaptive behaviors, including such
interventions as:

- (i) contingent application of noxious,
painful, intrusive stimuli or activities;
strangling, shoving, deep muscle squeezes
or other similar stimuli;
- (ii) any form of noxious, painful or intrusive
spray, inhalant or tastes;
- (iii) contingent food programs that include the
denial or delay of the provision of meals
or intentionally altering staple food or
drink in order to make it distasteful;
- (iv) movement limitation used as a punishment,
including but not limited to helmets and
mechanical restraint devices; or
- (v) other stimuli or actions similar to the
interventions described in subparagraphs
(i) through (iv) of this paragraph.

1 A child-specific exemption allows pre-approved
2 aversives to be administered in exceptional cases in the
3 three school years following the enactment of the
4 prohibition (2006-2007, 2007-2008, 2008-2009), and a
5 grandfather clause provides "that a student whose IEP
6 includes the use of aversive interventions as of June 30,
7 2009"--three years after the enactment of the prohibition--
8 "may be granted a child-specific exception in each
9 subsequent school year" N.Y. Comp. Codes R. & Regs.
10 tit. 8, § 200.22(e).

11 Neither exception applies to the children in the
12 instant case because the initial three years of limited
13 aversive interventions has now ended, and none of these
14 children had an IEP that authorized aversives prior to June
15 30, 2009.

16 17 **DISCUSSION**

18 Plaintiffs raised below and press on appeal numerous
19 challenges to New York's prohibition of aversive
20 interventions and seek declaratory and injunctive relief
21 preventing its enforcement. Specifically, Plaintiffs
22 contend that New York's regulation violates: [1] the IDEA;
23 [2] the Rehabilitation Act of 1973; and [3] the Due Process
24 and Equal Protection clauses of the United States
25 Constitution.

1 The district court granted Defendants' motion to
2 dismiss all those claims for relief. We review that
3 decision de novo, "construing the complaint liberally,
4 accepting all factual allegations in the complaint as true,
5 and drawing all reasonable inferences in the plaintiff[s']
6 favor." Chambers v. Time Warner, Inc., 282 F.3d 147, 152
7 (2d Cir. 2002). Although all factual allegations in the
8 complaint must be assumed true for the purposes of a motion
9 to dismiss, this principle is "inapplicable to legal
10 conclusions" and "'formulaic recitation[s] of the elements
11 of a cause of action.'" Ashcroft v. Iqbal, 556 U.S. 662,
12 678 (2d Cir. 2009) (quoting Twombly, 550 U.S. at 555). To
13 survive a motion to dismiss, a complaint must allege "enough
14 facts" to "raise a right to relief above the speculative
15 level" and "state a claim to relief that is plausible."
16 Twombly, 550 U.S. at 555, 570; accord id. at 555 n.3.

17 In addition to dismissing Plaintiffs' complaint under
18 Rule 12(b)(6), the district court also denied Plaintiffs'
19 motion for a preliminary injunction. We review that ruling
20 for abuse of discretion. Ashcroft v. Am. Civil Liberties
21 Union, 542 U.S. 656, 664 (2004); Malletier v. Burlington
22 Coat Factory Warehouse Corp., 426 F.3d 532, 537 (2d Cir.
23 2005). "A district court abuses its discretion when (1) its
24 decision rests on an error of law . . . or a clearly
25 erroneous factual finding, or (2) its decision--though not

1 necessarily the product of a legal error or a clearly
2 erroneous factual finding--cannot be located within the
3 range of permissible decisions." Mullins v. City of New
4 York, 626 F.3d 47, 51 (2d Cir. 2010) (internal quotation
5 marks omitted; ellipsis in original).

6
7 **I**

8 A standing question has arisen. While this appeal was
9 pending, the Massachusetts Department of Developmental
10 Services promulgated a regulation that governs JRC (as a
11 school in the Commonwealth), and bars it from using some
12 aversives on these children and others.

13 The Massachusetts regulation, 115 Mass. Code Regs.
14 5.14 (2012), prohibits the use of certain aversive
15 interventions--including "contingent application of physical
16 contact aversive stimuli such as spanking, slapping, hitting
17 or contingent skin shock," id. 5.14(3)(d)1.; see also id.
18 5.14(3)(d)--unless the child had a court-approved treatment
19 permitting the use of aversives before September 1, 2011
20 (which none of the children at issue in this case had). The
21 Massachusetts regulation permits other aversive
22 interventions--including "[c]ontingent application of
23 unpleasant sensory stimuli such as loud noises, bad tastes,
24 bad odors, or other stimuli which elicit a startle
25 response," and "delay of [a] meal for a period not exceeding

1 30 minutes," id. 5.14(3)(c)1.c.-d.--if they are contained in
2 the student's written behavior modification plan and if that
3 behavior modification plan meets certain special
4 requirements. See id. 5.14(4)(c).

5 Because certain aversive interventions, such as the
6 electric skin shock--the "principal form" of aversive
7 intervention used by JRC--are no longer permitted in
8 Massachusetts, Defendants contend that Plaintiffs' claims
9 are moot. We disagree.

10 First, the question is not one of mootness. New York's
11 prohibition on aversive interventions remains in effect and
12 applicable to these children. Accordingly, the case and
13 controversy is not moot. Cf. Lamar Advertising of Penn, LLC
14 v. Town of Orchard Park, 356 F.3d 365, 375-76 (2d Cir. 2004)
15 (explaining that, in the case of a statute or regulation, a
16 claim usually becomes moot when a statute or regulation is
17 amended).

18 The question is whether Plaintiffs retain standing, for
19 which: [1] "the plaintiff must have suffered an injury in
20 fact" that is both "concrete and particularized" and "actual
21 or imminent, not conjectural or hypothetical"; [2] "there
22 must be a causal connection between the injury and the
23 conduct complained of" such that the injury is "fairly
24 traceable to the challenged action of the defendant"; and
25 [3] "it must be likely, as opposed to merely speculative,

1 that the injury will be redressed by a favorable decision.”
2 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)
3 (internal quotation marks, citations, brackets, and ellipsis
4 omitted). Defendants contend that redressability has been
5 foreclosed by Massachusetts’ new regulation.

6 We conclude that a decision favorable to Plaintiffs
7 would likely redress their injury for several reasons.
8 First, if Plaintiffs prevailed, the children could receive
9 the aversives that the new Massachusetts regulation
10 continues to permit; whereas the New York regulation
11 prohibits *all* aversives for these children, the
12 Massachusetts regulation does not. Compare N.Y. Comp. Codes
13 R. & Regs. tit. 8, § 19.5(b), with 115 Mass. Code Regs.
14 5.14(3)(c), (3)(d). True, electric skin shocks are the
15 “principal form” of aversive interventions used by JRC; but
16 if Plaintiffs prevail, the children may be able to receive
17 other aversives at JRC.

18 Second, Defendants erroneously assume that if these
19 children are unable to receive aversive interventions at
20 JRC, they will be unable to obtain aversives anywhere. The
21 complaint seeks an injunction preventing Defendants’ from
22 enforcing New York’s prohibition on aversives and a
23 declaration that the prohibition violates the U.S.
24 Constitution and federal law. The prayer for relief is not
25

1 limited to treatment at JRC or in Massachusetts; JRC is not
2 mentioned in the prayer for relief.

3 As all the parties concede, no facility other than JRC
4 is *currently* treating New York children with aversive
5 interventions. But this is hardly surprising since New York
6 largely bans the use of aversive interventions. If New
7 York's prohibition was declared invalid, it is "likely" that
8 other facilities in New York would provide aversives. See
9 Lujan, 504 U.S. at 561 (internal quotation marks omitted).

10 It is also likely that these children could go to a facility
11 in another state. See N.Y. Educ. Law §§ 4407(1)(a),
12 4401(2)(f), (h) (providing that New York students with
13 disabilities who cannot obtain an appropriate education in
14 New York may attend an out-of-state facility that the
15 Education Department determines can meet the child's
16 needs).⁴

17 Finally, Plaintiffs would have standing to challenge
18 the New York prohibition even if, as Defendants argue, the

⁴ A number of other states have substantially limited or outright prohibited the use of aversive interventions in schools and with students. See Cal. Educ. Code § 56520(a)(3); 22 Pa. Code § 14.133(e); Mont. Admin. R. 10.16.3346(4); N.C. Gen. Stat. § 155C-391.1(b)(2), (h); Nev. Rev. Stat. § 388.5265; Wash. Admin. Code § 392-172A-03125; 22 Va. Admin. Code. § 40-151-820; N.H. Code Admin. R. Ed. §§ 1113.04, 1113.06; D.C. Code §§ 38-2561.03(b)(1), 38-2561.01. However, there is no indication that these children would not be able to attend a school in some other state that could provide them aversive interventions, if necessary.

1 Massachusetts law would be an additional impediment to
2 aversive interventions for these children. First,
3 Plaintiffs are prevented by issues of personal jurisdiction,
4 service, and venue from challenging the Massachusetts and
5 New York prohibitions in a single lawsuit; but their need to
6 invalidate the Massachusetts regulation would not deprive
7 them of standing to challenge the regulation in New York.
8 See Khodara Envt'l, Inc. v. Blakey, 376 F.3d 187, 194-96 (3d
9 Cir. 2004) (as amended) (Alito, J.); accord Lamar Adver. of
10 Penn, 356 F.3d at 374 (holding that the plaintiff had
11 standing to challenge a law blocking its posting of certain
12 advertising even though the plaintiff had not sought a
13 permit, which was an additional impediment to the
14 advertising). Second, Plaintiffs' claimed injury is not (as
15 Defendants contend) that these children are unable to obtain
16 aversives generally, but rather that the New York
17 prohibition prevents them from receiving aversives. Viewed
18 properly, Plaintiffs can obtain redress in this litigation:
19 authority to obtain aversive interventions under New York
20 law. Accordingly, Plaintiffs continue to enjoy standing
21 because a favorable judgment would make it "likely" that
22 they could ultimately obtain the treatment they seek. See
23 Lujan, 504 U.S. at 561 (internal quotation marks omitted).

1 includes aversive interventions without regard to their
2 individual needs. See D.D. v. N.Y.C. Bd. of Educ., 465 F.3d
3 503, 511 (2d Cir. 2006) (explaining “that the right to a
4 free appropriate public education [FAPE] is afforded to each
5 disabled child as an individual”).

6 Nothing in New York’s regulation prevents
7 individualized assessment or precludes educators from
8 considering a wide range of possible treatments. The
9 regulation prohibits consideration of a single method of
10 treatment without foreclosing other options. In so doing,
11 the regulation follows the goals and emphasis of the IDEA.
12 See 20 U.S.C. § 1400(c)(5)(F) (“Almost 30 years of research
13 and experience has demonstrated that the education of
14 children with disabilities can be made more effective by
15 . . . positive behavioral interventions and supports”); 64
16 Fed. Reg. 12406, 12589 (Mar. 12, 1999) (“[T]he primary focus
17 must be on ensuring that the behavioral management
18 strategies in the child’s IEP reflect the [IDEA’s]
19 requirement for the use of positive behavioral interventions
20 and strategies to address the behavior that impedes the
21 learning of the child or that of other children.”).⁶

⁶ See also 20 U.S.C. § 1411(e)(2)(C)(iii) (allowing states to reserve federal funding “[t]o assist local education agencies in providing positive behavior interventions and supports”); id. § 1414(d)(3)(B)(i) (providing that the IEP team should “consider the use of positive behavioral interventions and supports, and other

1 Although the IDEA does not prohibit alternatives such as
2 aversives, see 20 U.S.C. § 1414(d)(3)(B)(i), it cannot be
3 said that a policy that relies on positive behavioral
4 interventions only is incompatible with the IDEA.

5 Plaintiffs argue that, because the regulation
6 eliminates one possible method from the students' IEP, it
7 amounts to a predetermination that violates the procedural
8 guarantees of the IDEA, as explained in Deal v. Hamilton
9 Cnty. Bd. of Educ., 392 F.3d 840 (6th Cir. 2004). However,
10 there is a distinction between a policy that affects
11 individual cases on a categorical basis (such as the policy
12 at issue here) and a local predetermination that rejects
13 preemptively a measure that is permitted as a matter of
14 state law.

15 In Deal, a school district refused to consider a
16 particular teaching approach. Id. at 845-46. The Sixth
17 Circuit concluded that foreclosure of a program without

strategies, to address" "behavior [that] impedes the child's learning or that of others"); id. § 1454(a)(3)(B)(iii)(I) (allowing states to use federal grants to train educators in methods of "positive behavioral interventions and supports to improve student behavior in the classroom"); id. § 1462(a)(6)(D) (authorizing the Secretary of Education to enter into contracts with entities to ensure training in "positive behavioral supports."); id. § 1465(b)(1)(B)-(C) (permitting the Secretary of Education to support effective, research-based practices through training educators in "positive behavioral interventions and supports" and "effective strategies for positive behavioral interventions").

1 regard for its effectiveness was a procedural violation of
2 the IDEA because it deprived the parents of meaningful
3 participation in the IEP process. Id. at 857. We need not
4 pass on the reasoning of Deal because unlike the instant
5 challenge to a statewide prohibition enacted by a state
6 government, Deal involved a challenge to an unofficial
7 district policy involving a particular child's specific IEP
8 as to which the parents had a statutory right of input, 20
9 U.S.C. § 1414(d)(1)(B).

10 The distinction is significant. See Alleyne v. N.Y.
11 State Educ. Dep't, 691 F. Supp. 2d 322, 333 n.9 (N.D.N.Y.
12 2010) (distinguishing between authorities considering
13 predetermination in IEPs and the promulgation of statewide
14 regulations). "The IDEA was enacted to assist states in
15 providing special education and related services to children
16 with disabilities . . . not [to] usurp the state's
17 traditional role in setting educational policy." Taylor,
18 313 F.3d at 776-77. "Congress did not prescribe any
19 substantive standard of education" in the IDEA. J.D. v.
20 Pawlet Sch. Dist., 224 F.3d 60, 65 (2d Cir. 2000). Instead,
21 the IDEA "'incorporates state substantive standards as the
22 governing federal rule' if they are consistent with the
23 federal scheme and meet the minimum requirements set forth
24 by the IDEA." Taylor, 313 F.3d at 777 (quoting Mrs. C. v.
25 Wheaton, 916 F.2d 69, 73 (2d Cir. 1990)).

1 Moreover, Plaintiffs' interpretation of the IDEA would
2 effectively strip state governments of the ability to adopt
3 statewide policy because it is impossible to consider each
4 student's circumstances before adopting statewide policy.
5 For this reason, New York collects input--by parents,
6 professionals, and the public--when the Education Department
7 publishes a proposed regulation and an opportunity is
8 afforded for notice and comment. See N.Y. State Register,
9 Rule Making Activities, Nov. 15, 2006.

10 In this case, New York adopted the ban of aversives
11 only after the Education Department made site visits,
12 reviewed reports, and considered complaints from parents as
13 well as school districts and others raising concerns about
14 aversive techniques. Notice of Emergency Adoption &
15 Proposed Rulemaking, N.Y. State Educ. Dep't, June 20, 2006.
16 It concluded that aversive interventions are dangerous and
17 may backfire and that positive behavioral interventions are
18 sufficiently effective to provide a FAPE. Id.

19 The prohibition therefore represents a considered
20 judgment; one that conforms to the IDEA's preference for
21 positive behavioral intervention. See, e.g., 20 U.S.C.
22 § 1400(c)(5)(F). (Another such New York policy is the long-
23 standing bar on corporal punishment. See N.Y. Comp. Codes
24 R. & Regs. tit. 8, § 19.5(a).) The IDEA does not
25 categorically bar such statewide regulations that resolve

1 problems in special education; otherwise, the IDEA would be
2 transformed from a legislative scheme that preserves the
3 states' fundamental role in education to one that usurps the
4 role of the states. Cf. Rowley, 458 U.S. at 208 (explaining
5 that "Congress' intention was not that the [IDEA] displace
6 the primacy of States in the field of education, but that
7 States receive funds to assist them in extending their
8 educational systems to the handicapped").⁷

9 In sum, New York's regulation prohibits only
10 consideration of a single method of treatment without
11 foreclosing other options. Nothing in the regulation
12 prevents individualized assessment, predetermines the
13 children's course of education, or precludes educators from
14 considering a wide range of possible treatments. Therefore,
15 the district court correctly dismissed the procedural IDEA
16 claim.

17 18 **B**

19 Plaintiffs contend that the prohibition on aversive
20 interventions is a substantive violation of the IDEA because
21 aversives are necessary to control the severe behavioral

⁷ Plaintiffs direct our attention to Kalliope R. v. N.Y. State Dep't of Educ., 827 F. Supp. 2d 130 (E.D.N.Y. 2010), which concerned the State's foreclosure of a particular intensive teaching technique. Kalliope, however, is an interlocutory opinion, never appealed, that relied on Deal.

1 disorders that undermine the children's education.

2 Plaintiffs allege that a positive-only program is effective
3 with 70% of students but that each of these children fall
4 within the 30% who are not sufficiently treated with
5 positive-only interventions.

6 For many of the reasons discussed above, Plaintiffs
7 cannot state a substantive IDEA claim. The prohibition on
8 aversive interventions does not prevent these students from
9 obtaining an IEP specifically aimed at providing them an
10 appropriate education. Moreover, the Education Department
11 has decided to focus its special-education programs on
12 positive-only behavioral interventions, which is the clear
13 (although not exclusive) methodology favored by the IDEA.

14 Even if we assumed that permitting these children to
15 receive aversive interventions would help them fulfill their
16 potential, Plaintiffs' substantive claim would still fail.
17 The "IDEA does not require states to develop IEPs that
18 'maximize the potential of handicapped children.'" Walczak,
19 142 F.3d at 132 (quoting Rowley, 458 U.S. at 189); accord
20 Rowley, 458 U.S. at 197-98 & n.21. The IDEA "guarantees"
21 only that students with disabilities are provided an
22 "'appropriate' education, not one that provides everything
23 that might be thought desirable by loving parents."
24 Walczak, 142 F.3d at 132 (internal quotation marks omitted).
25 A state satisfies its obligation to provide a free

1 *appropriate* public education if it “provide[s] a disabled
2 child with meaningful access to an education” even if the
3 state “cannot guarantee totally successful results.” Id. at
4 133 (citing Rowley, 458 U.S. at 192); accord Rowley, 458
5 U.S. at 195 (explaining that the IDEA “imposes no clear
6 obligation upon recipient States beyond the requirement that
7 handicapped children receive some form of specialized
8 education”).

9 Defendants provide these students with meaningful
10 access to education opportunities by authorizing and funding
11 their specialized education and behavioral modification
12 treatment at an out-of-state residential facility that has
13 expertise in treating children with severe behavioral
14 disorders. Aversive interventions may help maximize the
15 children’s potential, but the IDEA does not require such
16 measures.⁸

17 Moreover, we decline Plaintiffs’ invitation to review
18 and second guess New York’s education policy. Although the
19 IDEA provides for some judicial review, “the Supreme Court
20 has cautioned[] . . . that this ‘independent’ review ‘is by
21 no means an invitation to the courts to substitute their own

⁸ Significantly, none of these students received an IEP that authorized use of aversive interventions before the enactment of the regulation in 2006 or during the grandfathering period when a child-specific exception was available.

1 notions of sound educational policy for those of the school
2 authorities they review.'" See Walczak, 142 F.3d at 129
3 (quoting Rowley, 458 U.S. at 206). We will not "simply
4 rubber stamp" the decisions of the states and locals, but we
5 must be "mindful that the judiciary generally lacks the
6 specialized knowledge and experience necessary to resolve
7 persistent and difficult questions of educational policy."
8 Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 (2d
9 Cir. 2005) (internal quotation marks omitted); accord
10 Rowley, 458 U.S. at 207 ("[C]ourts must be careful to avoid
11 imposing their view of preferable educational methods upon
12 the States.").

13 There is an ongoing debate among the experts regarding
14 the advantages and disadvantages of aversive interventions
15 and positive-only methods of behavioral modification. The
16 judiciary is ill-suited to decide the winner of that debate.
17 See Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 383
18 (2d Cir. 2003) (as amended) (reversing a district court
19 decision finding IEPs inadequate because the district court
20 "impermissibly chose between the views of conflicting
21 experts on a controversial issue of educational policy").

22 Our deference to the Education Department's decision is
23 further justified in this instance because New York adopted
24 the regulation after the Education Department obtained
25 information raising concerns regarding the potential health

1 and safety implications of aversives. See Notice of
2 Emergency Adoption & Proposed Rulemaking, N.Y. State Educ.
3 Dep't, June 20, 2006. The Education Department was
4 concerned that aversive interventions can result in
5 "aggressive and/or escape behaviors" and can foster the
6 development of "negative attitudes toward [one's] self and
7 school programs," id.--concerns raised by reports and
8 complaints by parents, school districts, and others. One
9 such source of concern was a lawsuit alleging abuse at JRC,
10 see Nicholson v. New York, 872 N.Y.S. 2d 846 (Ct. Cl. 2008),
11 which prompted a site visit on which the Education
12 Department "identified significant concerns for the
13 potential impact on the health and safety of New York
14 students," see Notice of Emergency Adoption & Proposed
15 Rulemaking, N.Y. State Educ. Dep't, June 20, 2006. This
16 Court is not institutionally suited to now second guess the
17 policy decision made by experts charged with formulating
18 education policy in New York. See Cerra, 427 F.3d at 192.

19 Because Plaintiffs have not and cannot allege that
20 these children have been deprived of a FAPE, they cannot
21 prevail on their substantive IDEA claim.⁹

⁹ The dissent concludes that a reasonable justification for preventing use of aversive therapies cannot be located in the record. We respectfully disagree. But even if there were no express justification, some justifications are implicit in the policy.

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To establish a prima facie case under the Rehabilitation Act, a plaintiff must allege: [1] that he or she is a person with disabilities under the Rehabilitation Act, [2] who has been denied benefits of or excluded from participating in a federally funded program or special service, [3] solely because of his or her disability. See Mrs. C., 916 F.2d at 74. Plaintiffs, however, do not argue that the regulation banning aversive interventions denies them benefits on the basis of disability: The regulation applies to all students, regardless of disability.¹⁰

28

1 Plaintiffs contend, however, that they state a claim
2 under Rehabilitation Act because New York's ban on aversives
3 was promulgated in bad faith or is the result of gross
4 mismanagement. See Wegner v. Canastota Cent. Sch. Dist.,
5 979 F. Supp. 147, 152 (N.D.N.Y. 1997) (relying on Brantley
6 v. Indep. Sch. Dist. No. 625, 936 F. Supp. 649, 657 (D.
7 Minn. 1996) (citing Monahan v. Nebraska, 687 F.2d 1164,
8 1170-71 (8th Cir. 1982))). We have never held that such a
9 claim exists under the Rehabilitation Act, but even assuming
10 that it does, Plaintiffs' complaint fails to state such a
11 claim.

12 Plaintiffs' allegations of bad faith and gross
13 mismanagement are refuted by the facts (of which we have
14 taken judicial notice) that the Education Department [1]
15 investigated the matter before offering the regulation for
16 public comment and [2] received the public's comments before
17 promulgating the regulation. See Notice of Emergency
18 Adoption & Proposed Rulemaking, N.Y. State Educ. Dep't, June
19 20, 2006; N.Y. State Register of Rule Making Activities,
20 Nov. 15, 2006.

21 Plaintiffs' response that bad faith or gross
22 mismanagement is manifest because there is no scholarly

§ 104.33(b)(1). As explained previously, the prohibition on aversives does not prevent educators from implementing IEPs for these children nor does it preclude their receipt of a FAPE.

1 support for banning aversives is similarly refuted by the
2 Education Department's citation to scholarly literature
3 discussing the dangers of aversives and the benefits of
4 positive-only treatment. See Notice of Emergency Adoption &
5 Proposed Rulemaking, N.Y. State Educ. Dep't, June 20, 2006.
6 In any event, such a dispute (regarding which education
7 policy is the most scientifically sound and effective
8 approach that is least likely to present health, safety, and
9 moral and ethical concerns) is best left for resolution by
10 the policymakers and education administrators, not the
11 judiciary. See Cerra, 427 F.3d at 192; see also Rowley, 458
12 U.S. at 206-07; Walczak, 142 F.3d at 129.

14 IV

15 In addition to their statutory claims, Plaintiffs also
16 contend that New York's prohibition of aversives deprives
17 them of their constitutional rights to substantive and
18 procedural due process and equal protection. Each claim is
19 addressed in turn.

21 A

22 Plaintiffs contend that the ban on aversive
23 interventions deprives these children of substantive due
24 process. Plaintiffs cannot prevail on such a claim because

1 there is no substantive due process right to public
2 education.

3 "[T]he Due Process Clause of the Fourteenth Amendment
4 embodies a substantive component that protects against
5 'certain government actions regardless of the fairness of
6 the procedures used to implement them.'" Immediato v. Rye
7 Neck Sch. Dist., 73 F.3d 454, 460 (2d Cir. 1996) (quoting
8 Daniels v. Williams, 474 U.S. 327, 331 (1986)). In
9 examining whether a government rule or regulation infringes
10 a substantive due process right, "the first step is to
11 determine whether the asserted right is 'fundamental,'"--
12 i.e., "implicit in the concept of ordered liberty, or deeply
13 rooted in this Nation's history and tradition," Leebaert v.
14 Harrington, 332 F.3d 134, 140 (2d Cir. 2003) (internal
15 quotation marks omitted). Where the right infringed is
16 fundamental, the regulation must be narrowly tailored to
17 serve a compelling government interest. Immediato, 73 F.3d
18 at 460. Where the right infringed is not fundamental, "the
19 governmental regulation need only be reasonably related to a
20 legitimate state objective." Id. at 461.

21 The right to public education is not fundamental.
22 Handberry v. Thompson, 446 F.3d 335, 352 (2d Cir. 2006)
23 (citing Plyler v. Doe, 457 U.S. 202, 221 (1982); San Antonio
24 Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)).
25 Thus, even if Plaintiffs alleged that these children were

1 unable to receive a public education at all because they can
2 no longer receive aversives, the bar on aversive
3 interventions would still comport with due process if it was
4 reasonably related to a legitimate government objective.
5 The regulation rises to that low threshold because it serves
6 a legitimate government objective: preventing students from
7 being abused or injured by aversive interventions.

8 Realizing that there is no fundamental right to public
9 education, Plaintiffs contend they have been deprived of the
10 substantive due process because the ban on aversives is
11 arbitrary and capricious (because, as Plaintiffs argue,
12 aversives are effective and there is no scientific support
13 for banning them). This argument is addressed above.

14 Moreover, we decline Plaintiffs' invitation to engage in
15 policymaking decisions that are best left to the political
16 branches. See Cerra, 427 F.3d at 192. In any event, safety
17 and ethical concerns as well as the potential for abuse
18 suffice to establish that New York's prohibition is not
19 arbitrary and capricious--even if, as Plaintiffs contend,
20 aversives are the best and, perhaps, only way to effectively
21 treat these children's severe behavior disorders.

1 to his or her specific needs in all other respects.

2 In addition, this claim fails because Plaintiffs do not
3 possess a property interest in any particular type of
4 education program or treatment. See Handberry, 446 F.3d at
5 352. Plaintiffs contend that their property right
6 originates in the IDEA but, given the IDEA's strong
7 preference for positive behavioral intervention, see, e.g.,
8 20 U.S.C. § 1400(c)(5)(F), the IDEA does not create a
9 property interest in the possible receipt of aversive
10 interventions as part of an IEP.

11
12 **C**

13 Plaintiffs contend that the prohibition on aversive
14 interventions violates equal protection by treating them
15 differently than other students who had IEPs permitting them
16 to receive aversives before June 30, 2009--the cut-off date
17 for the grandfather clause.

18 Laws that discriminate on the basis of disability are
19 subject to rational-basis review and upheld so long as there
20 is a "rational relationship between the disparity of
21 treatment and some legitimate governmental purpose." See
22 Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d
23 98, 109 (2d Cir. 2001). And, as explained above, there is
24 at least a rational basis to support the prohibition on
25 aversives.

1 Plaintiffs' contention that the prohibition
2 distinguishes between students with disabilities who had
3 IEPs authorizing aversives prior to June 30, 2009, and
4 students with disabilities who did not have IEPs permitting
5 aversives, does not save the claim. Classifications that do
6 not "proceed[] along suspect lines . . . must be upheld
7 against equal protection challenge if there is any
8 reasonably conceivable state of facts that could provide a
9 rational basis for the classification." FCC v. Beach
10 Commc'ns, Inc., 508 U.S. 307, 313 (1993). Classification on
11 the basis of authorization to administer aversive
12 interventions in a student's IEP is, of course, a non-
13 suspect classification subject to rational basis review.

14 Defendants' decision to grandfather the prohibition of
15 aversives so that students already authorized to receive
16 aversives could continue their treatment easily withstands
17 rational-basis review. Grandfathering bans aversive
18 interventions without interrupting education programs where
19 aversives were already being used or already authorized to
20 be used. It also avoids the tremendous labor of replacing
21 the IEPs of all students who had IEPs authorizing aversives.

22 Plaintiffs argue that the exception authorizing some
23 aversive interventions disproves that the ban was motivated
24 by safety. Not so. Although it is true that an outright
25 ban would better protect against any harms from aversives,

1 reducing the use of aversives can still provide a benefit by
2 decreasing the number of students subjected to aversive
3 interventions and the harms potentially associated with such
4 interventions.

5 In the end, Plaintiffs' argument is that they disagree
6 with Defendants' policy choice to ban aversive
7 interventions. As long as Defendants had a rational reason,
8 however, the prohibition must be upheld against an equal
9 protection challenge. Here, the safety of the students
10 coupled with an attempt to minimize the impact of the
11 prohibition on students already receiving aversives provided
12 a rational basis for the prohibition and the use of a
13 grandfather provision to implement it.

14
15 **V**

16 Plaintiffs contend that the district court erred in
17 denying their request for a preliminary injunction. Because
18 the district court correctly dismissed the suit, it did not
19 err in denying Plaintiffs' request for a preliminary
20 injunction. See Monserrate v. N.Y. State Senate, 599 F.3d
21 148, 154 & n.3 (2d Cir. 2010) (holding that a party cannot
22 satisfy the requirements for a preliminary injunction--
23 including "likelihood of success on the merits"--if that
24 party cannot sustain any of its claims for relief).

CONCLUSION

1
2 Accordingly, the judgment of the district court is
3 affirmed.

DISSENT

RICHARD J. SULLIVAN, District Judge, concurring in part and dissenting in part:

I concur in the majority's opinion with regard to Appellants' Rehabilitation Act, Due Process, and Equal Protection claims, but I respectfully dissent insofar as the Court's opinion relates to the dismissal of Appellants' IDEA claims because I believe that Appellants' complaint alleged sufficient facts to survive a motion to dismiss, and because I find that the materials outside the complaint relied on by the majority do not establish, as a matter of law, the reasonableness of the State's ban on aversive interventions.

In dismissing Appellants' complaint, the district court held that "the allegations demonstrate that the NYSED and the Board of Regents explored the available data, studies, and literature before making a reasoned decision that aversives should be generally prohibited." However, nowhere in the opinion did the district court actually cite from the pleadings to support this conclusion. Instead, the district court merely observed that "plaintiffs do not allege that [d]efendants did not consider the use of aversive interventions before adopting § 200.22" and then concluded

that “[t]he [c]ourt is not willing to second guess that policy decision.” Id. (emphasis added).

While it is of course true that courts are not to second guess state authorities in matters relating to educational policy, the law is equally clear that federal courts may not merely “rubber stamp administrative decisions” of this kind. Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 (2d Cir. 2005). Indeed, this Court has recognized that, notwithstanding “our deferential position with respect to state educational authorities crafting educational policy,” “our review must be searching, and we must recognize that even when educational authorities act with the best intentions they may sometimes fall short of their obligations under the IDEA, and courts must then act to ensure compliance with Congress’s directives.” P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Ed., 546 F.3d 111, 120-21 (2d Cir. 2008) (internal citations omitted). This is particularly the case at the pleading stage, where a plaintiffs’ allegations are presumed to be true. See Fed. R. Civ. P. 12(b)(6); ATSI Commc’ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007). Here, the district court’s conclusion that the prohibition of aversive

interventions was reasonable is particularly problematic, because Appellants alleged in their complaint that the scientific literature, which the district court mentioned (but did not cite) in its opinion, actually “supports the use of aversive interventions and their vital role in providing a FAPE to students with severe behavior disorders.”

The majority affirms the district court’s dismissal of Appellants’ suit, finding that the prohibition of aversive interventions reflects “a considered judgment by the State of New York regarding the education and safety of its children that is consistent with federal education policy and the United States Constitution.” In reaching this conclusion, the majority relies not on the pleadings or on the district court’s opinion, but rather on four pages from the Education Department’s Notice of Emergency Adoption and Proposed Rule Making, of which it has taken judicial notice. While the Court can certainly take judicial notice of facts, these four pages, standing alone, are insufficient to justify the district court’s dismissal of Appellants’ claims at this early stage of the litigation. Indeed, the first two of those pages simply note the Department’s “concerns”

with aversive interventions based on “site visits, reports and complaints filed by parents, school districts and others,” Notice of Emergency Adoption & Proposed Rulemaking, N.Y. State Educ. Dep’t, June 20, 2006; the latter two merely catalog scientific studies that purportedly support the proposed rule.

Importantly, the scientific studies summarized in the Notice of Emergency Adoption and Proposed Rule Making do not directly call for the prohibition of aversive interventions. To the contrary, these studies presuppose the use and utility of aversive interventions at least in certain contexts and merely set forth “standards” and “strategies to improve an ABI’s [aversive behavioral intervention’s] effectiveness and acceptability.” Id. It is worth noting that of the several studies cited in the Notice of Emergency Adoption and Proposed Rule Making, the two included in full in the record actually describe the need for aversive interventions in certain instances. See Dorothy C. Lerman & Christina M. Vondram, On the Status of Knowledge for Using Punishment: Implications for Behavior Disorders, 35 J. APPL. BEHAV. ANAL., 431, 456 (2002) (noting that “punishment is still sometimes needed to reduce destructive behavior to

acceptable levels"); Sarah-Jeanne Salvy et al., Contingent Electric Shock (SIBIS) and a Conditioned Punisher Eliminate Severe Head Banging in a Preschool Child, 19 BEHAV. INTERVENT. 59, 70 (2004) (noting that ABIs "can sometime be necessary, although not sufficient, to eliminate severe and harmful [self-injurious behavior] in the natural environment"). Consequently, I am unpersuaded that the Notice of Emergency Adoption and Proposed Rule Making cited by the majority provides a sufficient basis for upholding the district court's dismissal.

Of course, like the majority, I am "mindful that the judiciary generally lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." Cerra, 427 F.3d at 192. However, it seems to me that the appropriate course would be to return this action to the district court, which could then review a fuller record, beyond the pleadings, to assess the regulation and its compliance with the IDEA. If my cursory review of the literature in the field is any indication, it seems likely that Appellees will be able to demonstrate that "the regulations represent an informed, rational choice between two opposing schools of thought on

the use of aversives," Alleyne v. N.Y. State Educ. Dept., 691 F. Supp. 2d 322, 333 (N.D.N.Y. 2010), and that Appellants will therefore have difficulty overcoming the "substantial deference" accorded to the review of state policy-making agencies, Wasser v. N.Y. State Office of Voc. & Educ. Servs. for Individuals With Disabilities, 602 F.3d 476, 477 (2d Cir. 2010). Nevertheless, while the outcome may ultimately be the same, it is important that the result be based on a careful assessment of the merits, founded on a well-developed record. In my view, the district court's dismissal - and the majority's affirmance - takes an unnecessary short cut to reach an outcome that cannot be justified at this stage of the proceedings. For these reasons, I respectfully dissent.