IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE GEORGIA ADVOCACY OFFICE, et al.,

Plaintiffs,

v.

STATE OF GEORGIA, et al.,

Defendants.

CASE NO. 1:17-cv-03999-MLB

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS[1]

[1] This Opposition references the Complaint (Docket # 1) as "Compl. ¶ __," and Defendants' Memorandum of Law in Support of their Motion to Dismiss (Docket # 46) as "D. Memo at __." As in Defendants' Memorandum, this Opposition refers to the Defendants, collectively, as the "State."

The State mischaracterizes the issue before this Court. This litigation concerns discrimination against thousands of public school students with disabilities resulting from their segregation in a network of separate and unequal institutions and classrooms known as the Georgia Network for Educational and Therapeutic Support ("GNETS") program. Compl. ¶ 1. The Complaint states claims under Title II of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and the Equal Protection Clause of the United States Constitution:

- The State's first argument for dismissal fails because the Complaint's allegations regarding the discrimination that results from the State's actions – including its creation, funding, administration, and oversight of GNETS – are sufficient to state an ADA claim.
- The State's second argument fails because the Complaint's allegations that students in GNETS are unnecessarily segregated from, and do not receive the same educational opportunities as, their non-disabled peers state a claim under both the ADA and Section 504.
- The State's third argument fails because, under Eleventh Circuit precedent, the Complaint states ADA and Section 504 discrimination claims separate and apart from any claim Plaintiffs might have under the Individuals with Disabilities Education Act ("IDEA").
- The State's last argument fails because segregating students with behavioral disabilities from schools and placing them in an alternate system that provides an education well below the standard provided to non-disabled students – a discriminatory policy both irrational on its face and unjustified by any substantial state interest – violates the Equal Protection Clause.

Accordingly, Defendants' Motion must be denied.

The State created GNETS in 1970 as a statewide special education program for students ages three to twenty-one with behavioral needs due to their disabilities. Compl. ¶¶ 2, 77. The State funds and, through its agencies, administers GNETS. *See id.* ¶¶ 37-55. Under rules established by the State, a student is placed in GNETS if, after being referred by his or her local school system, GNETS determines the student meets the criteria for placement. *Id.* ¶¶ 4, 86-88.

GNETS is a segregated program housed in entirely separate buildings – known as GNETS "centers" – or in satellite classrooms in separate wings of zoned schools.[2] *Id.* ¶¶ 5, 89-97. As there are no students without disabilities in either of these locations, GNETS students are isolated and stigmatized by their GNETS placement. *Id.* ¶ 89-90. Further, GNETS students receive a low-quality education. GNETS teachers often lack certification in the subject matter they are teaching, academic instruction is poor, and GNETS students do not have access to courses and extracurricular activities available to their non-disabled peers. *Id.* ¶¶ 6, 99-105. Because of the lack of core courses and poor academic instruction, GNETS students have lower test scores than non-GNETS students and other students with disabilities, drop out of school at twice the rate of students attending zoned schools, and rarely graduate with a high school diploma. *Id.* ¶¶ 6, 106-108.

[2] A zoned school is a local or neighborhood school that a student would normally attend based on where the student lives. *Id.* ¶ 5.

Although GNETS is advertised as "therapeutic," it is anything but. GNETS students do not receive the services they need to improve their behavior. Rather, their behavior often worsens in GNETS due to the punitive atmosphere and methods of discipline, including seclusion and physical restraints. *Id*. ¶¶ 8, 109-111, 128, 147. Tragically, the students placed in GNETS do not need to be there. If provided necessary services, they could remain in their zoned schools and receive a far better education than they receive in GNETS. *Id*. ¶¶ 9, 112-118.

By maintaining and funding GNETS separately from local school districts, the State has created a system whereby a GNETS referral is the most convenient, and often the only, option for students with disability-related behavioral needs. *Id*. ¶ 11. As a result of the State's consolidation of the majority of its funding for these services in GNETS, local school districts have little incentive and few resources to provide the services necessary to educate children with disability-related behavioral needs in their zoned schools. *Id*. ¶ 11. Plaintiffs seek declaratory and injunctive relief to remedy this ongoing discrimination and prevent future discrimination against students at risk for GNETS placement. *See id.* ¶ 12.

ARGUMENT AND CITATION TO AUTHORITY

In ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court "accepts the factual allegations in the complaint as true and construes them in the

light most favorable to the plaintiff." *Speaker v. United States HHS CDC*, 623 F.3d 1371, 1379 (11th Cir. 2010). At this stage, the Complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotes omitted).

I. The State Is Liable For GNETS Discrimination.

A. The Complaint Need Only Allege That The State's Actions Result In Discrimination To State A Claim Under Title II Of The ADA.

The State argues that Plaintiffs must plead that it "administers" GNETS in order to state a claim under Title II of the ADA. D. Memo at 7. The only authority the State cites for this proposition is Title II's implementing regulation, 28 C.F.R. § 35.130. Although 28 C.F.R. § 35.130(d) states that a "public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," this is not the only provision within § 35.130 that gives rise to Title II violations. For example:

- Section 35.130(a) states that "[n]o qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity";

- Section 35.130(b)(1)(iii) states that a public entity may not, either directly or indirectly, "[p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others"; and

- Section 35.130(b)(3) states that a public entity may not, either directly or indirectly, "utilize criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability."

In interpreting § 35.130, the Department of Justice ("DOJ") has advised that a public entity can violate Title II by the "direct[] or *indirect*[] operat[ion] [of] facilities and/or programs that segregate individuals with disabilities . . . ." Exhibit A, U.S. DEP'T OF JUST., STATEMENT OF THE DEPARTMENT OF JUSTICE ON ENFORCEMENT OF THE INTEGRATION MANDATE OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND *OLMSTEAD V. L.C.* p. 3, ("DOJ Statement") (emphasis added). Accordingly, courts hold that to state a Title II segregation claim, a plaintiff need only allege that the defendant "provides, administers and/or funds the existing service system" and/or that the defendant "utilized criteria or methods of administration" that lead to unnecessary segregation of protected individuals. *See Day v. Dist. of Columbia*, 894 F. Supp. 2d 1, 22-23 (D.D.C. 2012). This remains true even where the defendant does not actually operate the facilities at issue. *See Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 317-18 (E.D.N.Y 2009) (state was proper Title II defendant where the "statutory and regulatory framework" resulted in individuals with mental illnesses living and receiving services in private segregated settings).

B. The State's Actions Lead To Discrimination.

Although the State argues that "the Complaint does not cite a single controlling act of the State," *see* D. Memo at 11, the Complaint is replete with detailed allegations regarding the State's creation, funding, administration, and oversight of GNETS.[3] Paragraph 158 of the Complaint alone lists five different ways by which the State's actions lead to unnecessary segregation of students with behavior-related disabilities in violation of Title II. Even if the Court were to both hold that "administration" is a necessary prerequisite to liability and accept the dictionary definitions of "administration" the State proffers, *see* D. Memo at 7-8, these allegations would show that the State is "responsible for the running of" or the "practical management and direction" of GNETS. Indeed, the State itself essentially admits that it manages GNETS when it asserts it "is operating a remedial plan for transitioning qualified students from GNETS." D. Memo at 13.[4]

---

[3] *See, e.g.*, Compl. ¶ 37 (Georgia created, funds, and through agencies administers GNETS); ¶ 42 (detailing State School Superintendent's oversight of GNETS); ¶ 77 (Georgia legislation created GNETS); ¶ 78 (GNETS administered by the State through regional organizations); ¶ 79 (State retains general responsibility for operation of GNETS); ¶ 80 (State employees provide services to GNETS students); ¶ 83 (GNETS funding provided by earmarked state and federal funds); ¶ 85 (State establishes criteria for placing children in GNETS); ¶ 95 (Georgia Department of Education closed numerous GNETS locations based on safety concerns after DOJ investigation); ¶¶ 89-96 (detailing how State segregates GNETS students).

[4] Although the State characterizes this as an admission by Plaintiffs, it does not cite any allegation in the Complaint that makes this statement, and none does.

Bacon v. City of Richmond, Va., 475 F.3d 633 (4th Cir. 2007), D. Memo at 10-11, is inapposite. In *Bacon*, the Fourth Circuit ruled that the City of Richmond had no obligation to fund remedies under a consent decree in a Title II action because no proof was presented that the "City had in any way discriminated against plaintiffs." *Id.* at 639-40 (explaining that Title II "cannot be read to impose strict liability on public entities that neither caused plaintiffs to be excluded nor discriminated against them"). Here, the Complaint alleges numerous examples of how the State's actions lead to discriminatory segregation, all of which must be taken as true at the motion-to-dismiss stage. *See supra* n. 3 (listing examples).

The GNETS regulations explicitly give the State, through the State Board of Education, the power to, *inter alia*, (1) "receive and disburse funds" appropriated to support GNETS; (2) "develop rules and procedures regulating the operation of the GNETS grant"; and (3) "[m]onitor GNETS to ensure compliance with Federal and state policies, procedures, rules, and the delivery of appropriate instructional and therapeutic services." Ga. Comp. R. & Regs. 160-4-7-.15(5)(a). Even under the State's dictionary definitions, the GNETS regulations demonstrate State administration because they show the State is responsible for "manage[ing] and … running" GNETS. *See* D. Memo. at 7 (dictionary definition of "administration").

Nevertheless, the State selectively cites sources which, it claims, give it only

a "very narrow role" in educating students with disabilities. *See* D. Memo at 8. To the extent these sources conflict with the Complaint's allegations regarding the State's actual involvement in GNETS, the Complaint's allegations control. A closer examination of these sources, however, demonstrates the power the State has to administer and regulate education programs like GNETS. *See, e.g.*, Ga. Const. Art. 8, § 1, ¶ 1 ("[t]he provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia"); Art. 8, § 5, ¶ VII(a) ("[a]ny special schools shall be operated in conformity with regulations of the State Board of Education pursuant to provisions of law").

Other regulations further demonstrate the State's control over education of students with disabilities. The authority to determine whether a local educational authority ("LEA") cannot serve a student with a disability lies with the State Board of Education. Ga. Comp. R. & Regs. 160-4-7-.20(1)(b). Additionally, the State Board of Education has the duty to adopt "classification criteria for each area of special education to be served on a state-wide basis" and "the criteria used to determine eligibility of students for state funded special education programs," Ga. Code Ann. § 20-2-152(a), and the Georgia Department of Education and Department of Behavioral Health and Developmental Disabilities have the responsibility to coordinate services for children experiencing "severe emotional

disturbance." Ga. Code Ann. § 49-5-220.

Finally, *Gwinnett Cty. Sch. Dist. v. Cox*, 710 S.E.2d 773 (Ga. 2011), which the State cites to support its claim that LEAs control GNETS, actually undermines that claim. *Gwinnett* distinguishes general education, which the court held to be under local control for the purposes of establishing general education charter schools, from "special schools" for children with disabilities, which are under State authority. *Id.* at 777-79; *cf. Todd D. v. Andrews*, 933 F.2d 1576, 1583 (11th Cir. 1991) (finding, in special education context, Georgia was responsible for providing eligible students with appropriate education when LEA was "unable or unwilling" to do so). Given the Complaint's allegations and the plain language of the State's regulations, Count I states a claim under Title II of the ADA.

II. The Complaint Alleges An Actionable *Olmstead* Claim.

The State next argues that Plaintiffs do not have a claim for actionable discrimination under the ADA and Section 504 because the Complaint fails to allege "that anyone who actually evaluated the students in the GNETS programs determined that they are more appropriately served in their zoned schools." D. Memo at 11. Consequently, the State reasons, because IEP teams have determined that GNETS students should not be in their zoned schools, and because the State claims it has a "good-faith working plan" for transitioning students from

GNETS to their zoned schools, no discrimination has occurred. *Id.* at 13.

This argument fundamentally misunderstands what *Olmstead* and the ADA require, particularly at the motion-to-dismiss stage. First, Plaintiffs need not allege (or even prove) that State treatment professionals have determined that students are eligible to be served in more integrated settings, such as their zoned schools. *See Day*, 894 F. Supp. 2d at 23 (rejecting this interpretation of *Olmstead*, and explaining "lower courts have universally rejected the absolutist interpretation [of *Olmstead*] proposed by defendants"); *see also Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 258–59 (E.D.N.Y. 2009), *vacated on other grounds*, 675 F.3d 149 (2d Cir. 2012), (holding that requirement would "condemn the placements of [individuals with disabilities in adult homes] to the virtually unreviewable discretion" of the State); *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp. 2d 509, 539–40 (E.D. Pa. 2001) (rejecting argument that *Olmstead* "require[s] a formal recommendation for community placement").

In fact, Plaintiffs need not plead that *any* treating professional determined that GNETS students can be educated in more integrated settings. Such evidence may ultimately come from "community-based organizations that provide services to people with disabilities outside of institutional settings, or from any other relevant source." *See* Exhibit A, DOJ Statement at 4; *see also Joseph S. v. Hogan*,

561 F. Supp. 2d 280, 291 (E.D.N.Y. 2008) (noting that not only is a state professional opinion not required, but that "it is not clear whether *Olmstead* even requires a specific determination by *any* medical professional that an individual with mental illness may receive services in a less restrictive setting, or whether that just happened to be what occurred in *Olmstead*") (emphasis in original).

The State's argument that Plaintiffs have failed to meet pleading standards are therefore premised on its misunderstanding about what *Olmstead* requires. *See* D. Memo at 15. In actuality, to state a claim under Title II and Section 504, Plaintiffs need only allege that students in GNETS are unnecessarily segregated and could successfully attend their zoned schools along with their peers if given needed supports and services. *See Hogan*, 561 F. Supp. 2d at 292 ("allegations that individuals with mental illness are unnecessarily segregated in highly restrictive [settings], even though their needs could be met in a more integrated setting, are adequate to state violations of the ADA and Section 504 under *Olmstead* and meet *Twombly's* plausibility standard"). To otherwise "limit[ ] the evidence on which *Olmstead* plaintiffs may rely would enable public entities to circumvent their *Olmstead* requirements by failing to require professionals to make recommendations regarding the ability of individuals to be served in more integrated settings." DOJ Statement at 4 (explaining why a "reasonable, objective

assessment by a public entity's treating professional is one, but only one, such avenue" for showing that an integrated setting is appropriate). Here, the Complaint alleges that GNETS students are unnecessarily segregated and could successfully attend schools with peers if given supports and services. *See, e.g.*, Compl. ¶¶ 117, 131, 141, 148, 151. The ADA and Section 504 claims are properly pled.[5]

The State likewise cannot evade responsibility for students at serious risk of being placed in GNETS by claiming that Plaintiffs have not sufficiently pled an *Olmstead* violation with respect to them. *See* D. Memo at 15. As the DOJ and numerous courts have recognized, *Olmstead* extends to persons "at serious risk of … segregation" for the simple reason that "[i]ndividuals need not wait until the harm of … segregation occurs or is imminent." DOJ Statement at 5; *see also Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013) ("the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings") (quoting DOJ Statement); *M.R. v. Dreyfus*, 697 F.3d 706, 720 (9th Cir.

[5] Further, the DOJ's July 15, 2015 Letter of Findings reflects the opinion of experts that students in GNETS could be served in a more integrated setting. *See* Letter from Principal Deputy Assistant Attorney General Vanita Gupta to Governor Nathan Deal and Attorney General Sam Olens at 8, 11-12 (dated July 15, 2015) (cited in Compl. at ¶¶ 13, 119-120, and attached as Exhibit B hereto). The letter concludes that "[b]ased on our investigation, including the findings of our experts, nearly all students in the GNETS Program could receive services in more integrated settings, but do not have the opportunity to do so." *Id.* at 8.

2012) (recognizing violation where plaintiffs established that "reduced access to personal care services will place them at serious risk of institutionalization"); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (Title II of the ADA "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation."); *Hunter ex rel. Lynah v. Cook*, No. 1:08-CV-2930-TWT, 2011 WL 4500009, at *5 (N.D. Ga. Sept. 27, 2011) (following *Fisher* and granting motion to amend complaint to add plaintiffs at risk of institutionalization). Plaintiffs' allegations that students are at risk of being segregated in the GNETS program due to the State's actions, which must be taken as true on this Motion to Dismiss, are therefore exactly what is required to plead a claim for violation of the ADA's integration mandate. *See Hunter*, 2011 WL 4500009, at *5 (explaining that a plaintiff can show an *Olmstead* violation if public entity's failure to provide community services would lead to individual's institutionalization).

Additionally, the State wrongly argues that because IEP teams have purportedly "affirmatively decided that community placement is inappropriate," there can be no *Olmstead* violation. *See* D. Memo at 14, 17. But, as the Complaint alleges, the State has chosen to deliver services to students with disability-related

behavioral needs through a segregated GNETS program, incentivized school districts to dump such students in GNETS programs regardless of whether students could be educated in their zoned schools, and often caused GNETS to be the only available option for these students. *See* Compl. ¶¶ 10-11, 88. The State cannot evade liability under the ADA simply because IEP teams channel students into a segregated system the State created. *See Long v. Benson*, No. 4:08–cv–26 (RH/WCS), 2008 WL 4571904, at *2 (N.D. Fla. Oct. 14, 2008) (noting that the State "cannot deny the right [to an integrated setting] simply by refusing to acknowledge that the individual could receive appropriate care in the community. Otherwise the right would, or at least could, become wholly illusory."); *see also Lane v. Kitzhaber*, 283 F.R.D. 587, 602 (D. Or. 2012) (holding professional's judgments "must actually be reasonable and based on professional assessments, rather than simply the exigencies of available services or providers"); *cf.* D. Memo at 16. Allowing the State "to rely on the absence of an assessment by its own professionals as grounds for dismissal would 'eviscerate' the Integration Mandate." *Day*, 894 F. Supp. 2d at 24 (citation omitted);*see also Disability Advocates, Inc.*, 653 F. Supp. 2d at 259 (same).

At a minimum, the State's assertion that IEP teams correctly segregate students in GNETS cannot influence a motion to dismiss, where the Court must

assume the truth of Plaintiffs' allegation that IEP teams unnecessarily use GNETS as a dumping ground for students local school districts do not want to educate. *See* Compl. ¶¶ 88, 114.[6] This dispute underlies Plaintiffs' well-pled complaint.

Finally, the State argues that it has a working *Olmstead* plan to move students out of GNETS and into their zoned schools, and that the GNETS program thus cannot constitute "discriminatory isolation." D. Memo at 13. But Plaintiffs allege that the State does not follow its own GNETS regulations, and thus has failed to provide needed services to address disability-related behavioral needs in zoned schools. *See, e.g.*, Compl. ¶¶ 88, 118. There is, accordingly, a question of fact as to whether the State has a valid *Olmstead* plan sufficient to avoid liability. *See* Exhibit A, DOJ Statement at 6-7 (An [*Olmstead*] plan "must do more than provide vague assurances of future integrated options" and must "contain concrete and reliable commitments to expand integrated opportunities.").

In short, the Court should reject the State's argument that Plaintiffs have not pled a valid *Olmstead* claim not only because it relies on fact determinations improper at the motion-to-dismiss stage, but also because it fails to recognize what

[6] The case the State relies on, *United States v. Arkansas*, 794 F. Supp. 2d 935 (E.D. Ark. 2011), highlights why its argument is – at best – premature. As the State itself acknowledges, it was only after a "six-week trial" that the court found in favor of Arkansas on the DOJ's ADA claim. D. Memo at 16-17. Here, at the motion-to-dismiss stage, the court cannot make any findings.

an *Olmstead* claim actually requires: allegations that the State engages in unnecessary segregation. The Complaint alleges that the State unnecessarily segregates children with disabilities who could be educated in classrooms with their non-disabled peers. *See, e.g.*, Compl. ¶¶ 117-118, 131, 141, 148, 151. Accordingly, the Court should deny the State's Motion to Dismiss on this ground.

III. The State Cannot Hide Behind The IDEA.

The State's argument that Plaintiffs' discrimination claims "[a]re [g]overned [e]xclusively by the IDEA," D. Memo at 17, represents a misunderstanding of the Complaint, the reach of the IDEA, and the rights established by the ADA and Section 504. In fact, the Complaint states discrimination claims under the ADA and Section 504 distinct from any IDEA claim Plaintiffs may have.

While the IDEA requires schools to provide a free and appropriate public education (FAPE) to students with disabilities, 20 U.S.C. § 1400 *et seq*., the ADA and Section 504 prohibit discrimination on the basis of disability in all public services and programs. *See* 42 U.S.C. § 12132; 29 U.S.C. § 794; *Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206 (1998). The IDEA does not subsume the ADA and Section 504's anti-discrimination provisions. *See, e.g., Ellenberg v. New Mexico Military Inst.*, 478 F.3d 1262, 1281 (10th Cir. 2007) ("the Supreme Court has long-recognized that the IDEA is simply not an anti-discrimination statute");

K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1097 (9th Cir. 2013) (discussing IDEA's non-exclusivity provision and holding "Congress has specifically and clearly provided that the IDEA coexists with the ADA and other federal statutes, rather than swallowing the others").

As noted above, *see supra* Part I, the Complaint alleges, among other things, that the State discriminates against students with behavioral disabilities by taking actions that result in these students being unnecessarily segregated from their non-disabled peers. *See* Compl. ¶ 151. The State cites no case for the proposition that the IDEA is Plaintiffs' exclusive remedy for this discrimination and, in fact, binding precedent in the Eleventh Circuit holds otherwise.

In *J.S. v. Houston Cty. Bd. Of Educ.*, 877 F.3d 979 (11th Cir. 2017), the Eleventh Circuit addressed *Olmstead*-based discrimination claims under the ADA and Section 504 arising from the same conduct as IDEA claims that the plaintiff had already resolved. In *J.S.*, the Eleventh Circuit reversed a trial court summary judgment decision that had accepted the argument raised by the State in this case – that the plaintiff's discrimination claim under the ADA and Section 504 failed as a matter of law because it was "merely a claim that he was denied a FAPE, a right guaranteed under the IDEA." *Id.* at 985. Analogizing to the Supreme Court's recent decision in *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017), the Eleventh

Circuit held that when determining whether a claim is cognizable under the ADA or Section 504, as opposed to the IDEA, "[w]hat matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading." *J.S.*, 877 F.3d. at 986 (quoting *Fry*, 137 S. Ct. at 755). Accordingly, if a complaint alleges that students are segregated and "isolated from [their] classroom and peers on the basis of [their] disability" in a manner that implicates the "intangible consequences of discrimination contemplated in *Olmstead* that could result from isolation, such as stigmatization and deprivation of opportunities for enriching interaction with fellow students," it states a claim under the ADA and Section 504, regardless of whether any IDEA claim (which Plaintiffs do not assert) exists. *Id.* at 986-87. In this case, the Complaint alleges that the State segregates thousands of students in GNETS, denies them the opportunity to be educated with their peers, and thereby stigmatizes them. Compl. ¶¶ 1, 5, 90. Under *J.S.*, these allegations state a discrimination claim under the ADA and Section 504. *See J.S.*, 877 F.3d. at 986-87. *Accord Abraham P. vs. Los Angeles Unified Sch. Dist.*, No. CV 17-3105-GW, 2017 WL 4839071, at *7 (C.D. Cal. Oct. 5, 2017) (gravamen of claim alleging unnecessary education segregation was discrimination under ADA and Section 504, not FAPE denial under IDEA, as plaintiff "could theoretically raise a similar argument if he was placed in a

segregated setting at a theater.").

IV. GNETS Violates The Equal Protection Clause Of The U.S. Constitution.

A. To Survive Constitutional Scrutiny, The State Must Prove That GNETS Furthers A Substantial State Interest.

The State's argument for dismissing Count III (the "Equal Protection Claim") hinges on its contention that the GNETS program is subject to rational-basis review. It is not. Under Eleventh Circuit precedent, "the specific interplay between the types of individuals affected by the statute and the deprivation at issue may justify requiring a heightened level of scrutiny to uphold the statute's categorization." *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1245 (11th Cir. 2012). Students with disabilities, although not a protected class, are historical targets of state discrimination. *See, e.g., Ass'n for Disabled Americans, Inc. v. Florida Int'l Univ.*, 405 F.3d 954, 959 (11th Cir. 2005) (describing "the long history of state discrimination against students with disabilities"). Furthermore, although "discrimination in education does not abridge a fundamental right," courts examine it closely, because "the gravity of the harm is vast and far reaching," and "equality in education, though not fundamental, is vital to the future success of our society." *Id.* at 957-58; *see also Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("education is perhaps the most important function of state and local governments" as "it is doubtful that any child may

reasonably be expected to succeed in life if he is denied the opportunity of an education"). In the Eleventh Circuit, when a state policy "significantly interferes" with the provision of a public school education to a disadvantaged group, even a group that is not a protected class, the state (not the plaintiffs) must demonstrate that the policy furthers a "substantial state interest." *Hispanic Interest Coal. of Ala.*, 691 F.3d at 1245*; see also Plyler v. Doe* , 457 U.S. 202, 230 (1982) ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest."). This requirement applies even where the policy "does not by its terms purport to deny an education to any child." *Hispanic Interest Coal. of Ala.*, 691 F.3d at 1245.

In *Hispanic Interest Coal. of Alabama*, the Eleventh Circuit addressed (in the context of a preliminary injunction) an Equal Protection challenge to an Alabama statute that "provide[d] a process for schools to collect data about the immigration status of students who enroll in public school." *Id.* at 1240–41. The Eleventh Circuit held the plaintiffs were likely to prove the provision unconstitutional because, although undocumented students were not a protected class, the provision deterred students from attending school, and Alabama failed to identify a countervailing substantial interest in collecting the data. *Id.* at 1246-49.

A similar interplay between types of individuals affected and the deprivation of rights at issue in *Hispanic Interest Coal. of Alabama* exists here. Like the undocumented students in *Hispanic Interest Coal. of Alabama*, students sent to GNETS are traditionally subject to discrimination. *Compare Plyler*, 457 U.S. at 218–19 (noting "the specter of a permanent caste of undocumented resident aliens . . . denied the benefits that our society makes available to citizens and lawful residents") *with Ass'n for Disabled Americans, Inc.*, 405 F.3d at 959 (noting "the long history of state discrimination against students with disabilities"). The GNETS students' vulnerability is compounded because they are disproportionately low-income and members of minority groups. Compl. ¶¶ 3, 81-82.

The GNETS program, like the statute at issue in *Hispanic Interest Coal. of Alabama*, also "operates in such a way that it 'significantly interferes with the exercise of' the right to an elementary public education as guaranteed by *Plyler*." *Hispanic Interest Coal. of Ala.*, 691 F.3d at 1245 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978)). The interference here is direct: GNETS operates to divert children with disabilities out of the public school system and into a segregated system of non-school programs.[7] *See, e.g.*, Compl. ¶¶ 1, 5, 7, 89-97.

[7] GNETS facilities are not schools. *See, e.g.*, FY2018 GNETS Program Frequently Asked Questions, attached as Exhibit C, at 2.

This segregation is, on its own, actionable discrimination. *See, e.g.*, *Brown*, 347 U.S. at 495 ("Separate educational facilities are inherently unequal."). But here, the State's segregated system also lacks the basic services citizens expect from schools. For example, GNETS students are not taught the required statewide curriculum, and are often taught by uncertified instructors. Compl. ¶¶ 99-102. Indeed, many students consigned to GNETS are "taught" by computers rather than by a teacher, and receive instruction that is not designed to help them become proficient in the subjects they are supposed to learn. *Id.* ¶¶ 103, 137. GNETS students lack access to basic programs and activities their public school counterparts take for granted, such as elective courses, extracurricular activities, tutoring, leadership and honors programs, foreign language, art and music classes, vocational training, physical education, dances, proms, and sports. *Id.* ¶ 104. Not surprisingly, only 10 percent of GNETS students graduate, as opposed to 78 percent of students in Georgia's public schools. *Id.* ¶ 107.

In short, the Complaint alleges that the State segregates students with behavioral disabilities from the public school system and shunts them into a system of institutions that provide (at best) an education well below the standard provided to non-disabled students, or (at worst) no education at all. This strikes at the core of the Equal Protection Clause. As the Supreme Court explained in *Plyler*:

> In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.

Plyler, 457 U.S. at 221–22. Accordingly, to survive Plaintiffs' equal protection challenge, the State must prove that GNETS furthers a substantial state interest. *Hispanic Interest Coal. of Ala.*, 691 F.3d at 1245.

B. The State Has Neither A Substantial State Interest In, Nor Even A Rational Basis For, Segregating Students In GNETS.

The State's proffered rationale for GNETS is as follows: "Without the GNETS program, these students would be served in the isolating residential placement setting." D. Memo at 23. The State cites no evidence for that proposition. Nor could it, as the statement is obvious hyperbole – it assumes that the *only* alternative to operating GNETS is sending every student currently assigned there to a residential program, even though Georgia's fellow states educate the equivalent student population in local schools with needed services and supports. *See* Compl. ¶ 87. The State thereby ignores the Complaint's premise: students placed in GNETS do not need to be there, and if the State dispersed the funding currently concentrated in GNETS to school districts, those students could

remain in their schools and receive a far better education. *Id.* ¶¶ 9-11, 112-117.

As an afterthought, the State adds that "[o]ther legitimate reasons support the existence of the GNETS program, including specially trained staff, additional services, and specially tailored curricula." *See* D. Memo at 23. In fact, GNETS staff have less training, use harsh and ineffective techniques, and are often replaced by computers. Compl. ¶¶ 8, 102-103, 109-111, 137. GNETS programs also provide *fewer* education services than do schools, operate in second-rate facilities, and have an inadequate curriculum. Compl. ¶¶ 6-7, 93-97, 100-101, 103-105, 108.

In short, GNETS provides a substandard education to a disadvantaged group of students that need more, not less, educational support. This is irrational on its face, and it is unjustified by any substantial state interest – except, perhaps, a misplaced assumption that the State can save money through consolidation and segregation. But even if it were cheaper for the State to segregate students with behavioral disabilities in GNETS,[8] "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources . . . . The State must do more than justify its classification with a concise expression of an intention to discriminate." *Plyler*, 457 U.S. at 227.

[8] Plaintiffs expect that discovery will show that segregation in GNETS is actually *more* expensive than non-segregated alternatives.

V. The Proposed Injunction Is Permissible Relief In The Eleventh Circuit

Finally, the State argues that the injunction Plaintiffs seek is simply a request that the Court order the State to "obey the law," a remedy that is not available in the Eleventh Circuit. *See* D. Memo at 25. The State is incorrect. The declaratory and injunctive relief sought here is designed to ensure that children with disabilities receive the educational services necessary to ensure them equal opportunity in integrated classrooms. This relief is not an "obey the law" injunction. *See, e.g., Florida PIRG v. E.P.A.*, 386 F.3d 1070, 1083-85 (11th Cir. 2004). Further, the State's argument is not supported by *Elend v. Basham*, 471 F.3d 1199, 1208-09 (11th Cir. 2006). In *Elend*, the court affirmed the dismissal of vague claims of impermissible First Amendment restrictions, but distinguished cases involving a "concrete, ongoing injury" and "a credible threat that the injury would be repeated." *Id*. at 1208-09. Here, Plaintiffs have alleged a "concrete, ongoing injury" – discrimination by the State against thousands of students through segregation in GNETS, a network of separate and unequal institutions.

CONCLUSION

For these reasons, the Court should deny Defendants' Motion.

Respectfully submitted,

Dated: February 7, 2018

By: */s/Christopher G. Campbell*

Christopher G. Campbell
Georgia Bar No. 789533
DLA PIPER LLP (US)
One Atlantic Center
1201 W. Peachtree Street, Ste 2800
Atlanta, Georgia 30309-3450
404-736-7800
christopher.campbell@dlapiper.com

Jessica C. Wilson
Georgia Bar No. 231406
Matthew J. Iverson
Admitted Pro Hac Vice
DLA PIPER LLP (US)
33 Arch Street, 26th Flr
Boston, MA 02110
617-406-6000
jessica.wilson@dlapiper.com
matthew.iverson@dlapiper.com

Ryan S. Macpherson
Admitted Pro Hac Vice
DLA PIPER LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101-4297
619-699-2700
ryan.macpherson@dlapiper.com

Craig Goodmark
Georgia Bar No. 301428
GOODMARK LAW FIRM
1 West Court Square
Decatur, GA 30030
404-719-4848
cgoodmark@gmail.com

Alison Barkoff
Admitted Pro Hac Vice
Anna Krieger
Pro Hac Vice Pending
CENTER FOR PUBLIC REPRESENTATION
1825 K Street, N.W. Suite 600
Washington, D.C. 20006
202-854-1270
abarkoff@cpr-us.org
akrieger@cpr-ma.org

Ira A. Burnim
Admitted Pro Hac Vice
Mark J. Murphy
Admitted Pro Hac Vice
Maura M. Klugman
Admitted Pro Hac Vice
BAZELON CENTER FOR MENTAL HEALTH LAW
1101 15th Street, N.W., Ste 1212
Washington, D.C. 20005
202-467-5730
irabster@gmail.com
markm@bazelon.org
maurak@bazelon.org

Devon Orland
Georgia Bar No. 554301
Leslie Lipson
Georgia Bar No. 648918
GEORGIA ADVOCACY OFFICE
1 West Court Square
Decatur, GA 30030
404-885-1234
dorland@thegao.org
llipson@thegao.org

Counsel for Plaintiffs The Georgia Advocacy Office, The Arc of the United States, R.F., C.S., and Q.H.

Shira Wakschlag
Admitted Pro Hac Vice
THE ARC OF THE UNITED STATES
1825 K Street, N.W., Suite 1200
Washington, D.C. 20006
202-534-3708
wakschlag@thearc.org

Counsel for Plaintiff The Arc of the United States

CERTIFICATE OF COMPLIANCE

Pursuant to Northern District of Georgia Local Rule 7.1D, the undersigned counsel for Defendant hereby certifies that the foregoing brief is a computer document prepared in Times New Roman 14 point font in accordance with Local Rule 5.1B.

/s/Christopher G. Campbell
Christopher G. Campbell
Georgia Bar No. 789533

CERTIFICATE OF SERVICE

I certify that I have this day electronically filed this document with the Clerk of the District Court using the CM/ECF System, which sends notification of such filing to all attorneys of record, and I hereby certify that I have mailed the afore-mentioned documents via the United States Postal Service to the non-CM/ECF participants, if any, indicated on the Electronic Mail Notice list.

/s/Christopher G. Campbell
Christopher G. Campbell
Georgia Bar No. 789533

EAST\151169070.1