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' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Almost three years after Plaintiffs filed their Complaint, the State is, once again, attempting to challenge it.[1] The State launched this second effort even though there have been no material changes in the procedural posture or facts of this case since the Court issued its March 19, 2020 Order (the "Order,") (Dkt. No. 77) denying the State's Motion to Dismiss. Indeed, this Court has already held that the Complaint states claims against the proper parties and seeks proper injunctive relief (Order at 6-20, 33-35). The Court also held that Plaintiffs have a valid claim

[1] This Opposition references the Complaint (Dkt. No. 1) as "Compl. ¶ __," and Defendants' Brief in Support of their Motion for Judgment on the Pleadings as "D. Br. at __." As in Defendants' Brief, this Opposition refers to Defendants, collectively, as the "State."

under the Fourteenth Amendment to the United States Constitution and need not exhaust their remedies under the IDEA (Order at 26-33). Nevertheless, in the apparent belief that the Court needs to spend more time considering these issues, the State has reconfigured its arguments and submitted them again. As set forth below, not only is this procedurally improper, but the State's repackaged arguments still fail on the merits. To summarize:

- Plaintiffs have standing because this Court has already held that the Complaint alleges a causal connection between the State's actions and Plaintiffs' injuries;
- The Eleventh Amendment to the United States Constitution is no bar to this Court's jurisdiction because the Complaint seeks a prospective injunction requiring state officials to comply with federal – not state – law;
- The Complaint does state valid claims against the Department of Behavioral Health and Developmental Disabilities ("DBHDD") and the Department of Community Health ("DCH");
- The State has no substantial state interest in segregating students in GNETS because the real alternative to doing so is not residential placement, as the State (without evidence) suggests, but appropriately educating those students in their local schools;
- The State once again mischaracterizes the relief the Complaint seeks, relief which this Court correctly described in its Order; and
- Plaintiffs need not exhaust administrative remedies for the reasons this Court stated in the Order.

FACTUAL BACKGROUND

The history of the GNETS program, its segregated nature, and the damage that it does to students are summarized on pages 2-3 of Plaintiffs' Opposition to the State's Motion to Dismiss (Dkt. No. 48). Plaintiffs incorporate that summary by reference.

PROCEDURAL BACKGROUND

On October 11, 2017, Plaintiffs filed a class action complaint alleging that the State's GNETS program violates Title II of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act of 1973, and the Fourteenth Amendment to the United States Constitution by segregating students with disability-related behaviors in a network of unequal and separate institutions and classrooms. Compl. ¶ 1. The State moved to dismiss the Complaint on January 8, 2018, and Plaintiffs filed an Opposition to the State's Motion to Dismiss on February 7, 2018. Oral arguments on the Motion to Dismiss took place on June 25, 2019, and Plaintiffs subsequently filed a Supplementary Brief in Opposition to that Motion on July 12, 2019. On March 19, 2020, the Court issued the Order denying the Motion to Dismiss in its entirety. In the months following that denial, the State filed an Answer, and the parties filed a joint preliminary report and

discovery plan and exchanged initial disclosures. The State filed the instant motion on August 14, 2020.

LEGAL STANDARD

Ordinarily, a motion for judgment on the pleadings is governed by the same standard as a motion to dismiss. *King v. Akima Glob. Servs., LLC*, 775 F. App'x 617, 620 (11th Cir. 2019) (citing *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1350 (11th Cir. 2018). Accordingly, this Court must "take the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiffs." *Edwards v. Prime Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010). But the State has already tried and failed to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). As nothing in the State's current Motion turns on the Answer or any other post-Answer pleading, what the State has styled as a "Motion for Judgment on the Pleadings" is really just a Motion for Reconsideration.

Viewed in this light, the legal standard changes. "A motion for reconsideration may not be used 'to present the court with arguments already heard and dismissed or to repackage familiar arguments to test whether the court will change its mind.'" *Monroe Cnty. Emps.' Ret. Sys. v. S. Co.*, 333 F. Supp. 3d 1315, 1321 (N.D. Ga. 2018) (Cohen, J.), quoting *Bryan v. Murphy*, 246 F. Supp. 2d 1256, 1258-59 (N.D. Ga. 2003). "Nor may it be used 'to offer new legal theories or

evidence that could have been presented in conjunction with the previously filed motion or response, unless a reason is given for failing to raise the issue at an earlier stage in the litigation.'" *Id.*, quoting *Adler v. Wallace Comput. Servs., Inc.*, 202 F.R.D. 666, 675 (N.D. Ga. 2001). "If a party presents a motion for reconsideration under any of these circumstances, the motion must be denied." *Id.*, quoting *Bryan*, 246 F. Supp. 2d at 1259. *See also King v. Farris*, 357 Fed. App'x 223, 225 (11th Cir. 2009), quoting *Calle v. U.S. Att'y Gen.*, 504 F.3d 1324, 1329 (11th Cir. 2007) ("a motion that merely republishes the reasons that had failed to convince the tribunal in the first place gives the tribunal no reason to change its mind." (quotations omitted)).

ARGUMENT

Part I of this Opposition explains why Civil Local Rule 7.2(E) bars most of the State's arguments. Part II explains why the State's arguments also fail on the merits.

I. THE STATE'S MOTION IS UNNECESSARY AND UNTIMELY

Civil Local Rule 7.2(E) states that:

> Motions for reconsideration shall not be filed as a matter of routine practice. Whenever a party or attorney for a party believes it is absolutely necessary to file a motion to reconsider an order or judgment, the motion shall be filed with the clerk of court within twenty-eight (28) days after entry of the order or judgment.

In contravention of this Rule, the State waited almost five months after the Order was issued before seeking to revisit the Court's holdings and made no attempt to explain why its Motion is "absolutely necessary." And it is not. The State could have made the arguments contained in the Motion within the requisite time period, or they could have waited until summary judgment and made the same arguments with the benefit of a full discovery record. The Court can and should deny the Motion on this ground alone. *See Lattimore v. Wells Fargo Bank, N.A.*, No. 1:12-CV-1776-CAP-JSA, 2014 WL 11858150, at *1 (N.D. Ga. May 6, 2014) (Pannell, J.) (denying motion to reconsider for failure to comply with LR 7.2(E)).

II. THE STATE'S ARGUMENTS FAIL ON THE MERITS (AGAIN)

A. Plaintiffs Have Standing Because There Is A Causal Connection Between The State's Actions And Plaintiffs' Injuries.

The State first argues that Plaintiffs lack standing to bring their claims because, it claims, local education agencies ("LEAs") make the decisions that place students in GNETS. D. Brief at 13. This is a new take on the State's first attempt to deny responsibility for the harms that GNETS inflicts by suggesting that the LEAs, and not the State, administer GNETS. *See* Order at 20. This new argument ostensibly rests on the recent decision in *Jacobson v. Florida Secretary of State*, 957 F.3d 1193 (11th Cir. 2020), *vacated and superseded*, 2020 WL

5289377 (11th Cir. Sept. 3, 2020),[2] in which the Eleventh Circuit held that voters lacked standing to sue Florida's Secretary of State over injuries allegedly caused by the structuring of election ballots, because "any injury from ballot order is not traceable to the Secretary…." *Jacobson*, 957 F.3d at 1207.

The State exaggerates *Jacobson's* significance. The decision did not announce a new rule of law or otherwise take any action that would justify a second challenge to the adequacy of the Complaint. *Jacobson* did nothing more than apply the well-established standing test to the specific facts of that case, in which the Eleventh Circuit concluded that (1) the *Jacobson* plaintiffs could not show an injury in fact; and (2) any plaintiffs' injuries were not traceable to actions taken by the *Jacobson* defendants. *Id.* at 1201.

Nevertheless, the State's repackaged argument distills to this:

1. The discrimination alleged in the Complaint occurs after IEP teams place students in GNETS, where those students are isolated and stigmatized.

2. LEAs, and not the State, control the IEP teams and therefore the placement decisions.

3. This case is like *Jacobson* because there is nothing the State can do to alter these placement decisions.

[2] The new panel opinion in *Jacobson* did not change the prior opinion's disposition of the standing issue. As the State filed its motion before the new opinion issued, in order to avoid confusion, Plaintiffs will cite to the first panel opinion.

D. Br. at 13; *see also* D. Br. at 2 ("Applied here, the State Defendants cannot redress independent acts of the non-party [LEAs] and Regional Educational Service Agencies ("RESAs")).

The obvious answer, of course, is the same one this Court already gave in response to the State's initial take on this argument: Even if the State cannot influence student placement decisions (which is not true, as explained below), the State **can** influence the isolating and stigmatizing impact caused by unnecessary segregation in GNETS. *See* Order at 18 ("Plaintiffs allege that the State School Superintendent "is responsible for . . . developing rules and procedures regulating the operation of the GNETS grant" and "monitoring GNETS to ensure compliance with Federal and state policies, procedures, rules and the delivery of appropriate instructional and therapeutic services."); *id*. at 20 ("Plaintiffs have alleged the State had a role in the management and direction of GNETS"). *See also United States v. Georgia*, 2020 WL 3496783, at *4 (N.D. Ga. May 13, 2020) ("Defendant ignores the possibility that state and local governments may exercise joint control and management over GNETS").[3] As this Court noted in the Order, these allegations

[3] *United States of America v. Georgia*, Civil Action No. 1:16-CV-03088-ELR (the "DOJ Action"), is the GNETS-related case before Judge Ross that is a subject of Plaintiffs' Motion to Consolidate Cases (Dkt. No. 93). On May 13, 2020, Judge Ross denied the Motion to Dismiss in that case and allowed the Department of

establish a "causal connection" between the State and the harms suffered by the Plaintiffs, and thus are sufficient to meet Article III's standing requirement. Order at 20. *See also id.* at 14 n.3 (noting that "Article III standing requires 'a causal connection between the injury and the conduct complained of,'" quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). *Accord Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019) ("Article III 'requires no more than *de facto* causality,'" quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.). These allegations also distinguish this case from *Jacobson* – where no causal connection existed between Florida's Secretary of State and the alleged injury – because here Plaintiffs have plausibly alleged that State has done and continues to do something that "contributed to [their] harm." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (en banc).[4]

Put another way, this Court has already ruled that Plaintiffs have alleged facts that, if true, demonstrate that the State administers the GNETS program,

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Justice to proceed with its ADA claim for substantially the same reasons that this Court has allowed Plaintiffs to proceed on their ADA and Section 504 claims. *See* 2020 WL 3496783. On August 7, 2020, the State filed a Motion for Judgement on the Pleadings, also relying on *Jacobson*, in the DOJ Action. *See* Civil Action No. 1:16-CV-03088-ELR, Dkt. No. 78.

[4] In *Jacobson*, the Eleventh Circuit addressed the standing question in the wake of a trial and with the benefit of fact finding. *See Jacobson*, 957 F.3d at 1199. In this case, the Court must assume that the Complaint's allegations are true.

whose stigmatizing and isolating nature violates Plaintiffs' rights under Title II, Section 504, and the Equal Protection Clause. *See* Order at 17-20; 20-25; 30-33. Accordingly, even if it were true that the State lacks influence over the decisions that place students in GNETS, it still has at least some responsibility for the harms caused by unnecessary GNETS segregation. This is enough. After all, "[a] defendant need not be the 'sole source' of harm, nor must a plaintiff 'eliminate any other contributing causes to establish its standing.'" *J.N. v. Or. Dep't of Educ.*, 2020 WL 5209846, at *9 (D. Or. Sept. 1, 2020), quoting *Barnum Timber Co. v. E.P.A.*, 633 F.3d 894, 901 (9th Cir. 2011); *see also Dep't of Com.*, 139 S. Ct. at 2565-66 (rejecting standing defense based on claim that "harm to [plaintiffs] is not fairly traceable to [defendant's] decision, because such harm depends on the independent action of third parties choosing to violate their legal duty").

Finally, the Court should note that the Complaint does allege that the State's policies influence IEP placement decisions. Paragraph 10 of the Complaint states:

> By maintaining and funding GNETS separate and apart from local school districts, the State has created a system in which a GNETS referral is the most convenient, and, in many school districts, the only option for students with disability-related behavioral needs.

Likewise, paragraph 11 of the Complaint alleges:

> The State does not provide local school districts necessary funding to provide needed disability-related behavioral services in zoned schools. As a result of the State's decision to consolidate 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.

If the Court accepts these allegations as true (as it must at this stage of the litigation), then Plaintiffs meet the requirements for Article III standing even if one focuses exclusively on GNETS placement decisions, as they have (1) incurred an injury in fact that (2) is fairly traceable to the challenged action of the State, and (3) is likely to be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61; *Jacobson*, 957 F.3d at 1201. The Court should, therefore, reject the State's repackaged attempt to deny any role in the harms caused by the GNETS program.

B. The Complaint Falls Within The *Ex Parte Young* Exception To The Eleventh Amendment Because It Seeks To Enforce Federal – Not State – Law Against A State Official.

The State next contends that the Eleventh Amendment bars Counts I and II of the Complaint because: (1) in the wake of the Order, "to state a claim for violation of federal law, the State must be misapplying and/or violating State constitutional and statutory law," D. Br. at 3, and (2) the Supreme Court's decision in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), holds that federal courts lack jurisdiction to enforce state law against state officials. This argument demonstrates a fundamental misunderstanding of Eleventh Amendment jurisprudence, *Pennhurst*, and the Order.

Eleventh Amendment jurisprudence is settled. Generally, the Eleventh Amendment bars an action against a state in federal court unless there has been a waiver by the state or valid congressional override. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985).[5] However, it has long been established that federal courts can, pursuant to the "*Ex parte Young* exception," impose prospective injunctions against state officials who violate federal law without running afoul of the Eleventh Amendment. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908).

As the Eleventh Circuit has explained, "[t]he test for determining whether a suit fits within *Ex parte Young*'s exception is typically 'straightforward,' asking only whether the 'complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Curling v. Sec'y of Ga.*, 761 F. App'x 927, 931 (11th Cir. 2019), quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Accordingly, "[a]s long as the plaintiff alleges ongoing violations of federal law and seeks injunctive or declaratory relief, or both, against state officials in their official capacity, plaintiffs usually face no hurdles in clearing *Ex parte Young*." *Id.* It is beyond question that Counts I and II fall within the *Ex*

[5] Abrogation of Eleventh Amendment immunity can occur pursuant to Spending Clause legislation. *Smith v. Allen*, 502 F.3d 1255, 1273 (11th Cir. 2007). Congress may also abrogate immunity for the purpose of deterring or preventing conduct that violates the Fourteenth Amendment. *Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

parte Young exception, as they allege an ongoing violation of federal law and seek prospective injunctive relief. *See* Complaint at 42-45, 47.

Notwithstanding the clarity of the law on this point, the State argues that the Supreme Court's holding in *Pennhurst* bars relief in this case. It does not. The question in *Pennhurst* was whether the Eleventh Amendment prohibited a federal court from adjudicating a state law claim against state officials when that state law claim was pendant to a federal law claim. *See Pennhurst*, 465 U.S. at 103 ("we now turn to the question whether the claim that petitioners violated *state law* in carrying out their official duties at Pennhurst is one against the State and therefore barred by the Eleventh Amendment," emphasis in original); *see also id.* at 121 ("[A] claim that state officials violated state law . . . is a claim against the State that is protected by the Eleventh Amendment. . . . [T]his principal applies as well to state-law claims brought into federal court under pendent jurisdiction."). Nothing in *Pennhurst* suggests that the Eleventh Amendment somehow deprives federal courts of jurisdiction to enforce federal law against state officials whose actions may also violate state law. Such a rule would put state officials who violate both state and federal law entirely beyond the reach of federal courts, a result that would fly in the face of *Pennhurst's* admonition that "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and

hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst*, 465 U.S. at 105, quoting *Ex Parte Young*, 209 U.S. at 105.

The State apparently believes that, because this Court read the Complaint to allege that it "may have exercised control over GNETS in a way that went beyond a strict reading of the statutory structure," Order at 18, that somehow converted Plaintiffs' ADA and Rehabilitation Act claims into claims to enforce some unspecified state law. This is nonsense – nothing in the Complaint seeks relief pursuant to any state statute or regulation, and nothing in the Order suggests that this Court found a hidden state law claim buried within the Complaint's allegations. And even if this Court had inferred that state officials must violate state law in order to violate the ADA or Rehabilitation Act in this case, that inference would be irrelevant to the Eleventh Amendment inquiry because the Supreme Court has held that "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 646 (2002).[6]

[6] The State appears to rest its argument on the fact that both the *Pennhurst* decision and the Order use the term *ultra vires*, *see* Mot. at 3-4, even though each usage appears in a different context. The *Pennhurst* majority uses the term in its discussion of Justice Stevens' dissent, criticizing Justice Stevens' belief that the *Ex parte Young* exception ought to apply whenever a state official exceeds his or her authority under state law. *See Pennhurst*, 465 U.S. 106. This Court, however, used the term in the portion of the Order discussing how the State may have

In short, regardless of whether state officials happen to have exceeded their authority under state law, it is beyond question that the Complaint asserts only claims for violations of federal law and seeks only prospective injunctive relief. Accordingly, pursuant to the *Ex parte Young* exception, the Eleventh Amendment does not deprive this Court of jurisdiction. *See Curling*, 761 F. App'x at 931.

C. The Complaint Still States Claims Against DBHDD and DCH.

The State's third argument – which it could have, but did not, raise in its prior motion – seeks to dismiss the claims against Defendants DBHDD and DCH because, according to the State, the Complaint "allege[s] that the two departments do nothing more than fund a program . . . ." D. Br. at 18-19. This is not true. Paragraph 45 of the Complaint alleges:

> [DBHDD] has the statutory responsibility for "planning, developing, and implementing the coordinated system of care for [children with severe emotional disabilities]," including students in GNETS. O.C.G.A. § 49-5-220(b). State law also requires Defendant DBHDD to work with Defendant GDOE to provide an appropriate education for youth with severe emotional disturbances.

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administered GNETS by stepping into the gap created by ambiguous GNETS regulations. *See* Order at 18-19. That discussion, however, took place within the Court's analysis of Plaintiffs' liability under federal law. *See id.* at 6 (discussing GNETS administration as necessary component of ADA and Rehabilitation Act liability). In addition, the Court never suggested that Plaintiffs must prove that state officials engaged in *ultra vires* behavior in order to hold the State liable. As the Court pointed out, the State may still be liable for violating the ADA even if it does not administer GNETS. *See* Order at 8 n.2. *See also* infra Part II(C).

Paragraph 51 of the Complaint alleges:

> [DCH] administers Georgia's Medicaid and Peach Care for Kids programs, which provide funding to and are integral to the coordinated system of care for children with significant mental health needs required by Georgia law. These programs are also a substantial source of funding for services provided through GNETS.

Moreover, although these entities are involved in GNETS funding decisions, the Complaint alleges that both make those decisions in a manner that inhibits local school districts from providing services to students with disabilities in their local schools. *See* Compl. ¶¶ 48, 53. This, in turn, encourages segregation in substandard GNETS institutions. *See id.* ¶¶ 9-11. Even if these funding policies do not amount to the "administration" of GNETS, they still violate the ADA by:

> …denying Plaintiffs the opportunity to participate in and benefit from educational services equal to that afforded other students in violation of 28 C.F.R. § 35.130(b)(1)(ii) and by denying Plaintiffs services that are as effective in affording equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement as that provided to other students in violation of 29 C.F.R. § 35.130(b)(1)(iii).

Order at 8 n.2. As this Court explained in the same footnote, these are alternative theories of liability and therefore alternative grounds for refusing to dismiss Defendants DBHDD and DCH.

D. The State Does Not Have A Substantial State Interest In Segregating Disabled Children In A Substandard System

In a blatant attempt to reargue an issue this Court already settled, the State now claims that it has a substantial state interest in segregating children with disability-related behavioral issues and giving them a substandard education in GNETS. D. Br. at 20. The Court specifically noted that the State did not make this argument in support of their motion to dismiss. Order at 33 ("[t]he State only attempts to defend GNETS under a rational basis theory"). This is dispositive. *See Monroe Cnty. Emps.' Ret. Sys.*, 333 F. Supp. 3d at 1321 (reconsideration improper to consider "new legal theories . . . that could have been presented in conjunction with the previously filed motion or response", quoting *Adler*, 202 F.R.D. at 675).

Nevertheless, Plaintiffs' argument on this issue in their opposition to the State's Motion to Dismiss remains on point:

> Defendants' proffered rationale for GNETS is as follows: "Without the GNETS program, these students would be served in the isolating residential placement setting." D. Mem. at 23. The State cites no evidence or authority for that proposition. Nor could it, as the statement is obvious hyperbole – it assumes that the *only* alternative to operating GNETS is the shipment of every student currently assigned to there to a residential program, even though Georgia's fellow states educate the equivalent student population in local schools with appropriate services and support. 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 local school districts, those students could

> remain in their zoned schools and receive a far better education. Compl. ¶¶ 9-11, 112-117.

Dkt. No. 48 at 23-24.

The State also argues, based on *Mencer v. Hammonds*, 134 F.3d 1066 (11th Cir. 1998), that the Equal Protection claim fails because the Complaint does not plead intentional discrimination. This is incorrect. Proof of discriminatory intent is required where, as in *Mencer*,[7] a plaintiff claims that a facially neutral policy has been implemented with an intent to discriminate. *See Johnson v. Governor of Fla.*, 405 F.3d 1214, 1222 (11th Cir. 2005) ("[a] facially-neutral law violates the Equal Protection Clause if adopted with the intent to discriminate"). This case, in contrast, involves a policy that discriminates on its face against students with disabilities. *See, e.g.,* Complaint ¶ 1. (Georgia "discriminates against thousands of Georgia public school students with disabilities . . . by segregating them in a network of unequal classrooms known as [GNETS]."). Where, as here, policies "facially single out the handicapped and apply different rules to them . . . the discriminatory intent and purpose of the [policies] are apparent on their face." *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir. 1995). In these circumstances, "[a] facially discriminatory policy is dispositive evidence of

[7] *Mencer* involved a claim that a former teacher had been denied promotion on account of her race and sex. *See id.* at 1067.

intentional discrimination" and "'a plaintiff need not otherwise establish the presence of discriminatory intent' with other evidence." *Rodriguez v. Procter & Gamble Co.*, No. 17-22652-CIV, 2020 WL 3103912, at *12 (S.D. Fla. June 10, 2020), quoting *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000). In short, the State's second attempt to dismiss Plaintiffs' Equal Protection claim fares no better than its first.

E. There Is Still Nothing Wrong With The Requested Relief

The State's next argument attacks, for the second time, the nature of the injunctive relief Plaintiffs seek – although this time the State's argument is the polar opposite of the one it deployed initially. In its Motion to Dismiss, the State argued that the relief sought was too vague, asking for what the State characterized as an "obey the law injunction." *See* Order at 33-36. This Court rejected the State's characterization, pointing out that the Complaint seeks "the services necessary to ensure Plaintiffs equal educational opportunity in classrooms with their non-disabled peers." Order at 35; *see also* Compl. at 47.

Now the State attacks this request for relief as too specific, characterizing it as a request for "the Court to eliminate the GNETS intermediate placement, to require all students to be served in 'regular' classrooms, and to require the general education classroom to be located in the students' neighborhood schools." D. Br.

at 21. Whatever the merits of the goals the State attributes to this lawsuit, the Court correctly described the actual relief Plaintiffs seek, and there is nothing unusual about orders requiring state entities to comply with the ADA by providing appropriate services in a non-segregated context. *See, e.g., United States v. Mississippi*, 400 F. Supp. 3d 546, 578-79 (S.D. Miss. 2019); *Lane v. Brown*, 166 F. Supp.3d 1180, 1187 (D. Or. 2016); *United States v. New York & O'Toole v. Cuomo*, 2014 WL 1028982, *2-3 (E.D.N.Y 2014). There are, in short, no grounds for dismissing the Complaint based on the relief it seeks.

F. Plaintiffs Still Do Not Need To Exhaust Administrative Remedies

This Court properly relied on controlling precedent – *J.S., III by & through J.S. Jr. v. Houston Cnty. Bd. of Educ.*, 877 F.3d 979 (11th Cir. 2017) – to hold that "[s]ince stigmatization is the gravamen of the complaint, Plaintiffs did not have to exhaust their remedies under the IDEA." Order at 30. The State now asks the Court to reconsider that decision, citing as authority *Parent/Professional Advocacy League v. City of Springfield, Massachusetts*, 934 F.3d 13 (1st Cir. 2019), a case that is over a year old and that the State "admittedly did not raise during the pendency of the Court's consideration on the Motion to Dismiss."[8] D. Br. at 23. Once again, this latter fact alone forecloses relief. *See, e.g., Monroe Cnty. Emps.'*

[8] The First Circuit decided *Springfield* in August 2019, more than seven months before this Court issued the Order.

Ret. Sys., 333 F. Supp. 3d at 1321 (reconsideration improper when used to offer new legal theories that could have been presented in conjunction with the previously filed motion absent reason for failing to timely raise issue).[9]

Moreover, even if the State had referenced *Springfield* in a timely fashion, it would not impact this Court's decision, for three reasons. First, *J.S.*, unlike *Springfield*, is binding precedent. Second, this Court's decision that exhaustion is not required is in accord with Judge Ross's interpretation of *J.S.* in her decision in the parallel action involving the DOJ. See *United States v. Georgia*, 2020 WL 3496783, at *8 n.5 (noting facts of *J.S.* are analogous to those in DOJ Action). Third, the Plaintiff Class seeks systemic relief that cannot be achieved through the IDEA's administrative procedures, Complaint ¶ 18, and the Eleventh Circuit recognizes that exhaustion may be excused where, as here, it would be futile or inadequate. *See N.B. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir.

[9] The State also invites the Court to pick apart the Complaint and hold that Plaintiffs must exhaust before making certain allegations or requesting certain forms of relief. *See* D. Br. at 24. This is not how exhaustion works. "In the context of determining whether a claim under Title II or § 504 seeks relief that is also available under the IDEA and is therefore also subject to the IDEA's exhaustion requirement, the Supreme Court has stated that '[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 (emphasis added), quoting *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017). This Court has already held that stigmatization is the crux of Plaintiffs' Complaint, and that holding is dispositive.

1996); *accord Honig v. Doe*, 484 U.S. 305, 327 (1988) ("parents may bypass the [IDEA] administrative process where exhaustion would be futile or inadequate").[10] The Court should, therefore, for the second time, reject the State's contention that exhaustion is required.

CONCLUSION

For these reasons, the Court should deny the State's Motion.

[10] Numerous courts have found exhaustion to be futile when plaintiffs allege systemic violations through class claims that cannot be remedied through relief provided in administrative proceedings. *See, e.g., J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 113-15 (2d Cir. 2004) (excusing exhaustion as futile in IDEA cases involving "allegations of systemic violations" where "the hearing officer has no power to correct the violation"); *Beth V. by Yvonne V. v. Carroll*, 87 F.3d 80, 89 (3d Cir. 1996) (excusing exhaustion as futile where plaintiffs "allege systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process"); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 756-57 (2d Cir. 1987) (excusing exhaustion in IDEA cases "alleging systemic violations"); *G.T. v. Kanawha County Schools*, 2020 WL 4018285, at *6 (S.D.W.Va. July 16, 2020) (excusing exhaustion as futile in IDEA case when allegations are "structural in nature" and plaintiffs seek "structural relief"). In fact, named Plaintiff *R.F.* has exhausted his administrative remedies, Complaint ¶ 133, and was unable to get the systemic relief Plaintiffs seek in this case through the administrative process.

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Respectfully submitted,

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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.

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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.

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