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

SUPPLEMENTARY BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS[1]

This brief addresses three issues raised during oral argument on Defendants' Motion.

Section I addresses, with reference to the Complaint's allegations and additional allegations that Plaintiffs can plead if the Court deems it necessary, Defendants' role in administering GNETS. It explains why, even if this Court were to accept Defendants' narrow interpretation of Title II's implementing regulations (an interpretation rejected by both the DOJ and other federal courts),

[1] Unless otherwise defined, this brief uses the same defined terms as Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss (the "Opposition").

the Defendants are *still* liable for GNETS' failings because their involvement with GNETS meets Defendants' definition of "administration."

Section II explains why Defendants are liable for GNETS' failings *regardless* of whether they or the LEAs administer GNETS, because the State, as a public entity that receives federal funding, has an affirmative obligation to ensure that its delegates, including LEAs, comply with federal anti-discrimination laws.

Finally, Section III addresses Defendants' contention, raised at oral argument, that they should be absolved of liability because Defendant GBOE has enacted regulations that (Defendants claim) *would* address the harms alleged in the Complaint *if* the State were to properly implement them and *if* the LEAs were to properly follow them. It is axiomatic that a defendant cannot prevail on a motion to dismiss simply by asserting, without fact-finding or even an offer of proof, that the facts alleged by the Plaintiffs are no longer true.

I. THE STATE "ADMINISTERS" GNETS UNDER ANY DEFINITION OF THAT TERM.

Citing 28 C.F.R. § 35.130 and various dictionaries, Defendants argue that for the State to be liable for discrimination under Title II or Section 504, it must "administer"—which Defendants define as managing, being responsible for, or directing—the GNETS program. *See* Defs.' Mem. at 7. As set forth on pages 4-5 of the Opposition, this is incorrect, because both the DOJ and federal courts have

held that *indirect* operation of a program, for example by funding a program operated by a third-party, is sufficient to trigger liability.

However, even if Defendants were correct on this point, the Complaint would *still* state a claim against them, as it alleges numerous ways in which the State manages or directs the GNETS program—by developing rules and policies regarding the operations of GNETS, establishing the strategic plan for GNETS, monitoring GNETS' programs to ensure compliance with federal and state rules and regulations, maintaining GNETS' facilities, and training GNETS' staff. All of these facts—which are sufficient to support a plausible claim that the State "administers" GNETS—are alleged in Plaintiffs' Complaint:

- "Defendant Georgia Board of Education ('GBOE') operates GNETS by providing financial support, facilities, staff training, and other resources. Defendant GBOE enters into agreements with state and local agencies to provide educational and other services to GNETS students." *Id*. ¶ 40.
- Defendant Richard Woods, the State School Superintendent, "is responsible for, among other things, . . . 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*. ¶ 42 (quoting Ga. Comp. R. & Regs. § 160-4.7.15(5)(a)).
- "Defendants Woods and Fitzgerald are responsible for overseeing implementation of Defendant State of Georgia's Strategic Plan for GNETS." *Id*. ¶ 50.
- "GNETS is administered by the State through regional organizations." *Id*. ¶ 78.

- "The State funds, maintains, coordinates, and is generally responsible for the operations of GNETS." *Id*. ¶ 79.
- "State employees provide services to students in GNETS." *Id*. ¶ 80.
- "The State establishes the criteria for placing students in GNETS." *Id*. ¶ 85.
- "By creating and maintaining segregated educational placements, the State has allowed and encouraged local school districts to avoid educating and supporting students with disabilities." *Id*. ¶ 91.

At this stage, the Court must "accept[ ] the[se] factual allegations . . . as true and construe[ ] them in the light most favorable to [Plaintiffs]." *Speaker v. U.S. Dep't of Health & Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010). Accordingly, the Court should find that the Complaint, as drafted, states plausible claims for relief under Title II and Section 504. If the Court still believes that more is needed, Plaintiffs can, and will, add numerous additional allegations that establish beyond doubt that Defendants manage, are responsible for, and direct the GNETS program. A copy of those additional allegations are attached at Tab 1.

II. EVEN IF THE LEAS DO ADMINISTER GNETS, DEFENDANTS ARE STILL LEGALLY RESPONSIBLE FOR THE LEAS' DISCRIMINATORY ADMINISTRATION.

Defendants cannot evade liability in this litigation by hiding behind the LEAs. As described above, the State's role in GNETS—from making funding

decisions, to promulgating regulations and issuing an operations manual, to provide training to GNETS staff—is more than sufficient to show that Defendants directly "administer" GNETS in a manner that triggers ADA and Section 504 liability. However, even if the Court were to find otherwise, Defendants would remain liable for LEAs' compliance with the ADA and Section 504. This is because the State, as a public entity governed by Title II of the ADA and a recipient of federal funds governed by Section 504, has an affirmative obligation to ensure that its delegates, be they grantees, contractors, or local governmental entities, comply with federal civil rights laws.

A. Defendants, As Grantees Of Federal Funding, Are Liable For Ensuring That The LEAs Comply With Federal Law.

In addition to the constraints on discrimination imposed by the United States Constitution, Defendants are subject to contractual constraints imposed by their agreement to accept federal funds. In *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605-06 (1986), the Supreme Court held:

> Congress … sought to impose § 504 coverage as a form of contractual cost of the recipient's agreement to accept the federal funds…. Under the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision…. Congress imposes the obligation of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds.

Among these contractual constraints are prohibitions against states engaging in indirect discrimination, *i.e.* states using third parties to provide services in a way that would be illegal if the states provided the services directly. Section 504's implementing regulations prohibit recipients of federal financial assistance from engaging in disability-based discrimination and impose liability on such recipients whether they engage in the discriminatory behavior "directly or through contractual, licensing, or other arrangements, on the basis of handicap." 28 C.F.R. § 41.51(b)(1). Likewise, Title II's regulations state that public entities "providing any aid, benefit, or service" are prohibited from disability-based discrimination "directly or through contractual, licensing, or other arrangements." 28 C.F.R. § 35.130(b)(1). *See also* 28 C.F.R. § 35.130(b)(1)(v) (A public entity may not "[a]id or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program.").

Accordingly, courts addressing a state's liability for a delegate's activities have held that states that receive federal financial assistance are liable for ensuring that their delegates comply with federal civil rights laws, including Section 504 and Title II. *See, e.g.*, *Henrietta D. v. Bloomberg*, 331 F.3d 261, 286 (2d Cir.

2003) ("Here, in accepting federal funds, New York State has promised that its programs will comply with the mandate of [Section 504]. *See Paralyzed Veterans*, 477 U.S. at 605…. Therefore, under our contract analogy, New York State is also liable to guarantee that those it delegates to carry out its programs satisfy the terms of its promised performance, including compliance with [Section 504]."); *Castle v. Eurofresh, Inc.*, 731 F.3d 901, 910 (9th Cir. 2013) (discussing Title II and holding: "The law is clear—the State Defendants may not contract away their obligation to comply with federal discrimination laws.").[2]

[2] While Title II and Section 504 differ in which entities they cover—with the ADA governing the conduct of all state and local public entities regardless of their funding source and Section 504 limited to those entities receiving federal financial assistance—courts have made it clear that the two laws are largely identical and should be interpreted in tandem. *See, e.g.*, *Castle*, 731 F.3d at 908 ("The Rehabilitation Act is materially identical to and the model for the ADA, except that it is limited to programs that receive federal financial assistance."); *Henrietta D.*, 331 F.3d at 272 ("Although there are subtle differences between these disability acts, the standards adopted by Title II of the ADA for State and local government services are generally the same as those required under section 504 of federally assisted programs and activities…. Indeed, unless one of those subtle distinctions is pertinent to a particular case, we treat claims under the two statutes identically.") (internal citations and quotations omitted). *See also Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000) ("Discrimination claims under the Rehabilitation Act are governed by the same standards used in ADA cases.... Cases decided under the Rehabilitation Act are precedent for cases under the ADA, and vice-versa.").

In *Henrietta D.*, a case with circumstances analogous to those at issue here,[3] the Second Circuit Court of Appeals rejected an argument by a state defendant that New York had no obligation to "supervise the conduct of subsidiary governmental entities who are more directly delivering social services." *Henrietta D.*, 331 F.3d at 284. The Second Circuit held that "the ADA and the Rehabilitation Act make States liable for the failure of their delegates to comply with the requirements of the Acts," *id.* at 291, and it explained its conclusion in detail. That explanation, which bears directly on this case, was as follows:

[3] In *Henrietta D.*, city residents with AIDS and HIV-related illnesses brought a class action against New York City and State for violating Title II of the ADA and Section 504 of the Rehabilitation Act, among other laws, by failing to provide meaningful access to public assistance programs, benefits, and services. Specifically, the plaintiffs—clients of New York City's Division of AIDS Services and Income Support ("DASIS"), an agency whose sole function is to assist individuals with AIDS and HIV in obtaining public assistance benefits and services—alleged that the City and State violated federal law in failing to provide them with adequate access to public benefits because DASIS "is ineffective and systemically fails to achieve its goals." *Id*. at 265. In analyzing the state's liability, the Court laid out the structure of the state's public benefits program. The New York State Department of Social Services oversaw the statewide benefits system, but the programs were administered on a day-to-day basis by 58 local county districts, including New York City. *Id*. at 266. While the local agencies operated the benefits system, state law required the state agency to "supervise all social services work." *Id*. (internal citations omitted). *Cf.* GNETS State Board of Education rule 160-4-7-.15 § 5(a)(2)(iii) (the "GNETS Rule," copy attached as Exhibit A to Tab 1) (requiring Defendant GBOE to: "[m]onitor GNETS to ensure compliance with Federal and state policies, procedures, rules, and the delivery of appropriate instructional and therapeutic services").

It is true that the Rehabilitation Act on its face does not directly announce that participating states will be subject to supervisory liability. Indeed, the Rehabilitation Act does not directly describe *any* features of the means by which it is enforced; it does cross-reference, however, the judicially-implied private right of action under Title VI of the Civil Rights Act of 1964…. Where Congress has explicitly directed the courts to create and administer a private right of action, judicial determination of the rules governing the scope of liability is itself, in effect, a clear statement by Congress…. Put another way, a State that accepts funds under the Rehabilitation Act does so with the knowledge that the rules for supervisory liability will be subject to judicial determination.

In defining the contours of a judicially-administered right of action, "[o]ur task is…to infer how the [enacting] Congress would have addressed the issue had the…action been included as an express provision…." We begin with the observation that Spending Clause legislation is "much in the nature of a contract," and that its "contractual nature has implications for our construction of the scope of available remedies…." Accordingly, absent other evidence of Congress's intent, our initial presumption is that the rules of liability will follow general rules of contract.

The common law of contracts strongly suggests that the state defendant is liable to ensure that localities comply with the Rehabilitation Act in their delivery of federally-funded social services. An "obligor"—that is, one who promises performance in exchange for consideration—"cannot rid itself of a duty merely by making an effective delegation…." Thus, once a party has made a promise, it is responsible to the obligee to ensure that performance will be satisfactory, even if the promising party obtains some third party to carry out its promise….Here, in accepting federal funds, New York State has promised that its programs will comply with the mandate of the Rehabilitation Act….Therefore, under our contract analogy, New York State is also liable to guarantee that those it delegates to carry out its programs satisfy the terms of its promised performance, including compliance with the Rehabilitation Act.

> The Justice Department's interpretation of the Rehabilitation Act strongly supports this view. The regulations define a covered "recipient" to include not only the State, but also any of its "successor[s], assignee[s], or transferee[s]…." In explaining its parallel ADA regulation, the Department noted: "All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements…." Furthermore, as other courts have observed, the fact that the Department in its regulations directs its enforcement efforts at the State agency, and not the State's other agents…suggests that the Department believes the State has supervisory responsibilities….
>
> Moreover, a presumption that the State is responsible for guaranteeing that local entities delivering services comply with the Rehabilitation Act is consistent with Congress's practice in other Spending Clause legislation….
>
> We therefore conclude that Congress's intent would best be effectuated by imposing supervisory liability on the state defendant.

Id. at 285-87 (internal citations omitted).

Henrietta D. is not an outlier. For example, in *Armstrong v. Schwarzenegger*, 622 F.3d 1058 (9th Cir. 2010), the Ninth Circuit Court of Appeals held that California was "responsible for providing reasonable accommodations to the disabled prisoners and parolees that they house in county jails," *id.* at 1063, and could not "shirk their obligations to plaintiffs under federal law by housing them in facilities operated by the third-party counties.…[E]ven in the absence of a regulation explicitly saying so, a State cannot avoid its obligations

under federal law by contracting with a third party to perform its functions. The rights of individuals are not so ethereal nor so easily avoided." *Id.* at 1074. *See also Phillips v. Tiona*, 508 F. App'x 737, 753 (10th Cir. 2013) (under Title II regulations "states may not avoid the responsibility to provide services to disabled prisoners by contracting away those obligations….The remedy for violations of the regulation…is not to sue the jails for breach of contract under a third-party beneficiary theory, or for violations of the ADA, but to sue the state for failing to meet its own obligations under the ADA." *Armstrong*, 622 F.3d at 1069.).

Likewise, in *Castle v. Eurofresh, Inc.*, the Ninth Circuit held that the state could not avoid ADA and Section 504 liability by sending prison inmates to perform required labor at private companies, despite the State's argument that it "had no authority" over job placements, duties, or accommodations. *Castle*, 731 F.3d at 909-10. Here, the Court held: "Title II's obligations apply to public entities regardless of how those entities [choose] to provide or operate their programs and benefits.…The law is clear—the State Defendants may not contract away their obligation to comply with federal discrimination laws." *Id.* at 910. This understanding of ADA and Section 504 supervisory liability has been similarly articulated in numerous decisions in a variety of contexts by district courts finding

that the state cannot delegate away its responsibility to prevent discrimination under these laws.[4]

Finally, although the Eleventh Circuit has not addressed this precise issue, it has noted, in accord with *Henrietta D.*, that "Spending Clause legislation is analogous to a contract between the federal government and recipients of federal funds." *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 347 (11th Cir. 2012). *See also Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1191 (11th Cir. 2007) (noting the Supreme Court "has sometimes found it useful to analogize Spending Clause legislation to a contract in which the federal government provides money to recipients in exchange for their promise not to discriminate against third parties.").

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[4] *See, e.g., Hunter on behalf of A.H. v. D.C.*, 64 F. Supp. 3d 158, 170 (D.D.C. 2014) ("[T]he District has not presented any support for its argument that it has no obligation to ensure that its private contractors comply with its ADA and Rehabilitation Act obligations, and all courts to address the issue have found that they have such an obligation."); *Martin v. Taft*, 222 F. Supp. 2d 940, 981 (S.D. Ohio 2002) (ADA "liability does not hinge upon whether the setting in question is owned or run directly by the State."); *Deck v. City of Toledo*, 56 F. Supp. 2d 886, 894–95 (N.D. Ohio 1999) ("[T]he failure to supervise various contractors' compliance with the ADA can amount to a discriminatory system."); *Indep. Living Ctr. of S. California v. City of Los Angeles*, No. CV1200551SJOPJWX, 2012 WL 13036779, at *8 (C.D. Cal. Nov. 29, 2012) ("Congress has a strong interest in ensuring that federal funds are not used in a discriminatory manner.…[T]his 'strong interest' would be undermined if government entities could avoid liability by transferring funds to private parties.").

It is indisputable that the State is a public entity subject to Title II, as well as a recipient of federal financial assistance within the meaning of Section 504. *See, e.g.*, Complaint ¶¶ 41, 51, 163. Accordingly, even if one assumes (contrary to the Complaint's allegations) that Defendants merely fund GNETS while the LEAs operate it, the State would *still* liable for the LEAs' failure to comply with federal civil rights laws.

B. ***Bacon v. City Of Richmond*** **Is Inapposite Because The Defendant In *Bacon* Was Not A Federal Funding Recipient.**

As set forth in the previous section, under federal law, public entities that receive federal funds (like the State) are contractually liable for the discriminatory actions of their delegates. In *Bacon v. City of Richmond, Virginia*, 475 F.3d 633 (4th Cir. 2007), there was no suggestion that the defendant city received federal funding or provided any federal funds to the Richmond City School Board. ("In this case we are asked to decide whether a city may be required to fund a federal court order mandating the system-wide retrofitting of city schools . . . ." *Id.* at 636.). *Bacon* did not, therefore, address the question at issue here—whether a state that receives federal funds may evade responsibility for discrimination by its delegates. As set forth in the previous section, the answer to that question is no.

III. THE STATE'S GNETS REGULATIONS DO NOT ABSOLVE IT OF RESPONSIBILITY FOR ENSURING LEA COMPLIANCE WITH TITLE II OF THE ADA AND SECTION 504

At oral argument, the State suggested that it has done all it has to do to ensure GNETS students are not unnecessarily segregated and do not receive unequal educational opportunities because it recently promulgated regulations that *could* allow GNETS students to receive services in a mainstream classroom in a local school. The impact of these regulations—which GDOE promulgated after the Department of Justice filed suit against the State for violating the ADA in its administration of its GNETS programs—is a question of fact inappropriate for resolution on a motion to dismiss. *Speaker*, 623 F.3d at 1379. Plaintiffs' well-pled complaint, which the Court must take as true for purposes of this motion, alleges that the named plaintiffs and thousands of other similarly-situated students are in GNETS programs where they are unnecessarily segregated and provided unequal and inferior educational opportunities. After discovery, Plaintiffs will show that regardless of the new regulations, the harms alleged in the Complaint continue for the vast majority of GNETS students.

After all, Georgia cannot escape liability simply because its regulations now permit services to be provided in less segregated settings. The State must ensure its regulations are not implemented in a discriminatory manner. *See Cota v.*

Maxwell-Jolly, 688 F.Supp.2d 980, 995 (N.D.Cal.2010) (28 CFR § 35.130(b)(3) "applies to written policies as well as actual practices, and is intended to prohibit both 'blatantly exclusionary policies or practices' as well as 'policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate.'"); *Dunn v. Dunn*, 318 F.R.D. 652, 665 (M.D. Ala. 2016) (noting that a state's failure to provide sufficient oversight or to properly administer a federally-funded program can result in liability, as "an omission as well as a commission can be an actionable method of administration."); *Kathleen S. v. Dep't of Pub. Welfare of Com. of Pa.*, 10 F. Supp. 2d 460, 473 (E.D. Pa. 1998) (finding that Commonwealth of Pennsylvania Department of Public Welfare's failure to implement plans necessary to ensure compliance with the ADA's integration mandate was actionable under the ADA).

IV. CONCLUSION

For these reasons, and the reasons set forth in the Opposition, the Court should deny Defendants' Motion to Dismiss.

Respectfully submitted,

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By: */s/ Devon Orland*

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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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