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

THE GEORGIA ADVOCACY OFFICE, et al.,	)	
Plaintiffs,	)	CIVIL ACTION FILE
v.	)	NO. 1:17-CV-03999-MLB
STATE OF GEORGIA, et al.	)	
Defendants.	)	

DEFENDANTS' BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Defendants submit this Brief in Support of their Motion for Summary Judgment. As set forth below, summary judgment is warranted against Plaintiffs' claims because (1) Plaintiffs lack standing; (2) the State[1] does not administer or otherwise cause the alleged acts of discrimination; (3) the State does not engage in discrimination under the Americans with Disabilities Act ("ADA"), the Rehabilitation Act of 1973 ("Rehabilitation Act"), or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

[1] In this Brief, the Defendants interchangeably use the term "State" and "Defendants" unless otherwise specified by identifying an agency Defendant as follows: Department of Education ("DOE"), Department of Community Health ("DCH"), and Department of Behavioral Health and Developmental Disabilities ("DBHDD"). Also, since the filing of this lawsuit, Russel Carlson is now the Commissioner of DCH, and Kevin Tanner is the DBHDD Commissioner.

I. Introduction

Plaintiffs attempt to force the square peg of systemic and generalized theories into the round hole made by controlling precedent that requires an individualized approach to claims of discrimination based on behavioral health conditions. None of the three claims—arising under the ADA, the Rehabilitation Act, or the United States Constitution—can overcome summary judgment due to this fundamental flaw in Plaintiffs' strategy. Not only are the Plaintiffs proceeding under an erroneous generalized theory of discrimination, they named the wrong parties for the acts of discrimination they allege. Put simply, because all of the actionable discrimination they claim is a result of decisions made by nonparty local education officials, they cannot show that their alleged harms are traceable to or caused by the State, and any remedy against the State would not impair, address, or effect any decision of those nonparties.

II. Background

A. Plaintiffs' Allegations

This lawsuit is based on Plaintiffs' misconceptions of the locally-administered Georgia Network for Educational and Therapeutic Services ("GNETS") Program services. A state regulation referred to as the "GNETS Rule" explains that GNETS is "a service available within the continuum of supports for [local school districts] to consider when determining the least restrictive environment for students with

disabilities, ages 5-21." Ga. Comp. R. & Regs. 160-4-7-.15(2)(a). In the order denying the State's motion to dismiss, this Court identified what the Plaintiffs allege are the acts of discrimination in GNETS:

> GNETS classrooms lack access to libraries, cafeterias, gyms, science labs, music rooms, or playgrounds. (Dkt. 1 ¶ 94.) The instruction is not rigorous; much of it happens on computers, not through teachers. (Id. ¶¶ 100–105.) And electives are sparse. (Id. ¶ 105.) GNETS teachers and support staff often physically restrain students to control their behavior. (Id. ¶ 109.)
>
> GNETS is also stigmatizing. (Id. ¶ 90.) GNETS students enter the building in separate entrances when their classroom is in a zoned school. (Id. ¶ 97.) Otherwise GNETS classrooms are in different buildings, separating GNETS students from other children. (Id. ¶ 5.) Families feel they must consent to these requirements because school officials tell them GNETS is the only way their children can get an education. (Id.¶ 114.)

(Dkt. 77 at 4-5.) Another fundamental contention of the Plaintiffs is that an unnamed and unquantified number of students "placed in GNETS do not need to be there."[2] (Dkt. 1 ¶ 9.)

Of course, at summary judgment allegations about discrimination are not enough to impose a sweeping injunction against the State Defendants much less one

[2] To the extent that Plaintiffs' allegation means that no student is appropriately referred for GNETS services, the allegation exceeds the opinions of their proffered experts. Elliott Dep. at 69:20-70:14; Elliott Dep. at 70:16-71:5; Campbell Dep. at 19:4-6; 15:4-12 (agreeing that the consideration of individual students' needs may create a situation where it is "appropriate" to "segregate students" from the general education environment).

that would seek to reach the nonparties to this lawsuit, including: 2,306 public schools in Georgia, which are each governed by one of 219 independent school systems, and the 119,492 teachers they collectively employ. (Campbell Dep. Ex. 16, attached hereto as Exhibit A). To survive summary judgment, Plaintiffs must establish a question of material fact—for purposes of standing and on the merits—about whether these acts are traceable to the State, redressable by an order against the State, and caused by the State Defendants. They have not done so.

The Complaint does not make the task of identifying any actionable conduct by the State easy. The Court's order on the motion to dismiss identified some, but that was in the context of deciding whether the State "administers" the GNETS Program (it does not). (Dkt. 77 at 17-18.) The Complaint appears to allege several contradictory things about the State and its purported role in causing the alleged discrimination. For example, the Complaint alleges that the State provides insufficient funding to allow local school districts to provide disability-related services. (Dkt. 1 ¶ 11.) The same paragraph contends, however, that it is the local school districts who then have "little incentive and few resources to provide" necessary services.[3] (*Id.*) Indeed, another paragraph identifies the "overall capacity

[3] Of course, Georgia school districts are not wholly dependent on State coffers; each has the constitutional authority to set and utilize property tax rates for education purposes. Ga. Const. Art. VIII, § 6, ¶ I.

to provide" such services as the problem.[4] (*Id.* ¶ 118.)

Plaintiffs recognize that a regulation promulgated by the State Board of Education establishes the criteria that local officials apply when deciding whether a referral for GNETS services is appropriate. (Dkt. 1 ¶ 85-86 (citing Ga. Comp. R. & Regs. 160-4-7-.15(2)(a) (the "GNETS Rule").) The Complaint does not challenge the criteria as inherently or per se discriminatory. the Plaintiffs also acknowledge that the GNETS Rule provides that a student may only receive GNETS services if his or her IEP Team recommends them after (1) an assessment of the student's unique and individual needs; (2) attempts to provide services in less restrictive environments; and (3) a determination that the general education classroom is not appropriate for the needs of the student. (Dkt. 1 ¶ 88.) The Complaint does, however, question an unknown number of IEP Team recommendations. (*Id.*) Dr. Elliot reviewed 79, and she opined that GNETS, for a majority of the students whose IEPs she reviewed were unnecessarily referred to GNETS because school personnel at the LEA level were not doing pre-supports for students. Elliott Dep. at 79:21-80:13. One of the Plaintiffs other experts, Ms. Kimm Campbell, reviewed no IEPs. (Campbell Dep. 102:9-18.)

Many of Plaintiffs' other allegations are far less specific and, instead,

[4] As discussed more fully below, State officials have publicly shared concerns about overall workforce. *See* Georgia Apex Program Annual Evaluation Results July 2021 - June 2022, attached hereto as Exhibit B.

conclusory. These include false contentions that the State's "maintaining and funding GNETS separate and apart from local school districts … created a system in which a GNETS referral is the most convenient" or only option. (Dkt. 1 ¶ 10; *see also* ¶¶ 77, 91, 112.) Undisputed facts demonstrate the fallacy of this allegation. While the State does and historically has appropriated funds utilized by GNETS Programs, the funding is always in the form of an appropriation for a voluntary grant. Ga. Comp. R. & Regs. 160-4-7-.15(4)(c); *see generally*, General Appropriations Acts FY2019 through FY2024, attached hereto as Exhibits D through M. Local school districts are not required to seek the funding. (Low Dep. at 216:21-23; 217:18-23.) As shown below, the GNETS grants afford local officials with near total discretion to decide whether to offer GNETS services in settings ranging from fully integrated to wholly separate. *See* Ga. Comp. R. & Regs. 160-4-7-.15(4)(c). Thus, any "system" dependent on a GNETS referral is the exclusive decision of local school district. Further, no evidence establishes that Medicaid funds are used to operate or administer the GNETS Program. (*See* Compl. ¶ 83.) And, while the Plaintiffs frequently contend and blame the "creation" of GNETS on the State, they offer no evidence addressing relevant legislative history, statutory changes, or evidence about the GNETS Rule.

Contrary to these allegations, the State does not maintain the GNETS Program. Plaintiffs' proffered substantive experts—Dr. Judy Elliott and Kimm

Campbell, MSW, LCSW—made this claim but could not support it with any admissible testimony.[5] *See infra* at III.A.2. Finally, no admissible evidence from local school officials identifies the purported incentives or how those alleged incentive operate, nor does any admissible evidence support Plaintiffs' allegations that the claimed incentives operate on a systemic basis. This includes the testimony of Dr. Elliott and Ms. Campbell; neither effectively or clearly articulated answers to these questions and, instead, offered impermissible "*ipse dixit*" testimony about the claimed incentives. *New v. Kohl's Dep't Stores, Inc.*, 1:18-CV-2529-MLB, 2021 WL 3417524, at *7 (N.D. Ga. Feb. 18, 2021).

B. State Agencies Identified in the Complaint

The Complaint identifies three Georgia agencies: the DOE, DCH, and DBHDD. The DOE is the State Educational Agency ("SEA") for purposes of the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1401(32). It is governed by the State School Superintendent, an independent and elected

[5] Plaintiffs also proffer the testimony of Dr. E. Sally Rogers to provide statistical analyses. Contemporaneously with its Motion for Summary Judgment, the State is also filing motions to deem inadmissible some or all of the testimony offered by each of Plaintiffs' proposed expert witnesses. Should the Court agree that the testimony is inadmissible, it may not be considered at summary judgment. *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1313 (11th Cir. 2014) (citation omitted) (providing that only admissible evidence can be considered on a motion for summary judgment). Portions of each proposed expert report and deposition are discussed in this Brief out of an abundance of caution. The proffered expert reports of Elliott, Campbell, and Rogers are attached hereto as Exhibits N-P, respectively.

constitutional officer, and the State Board of Education. O.C.G.A. §§ 20-2-34 (State School Superintendent), 20-2-1 (State Board). Among other duties, the DOE is charged with adopting the "criteria used to determine eligibility of students for state funded special education programs." O.C.G.A. § 20-2-152(a). The DOE is also authorized to provide grants to regional educational service agencies ("RESAs") and local school districts for the provision of special education services.[6] O.C.G.A. § 20-2-152(c)(1).

DBHDD focuses on "state programs for mental health, developmental disabilities, and addictive diseases." O.C.G.A. § 37-1-20(1). DCH is the State Medicaid agency. *See* O.C.G.A. § 49-4-142. To provide access to some of Georgia's uninsured and Medicaid beneficiaries, DBHDD frequently contracts with government and private providers of behavioral health services, including CSBs. *See generally*, https://dbhdd.georgia.gov/be-dbhdd/be-supported. An example is the Apex Program, a DBHDD initiative through which it contracts with providers that have partnered with local schools to offer some in-school behavioral health services. *See generally*, https://dbhdd.georgia.gov/georgia-apex-program.

For purposes of this lawsuit, DCH administers the State Medicaid Plan. O.C.G.A. § 49-4-142(a).

[6] RESAs are "not state agencies." O.C.G.A. § 20-2-270(f); *see also N. Georgia Reg'l Educ. Serv. Agency v. Weaver*, 272 Ga. 289, 291 (2000).

C. Local Education Agencies and the GNETS Program

As recognized in this Court's order on the State's motion to dismiss, "the fundamental principle" of Georgia education policy is one of local control. (Dkt. 77 at 8 (citing *Gwinnett Cnty. Sch. Dist. v. Cox*, 710 S.E.2d 773, 775 (Ga. 2011).) This policy is established by Georgia's Constitution, which empowers "county and area boards of education [authority] to establish and maintain public schools within their limits." Ga. Const. Ar. 8 § V ¶ 1. As the Supreme Court of Georgia has said, on this point there is no ambiguity: "[t]he constitutional history of Georgia could not be more clear that, as to general K-12 public education, local boards of education have the exclusive authority to fulfill one of the 'primary obligation[s] of the State of Georgia,' namely, '[t]he provision of an adequate public education for the citizens.'" *Cox*, 710 S.E.2d at 776.

This constitutional principal is reflected in Georgia statutes that establish local control for each of the bases of discrimination alleged by the Plaintiffs: the provision of special education services, access to libraries, cafeterias, gyms, science labs, music rooms, playgrounds, instruction, electives, and entrances to buildings. (Dkt. 77 at 4-5.) *See* O.C.G.A. §§ 20-2-152(b) (special education generally), 20-2-520 (buildings and physical plant); 20-2-943 (hiring and firing of teachers); 20-2-271 (RESAs and professional development and training). These statutes make no

exception for the GNETS Program.

The legal discretion afforded to LEAs and RESAs with regards to GNETS is also incorporated into the one statute that addresses the GNETS Program. *See* O.C.G.A. § 20-2-270.1(c). For that matter, the statute does not refer to GNETS by name, nor does it provide (or even mention) any role for the State. *Id.*

The GNETS Rule is the only DOE regulation addressing the GNETS Program. Ga. Comp. R. & Regs. 160-4-7-.15. It reinforces Georgia's constitutional and statutory laws requiring local control. (*Id.*) In addition to defining GNETS as a "service" administered by the LEAs, the GNETS Rule also explains that the purpose of GNETS is to provide services needed to implement an individual student's IDEA-required individualized education program ("IEP").[7] *Id.* at 160-4-7-.15(2)(a); *see also* 20 U.S.C. §§ 1401(14), 1414(d)(1)(A) (defining IEP). The

> IEP spells out a personalized plan to meet all of the child's 'educational needs.' [20 U.S.C.] §§ 1414(d)(1)(A)(i)(II)(bb), (d)(1)(B). Most notably, the IEP documents the child's current 'levels of academic achievement,' specifies 'measurable annual goals' for how she can 'make progress in the general education curriculum,' and lists the 'special education and related services' to be provided so that she can 'advance appropriately toward [those] goals.' §§ 1414(d)(1)(A)(i)(I), (II), (IV)(aa).

Fry v. Napoleon Cnty. Sch., 580 U.S. 154, 158–59 (2017).

[7] As its name suggests, the IEP is based on the individual needs of a particular child. *See* 20 U.S.C. § 1414(d)(1)(A).

Students can only access the GNETS Program if the team creating the IEP (the "IEP Team") recommends it and concludes that it provides the least restrictive environment for a student to obtain a free and appropriate public education ("FAPE") under the IDEA. Ga. Comp. R. & Regs. 160-4-7-.15(4)(a), (5)(b)(1); 20 U.S.C. § 1401(9) (defining FAPE). No State officials sit on an IEP Team. 20 U.S.C. § 1414(d)(1)(B).

If a parent is dissatisfied with an IEP Team's recommendation that the student receive GNETS Program services, they have a right to challenge the IEP through the IDEA's dispute resolution process that begins with the filing of a complaint, includes a "preliminary meeting" with relevant parties, and includes an opportunity for administrative and judicial review. *Fry*, 580 U.S. at 159 (citing 20 U.S.C. § 1415). *See also* Ga. Comp. R. & Regs. 160-4-7-.12. One of the named Plaintiffs in this litigation did just that and was ultimately referred out of the GNETS Program. Elliott Dep. Ex. 3, attached hereto as Exhibit C. Here again, the State takes no material part in this process, further demonstrating any concerns that families have about the referral is a consequence of local decisions. *See* (Dk7. 77 at 5 (citing Compl. ¶ 114).)

In contrast to the limited role the GNETS Rule affords the State, it empowers the LEAs and RESAs to make each of the other decisions that the Plaintiffs allege are discriminatory or lead to discrimination. Local officials decide *how* to spend GNETS voluntary grants, and this discretion allows every setting from fully

integrated to wholly separate. Ga. Comp. R. & Regs. 160-4-7-.15(4)(c). LEAs are also charged with "monitor[ing]" the student's IEP to "determine students' progress and access to services in a lesser restrictive environment." Ga. Comp. R. & Regs 160-4-7-.15(5)(b)(8). In other words, the State lacks authority to mandate that GNETS services be provided in a fully integrated setting as the Plaintiffs demand.

Taken together, this authority and the record evidence demonstrate that local officials decide *whether* to seek GNETS grants, for *whom* GNETS services are appropriate, *when* it is appropriate for a student to return to the general education setting, *where* to provide GNETS services (e.g., an integrated or separate environment), and *by whom* those services are provided.

II. STANDARD OF REVIEW

At summary judgment, the moving party must show, based on the record, that there are no genuine issues as to any material fact. *Hickson Corp. v. N. Crossarm Co*., 357 F.3d 1256, 1260 (11th Cir. 2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the nonmoving party cannot show specific facts establishing such a dispute, summary judgment is warranted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) (citing Fed. R. Civ. P. 56(e)). *See generally IOU Cent., Inc. v. Shore Appliance Connection Inc*., 1:20-CV-2367-MLB, 2022 WL 605448, at *2 (N.D. Ga. Mar. 1, 2022), appeal dismissed, 22-11053-AA, 2022 WL 4483116 (11th Cir. Sept. 13, 2022), and reconsideration denied, 1:20-CV-

2367-MLB, 2023 WL 3627893 (N.D. Ga. Jan. 9, 2023).

III. ARGUMENT AND CITATION TO AUTHORITY

Plaintiffs allege three counts of unlawful discrimination against the State. (Dkt. 1 ¶¶ 154-169). The claims arise under the ADA (Dkt. 1 ¶¶ 154-60), the Rehabilitation Act of 1975 (Dkt. 1 ¶¶ 161-65), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, (Dkt. 1 ¶¶ 166-69.) This Court has previously recognized that claims of discrimination arising under the ADA and Rehabilitation Act are subject to the same legal analysis, and for this reason, they are collectively referred to as "ADA claims.". (Dkt. 77 at 7 (citing *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000).) None can overcome summary judgment for threshold.

A. Plaintiffs Lack Standing.

The Constitution of the United States requires any party seeking judicial relief from a federal court establish Article III or constitutional standing. *Anderson v. Raffensperger*, 497 F. Supp. 3d 1300, 1307 (N.D. Ga. 2020) (Brown, J.). The three elements of constitutional standing are well established; they are: (1) a concrete, particularized, actual and imminent injury in fact that is neither conjectural nor hypothetical; (2) traceable to the defendant; (3) that is subject to redress by a permissible judicial order. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). Here, the Plaintiffs' claims satisfy none

of these jurisdictional requirements.

1. Plaintiffs Have Not Shown A Cognizable Injury In Fact.

Plaintiffs articulate three types of injuries for purposes of standing: injury to the Individual Named Plaintiffs, injury to a potential class of plaintiffs, and injury to those who are "at risk" of institutionalization (collectively, the "General Plaintiffs"). *See* (Dkt. 77 at 23.) They have failed to demonstrate a cognizable injury, because Plaintiffs have not identified any specific service or benefit, any individual who has been subject to "unjustified isolation," and the at-risk theory is unavailable given the individualized analysis required by the ADA.

a. The Failure To Identify Specific Services.

As a threshold matter, Plaintiffs have not identified the **specific** services that are afforded to non-disabled students and denied to the General Plaintiffs. (Dkt. 1 ¶ 158.) Nor have Plaintiffs identified which **specific** opportunities or benefits of educational services are denied to the General Plaintiffs but afforded to non-disabled students. (Dkt. 1 at ¶ 158(i).) Similarly, no admissible evidence identifies what educational services have been denied to the Individual Named Plaintiffs and would be "as effective in affording equal opportunity to obtain the same result" as non-disabled students. (*Id.*) The same is true about Plaintiffs' claim that the General Plaintiffs are subject to any "method of administration" by the State that has "the effect of defeating or substantially impairing" the achievement of the State's

educational goals for each individual student. (*Id.*) Here, the Plaintiffs have identified neither the requisite "method of administration" nor demonstrated that the identified method "defeats" or "impairs" each individual student.[8] Finally, Plaintiffs have not shown a cognizable injury for failure to serve the General Plaintiffs in the "most integrated setting appropriate to their needs," which is referred to as the *Olmstead* claim. (*Id.*)

As importantly, the Plaintiffs have not shown or even contended that the criteria set forth in the GNETS Rule (applicable only to LEAs and RESAs who seek voluntary GNETS grants) are *per se* discriminatory, or have caused the alleged discrimination of the General Plaintiffs. This matters, as this Court has previously focused on the GNETS Rule and its criteria as a possible interpretation of the Plaintiffs' Complaint. (Dkt. 123 at 18-19.)

b. Individualized Assessments Are Necessary To Show Discrimination.

Plaintiffs' lack of a cognizable injury stems from their strategy of attempting to establish sweeping liability based on a generalized theory instead of specific and individualized assessments. The analysis can begin with the text of Title II of the ADA; it prohibits discrimination against a "**qualified individual** with a disability." 42 U.S.C. § 12132 (emphasis added). The definition of "qualified individual" also

[8] The allegations regarding Plaintiffs' obligation to show a reasonable modification (Dkt. 1 ¶ 158(iv)) are discussed below.

speaks of a singular person: "**an individual** with a disability." 42 U.S.C.A. § 12131(2). *Cf. United States v. Mississippi*, 82 F.4th 387, 388 (5th Cir. 2023) (rejecting *Olmstead* claims based on generalized theory). Given the statute's focus on discrimination against an individual, the failure to allege any specific service or practice precludes a finding of an actual, imminent, or concrete injury for the discrimination claims.

c. The Lack of an *Olmstead* Injury.

The Plaintiffs' *Olmstead* claim fails for these and additional reasons. As this Court previously held, *Olmstead* claims are based on a Department of Justice regulation known as "the integration regulation." (Dkt. 77 at 20 (citing 28 C.F.R. § 35.130(d).) At least as it applies to cases involving behavioral health issues, the Supreme Court applied and provided the binding construction of Title II and the integration regulation in *Olmstead*. 527 U.S. at 597-98, 607 (plurality opinion), 608-15 (Kennedy, J., concurring).[9]

In 2019, a panel of the Eleventh Circuit described *Olmstead* as establishing liability only when, among other things, "the State's treatment professionals [determine] that [community] placement is **appropriate**." *United States v. Florida*,

[9] As recently recognized by the United States Court of Appeals for the Fifth Circuit, Justice Kennedy's more narrow concurring opinion in *Olmstead* provides the controlling analysis. *United States v. Mississippi*, 82 F.4th 387, 394 n.11 (5th Cir. 2023) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

938 F.3d 1221, 1250 (11th Cir. 2019) (emphasis added). Under this rubric, the question of what constitutes "appropriate" placement and services is necessarily individualized for several reasons. Substantively, as recognized by both the *Olmstead* plurality and Justice Kennedy's concurrence, individuals' needs vary. For some, "placement outside the institution may never be appropriate." 527 U.S. at 605 (plurality); *see also id.* at 609-10 (Kennedy, J., concurring). For others, "community-based care [may be] medically appropriate." *Id.* at 609 (Kennedy, J., concurring). Given this spectrum, the Fifth Circuit recently held that "[a]ppropriate" treatment of those with serious mental illness, as *Olmstead* clearly understood, must be individualized." *Mississippi*, 82 F.4th at 396. The Plaintiffs' proffered expert witnesses agree. (Campbell Dep. 184:7-17; 111:22-112:3, 129:20-130:4; 16:14-19; Elliott Dep. 46:18-20, 84:2-12, 84:13-85:1, 202:1-4.) Indeed, the Plaintiffs' experts concede that, at least for some students, all appropriate services could be provided and isolated settings would still be appropriate and necessary. (Elliot Dep. 69:20-70:14, 70:16-71:5; Campbell Dep. 19:4-6; 15:4-12.)

Despite this unanimity of legal and proposed expert opinion, the Plaintiffs here have brought only generalized claims and not provided an individualized assessment of each student receiving GNETS services or who may, based on Plaintiffs' allegations, be at risk of such a referral. This omission renders the *Olmstead*-based injuries hypothetical, conjectural, and lacking the concreteness

needed to establish standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (a "threatened injury must be certainly impending to constitute injury in fact, ... [a]llegations of possible future injury are not sufficient."). The Fifth Circuit considered this question and concluded that the first two elements of an *Olmstead* claim—appropriate placement and consent—are "necessarily patient-specific." 82 F.4th at 394. The Fifth Circuit is right. Without an individual assessment, the Court has no ability to discern who is appropriately served in a separate setting and who could appropriately be served in a more integrated environment.

A series of hypotheticals demonstrates this point: which of the near 3,000 students who currently receive GNETS services are appropriately receiving (what Plaintiffs allege are) institutionalized services? Which are not? Of those who are currently inappropriately served by the GNETS Program, was the IEP Team's initial referral appropriate? When did circumstances change for that student? For the "at-risk" population, will institutionalization ever be appropriate? If so, when? If not, what certainty is there of such a conclusion? *Compare United States v. Florida*, 12-CV-60460, 2023 WL 4546188, at *40 (S.D. Fla. July 14, 2023) (reviewing medical records of and reaching individualized conclusions about *each* of the 139 persons at issue).

Under Eleventh Circuit precedent, the inability to answer these questions deprives Plaintiffs of demonstrating a cognizable injury as opposed to a potential or

hypothetical one. *See Trichell v. Midland Credit Mgmt., Inc.,* 964 F.3d 990, 996 (11th Cir. 2020). In *Trichell*, the court recognized that the potential of an injury is not an injury. *Id.* By providing only generalized information, the Plaintiffs ask this Court to speculate about whether any person currently receiving GNETS Program services is doing so based on an inappropriate assessment of the individual student's needs by local officials.

d. The At-Risk Claim.

While this shortcoming infects all of Plaintiffs' alleged injuries, it is particularly acute for the alleged at-risk population. On the motion to dismiss, this Court decided that allegations of being "at serious risk of being placed in the GNETS program at some unknown future date" was sufficient at that "stage [where] Plaintiffs need only allege" an at-risk status. (Dkt. 77 at 23 (citing (Dkt. 1 ¶ 23).) Summary judgment imposes a different standard, and particularly in the light of legal developments since 2020, the at-risk claim does not establish standing.

On this point, the reasoning of the Fifth Circuit in *Mississippi* is both compelling and uniquely based on the state of the law after *Kisor v. Wilkie*, —— U.S. ——, 139 S. Ct. 2400, 2414, 204 L.Ed.2d 841 (2019). 82 F.4th at 387. In *Mississippi*, the court reviewed an injunction imposed by the district court at the request of the United States Department of Justice (the "DOJ"). *Id.* at 388-89. The injunction came as a result of the DOJ's claims that Mississippi violated the ADA in the

provision of mental health services. *Id.* As here, the "suit was not based on individual instances of discrimination. Rather, the federal government charged that due to systemic deficiencies in the state's operation of mental health programs, every person in Mississippi suffering from a serious mental illness was *at risk* of improper institutionalization under Title II." *Id.* at 389 (emphasis in original).

After a thorough review of the *Olmstead* decision, the ADA, the integration mandate, the development of administrative law since *Olmstead*, and decisions from other circuits, the court rightly concluded that "[n]othing in the text of Title II, its implementing regulations, or *Olmstead* suggests that a *risk of institutionalization*, without actual institutionalization, constitutes actionable discrimination." *Id.* at 392 (emphasis in original). The court recognized that the text of the "ADA does not define discrimination in terms of prospective risk to qualified individuals." *Id.* Instead, by "stating that no individual shall be 'excluded,' denied,' or 'subjected to discrimination,' the statute refers to the actual, not hypothetical administration of public programs." *Id.* (citing 42 U.S.C. § 12132). Even the integration regulation does not speak to "'risks of maladministration.'" *Id.* Finally, an "at-risk" theory lacks the kind of individualized analysis mandated by the *Olmstead* opinions. *Id.* at 394.

Equally important, the Fifth Circuit considered the cases previously cited by the Plaintiffs and considered, in part, by this Court when denying Defendants'

motion to dismiss. (Dkt. 77 at 13-18, 22 n.6, 24 n.7.) The court recognized that the weight of persuasive authority had recognized at-risk theories, but after a thorough analysis, it correctly decided that each case was "distinguishable or unreliable legally." 82 F.4th at 396. None of those cases involved systemic claims like those before the Fifth Circuit and this Court. *Id.* at 396. In addition, the courts issuing the persuasive authority "rel[ied] heavily, but mistakenly, on the DOJ guidance promoting at-risk Title II discrimination claims." *Id.* As recognized, after *Kisor*, such deference is now inappropriate. *Id.* at 396-97. This Court expressed similar reservations without citing *Kisor*. (Dkt. 77 at 15-16 n.4.)

Each of these concerns applies with equal weight to the Plaintiffs' at-risk claims. They are, at their core, hypothetical. Establishing an injury for the potential risk of harm is no different from what the plaintiffs unsuccessfully attempted in *Trichell*, 964 F.3d at 996. Deciding that being at-risk of discrimination replaces the necessity of showing discrimination with establishing only the status of being disabled. This is an insufficient injury for claims of discrimination. *See id.* Second, the decision that anyone at-risk of discrimination has an injury would require a conclusion that the GNETS Program constitutes *per se* discrimination, because anyone who IEP Teams refer for GNETS Program services would be subject to discrimination. The *Olmstead* opinion rejects this absolutist approach. 527 U.S. at 605 (plurality), 609 (Kennedy, J., concurring). So too do Plaintiffs' own proffered

expert witnesses. (Campbell Dep. 184:7-17; 111:22-112:3, 129:20-130:4; 16:14-19; Elliott Dep. 46:18-20, 84:2-12, 84:13-85:1, 202:1-4.) For any of these reasons, Plaintiffs lack standing to sue on behalf of an unidentified and unquantified "at-risk" population.

2. Plaintiffs' Claims Are Neither Traceable To Nor Redressable By the State.

This Court previously considered the requisite demonstration of traceability in the light of the Eleventh Circuit's decision of *Jacobson v. Florida Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020). (Dkt. 123 at 16-20.) It decided that the Plaintiffs had at least alleged sufficient facts for standing given that the standard of review required the Court to accept as true their allegations. (Dkt. 123 at 20.) Summary judgment is different.

As this Court described, *Jacobson* is an election law case arising from the State of Florida. The plaintiffs there sued the Florida Secretary of State when challenging a law that "she does not enforce," but is instead implemented by local election officials. 974 F.3d at 1241. Writing for the majority, Chief Judge Pryor wrote this fact—the lack of enforceability—deprived the plaintiffs of showing traceability and redressability. *Id.* This precedent applies now for several reasons.

a. Traceability.

An injury lacks Article III traceability if the "challenged action [is] the result of the independent action of some third party not before the court." *Jacobson*, 974

F.3d at 1253 (citation omitted). All of Plaintiffs' alleged injuries are traceable to local actors and can only be remedied by an order compelling or restraining such local acts. Under these circumstances, Plaintiffs have not established traceability for any of the theories of discrimination.

First, Like the local officials in *Jacobson*, local boards of education are "independent officials under [Georgia] law." 974 F.3d at 1253. Like the election officials in *Jacobson*, local school boards are "elected at the county [or city] level by the people of [Georgia]; they are not appointed." *Id.* Georgia's Constitution provides the same: local school systems are under the "management and control of a board of education" and not the DOE. Ga. Const. Art. VII, § V, ¶ II. Any claims of "general supervision and administration" are insufficient to establish traceability or redressability. *Jacobson*, 974 F.3d at 1253–54.

Second, these local, constitutional officers directly oversee and have exclusive authority to perform or not perform the acts Plaintiffs allege constitute discrimination, specifically including, but not limited to: **(1)** "provide special education programs for all eligible students" (O.C.G.A. § 20-2-152(b)); **(2)** refer individual students for GNETS services after an individualized assessment by a team of professionals and subject to a dispute resolution mechanism in the IDEA (Ga. Comp. R. & Regs. 160-4-7-.15(4)(a)); **(3)** decide whether to apply for voluntary GNETS grants; **(4)** allocate "supports and resources … to facilitate flexible models

of service delivery and best practices for equitable educational support as appropriate" (*id.*, 160-4-7-.15(5)(b)(10)); **(5)** collaborate with community service providers that deliver mental health services (*id.*, 160-4-7-.15(5)(b)(11)); **(6)** decide the setting to provide GNETS services, ranging from fully integrated to fully separated (*id.*, 160-4-7-.15(4)(c); O.C.G.A. § 20-5-152(b)(1)); **(7)** maintain school buildings, including those that provide GNETS services (O.C.G.A. §§ 20-2-152(b), 20-2-520)); **(8)** contract for the employment of individual educators (O.C.G.A. § 20-2-943); **(9)** employing "professional workers as are needed" by eligible students (O.C.G.A. § 20-2-152(b)); **(10)** train educators, including on identifying the least restrictive environment appropriate to the needs of individual students (O.C.G.A. §§ 20-2-271(addressing RESAs); Ga. Comp. R. & Regs. 160-4-7-.07(6)(b) (addressing training on the least restrictive environment); **(11)** provide transportation for students receiving GNETS services (Ga. Comp. R. & Regs. 160-4-7-.15(5)(b)); and **(12)** develop "appropriate and legally based disciplinary procedures" (Ga. Comp. R. & Regs. 160-4-7-.10).

When previously considering this question, the Court decided, on a deferential standard of review, that "discovery is necessary to learn whether the State—within the statutory scheme—administers GNETS in such a way that caused the harm at issue and thus can redress that harm." (Dkt. 123 at 19.) This question has now been answered in the negative. Plaintiffs have not raised a question of material fact to

allow a factfinder to conclude that the alleged acts of discrimination—decisions about *who* is referred for GNETS services, *who* provides GNETS services; *where* and in what kind of facility GNETS services are offered, and *how* GNETS services are provided—are all decided by local officials. This is dispositive.

Third, the *Jacobson* court decided that the Florida Secretary's inability to impose any enforcement mechanism on the plaintiffs without judicial process against the local officials mattered: "That the Secretary must resort to the judicial process if the [local officials] fail to perform their duties underscores her lack of authority over them." *Jacobson*, 974 F.3d at 1253. The same is true for the DOE; Code Section 20-2-243 guarantees LEAs a due process hearing and judicial review before the DOE can withhold funds for noncompliance with any "school laws [or] rules [and] regulations … established by the State Board of Education." O.C.G.A. § 20-2-243. This third and independent fact deprives Plaintiffs' ability to show that their alleged injuries are traceable to any of the Defendants.[10]

b. Redressability.

Redressability considers whether the named party has the legal "authority to redress the alleged injury." *Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1186 (N.D. Ga. 2022) (citing *Jacobson*, 974 F.3d at 1269). Here, the answer

[10] Based on the State's arguments at the time, this Court did not previously consider the fact that Georgia law requires judicial involvement in any enforcement actions which vitiates traceability. *Jacobson*, 974 F.3d at 1253. *See* (Dkt. 123, 16-20.)

is "no," and this is the case for several, independent reasons.

First, like the matter in *Jacobson*, an order against the State would not bind any local officials ranging from teachers themselves to superintendents to boards of education. None are parties to this lawsuit, and consequently, are not bound by a Court order against the State. *Jacobson*, 974 F.3d at 1254. In practical terms, this means that no order issued as a result of Plaintiffs' lawsuit would prevent, impair, or otherwise impact any of the decisions that form the bases of Plaintiffs' allegations and are discussed above. *See supra* at (a). *Jacobson* makes clear that courts are not permitted to simply presume otherwise, "even [with] the most persuasive of judicial opinions." 974 at 1255.

Applied here, this authority establishes that an order against the State could not require LEAs to implement PBIS, even if the State is offering it. *Compare* Campbell Rep. at 18-19 *with* O.C.G.A. § 20-2-741(b) (establishing that PBIS is "encouraged" for but not mandated on local school districts). The same is true for Ms. Campbell's other suggestions that LEAs adopt unidentified policies from unidentified states and sources. (Campbell Rep. at 21-23; Campbell Dep. 93:19-23, 95:13-15, 129:20-131:15, 134:15-135:5, 163:3-10, 192:13-25, 202:12-19, 209:4-10, 247:4-8). Similarly, an order against the State could not compel LEAs to accept services from Apex Program providers, nor could it force behavioral health service providers to partner with local school districts or even become Medicaid providers.

(Campbell Dep. 109:8-16, 15-19.)

Second, in order to make any order in this case binding on the nonparty local officials, this Court would be required to rewrite not just the statutes and regulation cited above. Presuming without deciding that the State's Constitution itself could avoid judicial amending, even implementing Dr. Campbell's proffered "reasonable accommodation" of expanding PBIS would necessitate rewriting the statute making PBIS voluntary for local school districts. (Campbell Rep. at 22; Campbell Dep. at 262:22-23; O.C.G.A. § 20-2-741(b).) So too would her suggestion that the Apex Program be made effectively mandatory in local schools. (Campbell Report at 15-17). This demand of Plaintiffs asks too much in the Eleventh Circuit. *Jacobson*, 974 F.3d at 1255, 1257. *See also Badaracco v. Comm'r*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement").

Third, to the extent that the Plaintiffs seek to establish traceability or redressability by identifying a particular statute or regulation that violates the ADA or the Equal Protection Clause (they have not to date), an injunction would be equally ineffective after *Jacobson*. Federal courts "may 'enjoin executive officials from taking steps to enforce a statute.' And [they] can exercise that power only when the officials who enforce the challenged statute are properly made parties to a suit." *Jacobson*, 974 F.3d at 1255 (citation omitted). Applied here, this controlling

authority bars Plaintiffs' request that this Court mandate funding or some other remedy based on an alleged infirmity of a State statute or regulation. Each of these three reasons provides an independent basis to grant summary judgment for lack of standing.

B. Plaintiffs' ADA and Rehabilitation Act Claims.

Plaintiffs allege four types of ADA claims arising from a DOJ regulation. **Two** establish liability only in circumstances where the State is "**providing** any aid, benefit, or service" in a manner that is (1) not equal to others; or (2) "not as effective in affording equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement" afforded to other students. 28 C.F.R. §§ 35.130(b)(1)(ii) and (b)(1)(iii) (emphasis added); (Dkt. 1 ¶ 158(i) and (ii)). **One** establishes liability only if the State is "**utiliz[ing] criteria** or methods of **administration** … [t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the" program's objectives for qualified individuals with disabilities. 28 C.F.R. § 35.130(b)(3)(ii) (emphasis added); (Dkt. 1 ¶ 158 (iv)). The **fourth** is the *Olmstead* claim. 28 C.F.R. § 35.130(d); (Dkt. 1 ¶ 158(iii)).

1. Plaintiffs Lack Evidence of a Reasonable Accommodation for Any ADA and Rehabilitation Act Cause of Action.

For any claim arising under the ADA, Plaintiffs bear the burden of identifying a "reasonable accommodation" that is not only effective but reasonable. *Willis v. Conopco*, Inc., 108 F.3d 282, 283 (11th Cir. 1997). In the Eleventh Circuit, what

constitutes "reasonable" is a "highly fact specific inquiry … relative to the particular circumstances of the case … What is reasonable must be decided case-by-case based on numerous factors." *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1086 (11th Cir. 2007). Plaintiffs' generalized approach to ADA liability fails this precedential requirement of individualized determinations of what is reasonable.

Plaintiffs have not identified what reasonable accommodation they rely on to establish their prima facie case. Kimm Campbell's report offered some. (Campbell Rep. at 22-23.) None are based on the individual needs of particular students as *Bircoll* demands. 480 F.3d at 1086. This alone is dispositive.

In addition, Plaintiffs failed to conduct any cost or workforce study as *Olmstead* requires to help determine whether the proposed accommodations are reasonable. Footnote 16 of the plurality's decision considered the "reasonable modification" regulation. 527 U.S. at 606 n.16. There, Justice Ginsburg wrote that the standard under the ADA must be at least the same as the Rehabilitation Act, and that statute requires consideration of cost and workforce. *Id.* Accordingly, a basic requirement of reasonableness must be considerations of cost and workforce. Dr. Elliott and Ms. Campbell agree. (Elliott Dep. 41:5-15; Campbell Dep. 118:18-120:7; 41:19-42:2) Despite this universal recognition, neither the Plaintiffs nor any of their experts did so. The resulting absence of necessary evidence is dispositive.

2. The Non-*Olmstead* Claims.

This Court has never considered the merits of Plaintiffs' non-*Olmstead* claims. (Dkt. 77 at 8 n.2.) Those arising under 28 C.F.R. §§ 35.130(b)(1)(ii) and (b)(1)(iii) cannot overcome summary judgment for at least two reasons beyond those already addressed. First, as a matter of law and fact, and as described above, the State does not "provid[e]" the services complained about by Plaintiffs. Neither the ADA nor the implementing regulations define the word "provide." *See* 42 U.S.C. §§ 12103, 12131; 28 C.F.R. § 35.104. Nevertheless, because some regulations use the word "provide," and others use the term "administer," they must be interpreted differently.[11] *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Indeed, the Complaint does not allege, and evidence does not show, that any service actually provided by the State is done so in a discriminatory manner. Second, the *Olmstead* plurality spoke broadly when it concluded that the ADA does not impose "on the States a 'standard of care' for whatever medical services they render." 527 U.S. 603 n.14. This also precludes recovery for alleged qualitative failures of effectiveness of services actually provided.

The allegations arising from 28 C.F.R. 35.130(b)(3)(ii) fail for one of the same reasons as the *Olmstead* claim: the State does not administer or "utilize … methods

[11] Methods of statutory construction apply to the judicial interpretation of federal regulations. *See Envt'l Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007) (applying rules of statutory construction to EPA regulations).

of administration" that causes Plaintiffs' alleged discrimination. Even more, Plaintiffs have not identified a "method[] of administration" that causes the alleged harm, nor do any of their proposed recommendations address such a method. Plaintiffs have not argued or produced competent evidence that the criteria set forth in the GNETS Rule has the "purpose or effect" of discrimination. *Id.* Indeed, Plaintiffs have not shown a single student who suffered discrimination because of the criteria.

Finally, Plaintiffs' non-*Olmstead* claims are simply repackaged IDEA claims and cannot be raised without exhausting administrative remedies. The IDEA requires states that accept federal education funds to provide a FAPE to students with disabilities. 20 U.S.C. § 1412(a)(1)(A). Among other things, a FAPE must "meet the standards of the State educational agency; and include an appropriate preschool, elementary school, or secondary school education in the State involved." 20 U.S.C. §§ 1401(9)(B) and (9)(C). This is exactly what Plaintiffs allege in Paragraph 158(ii) and (v) of the Complaint. (Dkt. 1 ¶ 158.) The same is true of Plaintiffs' allegation in Paragraph 101, which challenges instruction for not being "aligned with Georgia's statewide curriculum." (Dkt. 1 ¶ 101.)

This Court previously concluded that "stigmatization is the gravamen **of the complaint**," but that analysis was limited to the *Olmstead* claim and is inconsistent with the current status of the case regardless. (Dkt. 77 at 20 n.5, 30.) It is now more

apparent that the answers to the Supreme Court's two hypothetical questions demonstrate that the non-*Olmstead* claims are really IDEA claims: "if the alleged conduct had occurred at a public facility that was *not* a school;" and (2) could an adult at the school bring the lawsuit (e.g., "an employee or visitor"). *Fry*, 580 U.S. at 153. Because the "answer is no, then the complaint probably does concern a FAPE, even though it does not explicitly say so." *Id.*

This is supported by the USDOE, the agency that enforces the IDEA:

> [c]ircumstances that may indicate that the child's placement in the LRE may not be appropriate [and thus an *IDEA* issue] include, but are not limited to, a scenario in which a continuum of placements that provides behavioral supports is not made available … and, as a result, the IEP inappropriately calls for the child to be placed in special classes, separate schooling, or another restrictive placement outside the regular educational environment[.]

USDOE Dear Colleague Letter at 10, attached hereto as Exhibit Q. This ends the inquiry.

3. The *Olmstead* Claim.

In addition to the other arguments in this Brief, the Plaintiffs' *Olmstead* claim cannot overcome summary judgment for three additional reasons: (1) the integration mandate represents an improper expansion of the ADA's text; (2) no treatment professional has determined that those already or at risk of being referred by local officials for GNETS services could appropriately be served in the more integrated settings; and (3) the Plaintiffs have provided no evidence of systemic non-

opposition.

a. The Invalidity of the Integration Mandate.

The integration mandate's imposition of liability for "administration" of services is inconsistent with the ADA's requirement that the services be "of a public entity" to be actionable. *Compare* 28 C.F.R. § 35.130(d) *with* 42 U.S.C. § 12132. It is axiomatic that a regulation cannot impose a different basis of liability than the statute upon which it is based. *See Decker v. NW Envt'l Def. Ctr.*, 568 U.S. 507, 609 (2013) (citation omitted) (describing as a "basic tenant" that regulations must be "consistent with the statute"). Here, the word "administer" appears nowhere in the relevant statutory text, 42 U.S.C. §§ 12131-12134, but the Plaintiffs cite the integration regulation as the basis of liability despite its inconsistency with the ADA. This is an open question in this circuit, and it is not a difficult one. *See Olmstead*, 527 U.S. at 592.

The ADA does not focus on administration, but the actual provision of services "of a public entity," 42 U.S.C. § 12132, and "provided by a public entity," 42 U.S.C. § 12131(2). Thus, so long as "administer" means something other than "provide," the regulation is inconsistent with this statutory text.[12] This too is not a

[12] Like the ADA itself, the Georgia Code uses the word "provides" in a statute dealing with special education generally. O.C.G.A. § 20-2-152(b) explains that LEA's "**shall**, subject to any limitations specified in this Code section, **provide special education** programs for all eligible students with special needs who are

difficult call. Merriam-Webster's Collegiate Dictionary defines "provide" as "to supply or make available." (11th Ed. 2014). The same dictionary defines "administer" as to "manage or supervise the execution." *Id*. This distinction matters, and Justice Kennedy's controlling concurrence in *Olmstead* demonstrates the necessity of applying it to limit the integration regulation: courts "must be cautious when [they] seek to infer specific rules limiting States' choices when Congress has used only general language in the controlling statute." 527 U.S. 581, 615 (Kennedy, J., concurring). For this reason, Plaintiffs' attempt to establish liability based on the State's purported "administration" of the GNETS Program never gets out of the gate.

b. The State Does Not Administer the GNETS Program.

Second, for the reasons set forth in the discussion of traceability and redressability, the State does not "administer" the GNETS Program. *See supra at* III.A.1.d. As this Court has already said, neither "broad supervision [nor] funding" establishes administration. (Dkt. 77 at 17.) And, Plaintiffs have not shown that the State "regulate[s] the operation of the GNETS grant[s]," or how "monitoring GNETS to ensure compliance," standing alone, would demonstrate actionable

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residents of their local school systems." (emphasis added). This is dispositive for at least two reasons. First, the obligation to "provide" services as contemplated by the ADA is borne exclusively by LEAs. Second, the Plaintiffs have not argued, much less shown, that the DOE violates this statutory mandate by invading the exclusive province of the LEAs. *Cf. Cox*, 289 Ga. at 265 (describing the exclusive role for LEAs).

administration. (*Id.* at 18.) Finally, Plaintiffs have not argued or shown that the State has exceeded its limited authority vis a vis GNETS, which this Court left open in prior orders. (*Id.* at 19.)

c. Plaintiffs Have Not Created A Material Question of Fact Showing Unjustified Isolation.

In *United States v. Florida*, the Eleventh Circuit identified the three elements of an *Olmstead* claim: "(1) a determination by the State's treatment professionals that such placement is appropriate; (2) the individuals to receive such treatment do not oppose it; and (3) the placement can be accommodated, considering the state's resources and the needs of other individuals who receive such treatment." 938 F.3d at 1250. This controlling authority was not decided at the time of this Court's orders on the State's motion to dismiss or for judgment on the pleadings.

Florida removes any doubt that, in this circuit, liability may not be imposed unless a "**State's** treatment professional[]"decides a disabled individual could appropriately be served in the community. 938 F.3d at 1250 (emphasis added). This is consistent with *Olmstead*, where Justice Kennedy wrote of the need of deference to a "reasonable treating physician," and the plurality identified the necessity of a "professional[]" determination of appropriateness. 527 U.S. at 610 (Kennedy, J., concurring), 602 (plurality). Plaintiffs cannot overcome summary judgment because each IEP Team, which include the relevant professionals, made an affirmative recommendation for GNETS services and not community placement.

Plaintiffs' generalized claim is "incompatible with … [this] patient-specific inquiry." *Mississippi*, 82 F.4th at 394. The approach also falls well short of overcoming the "greatest deference" afforded to IEP Team decisions.[13] *Olmstead*, 527 U.S. at 610 (Kennedy, J., concurring). In fact, it "turns *Olmstead* on its head" by requiring Georgia to rely on the Plaintiffs' "outside professionals" who have not conducted an individual review instead of the students' IEP Teams. *Mississippi*, 82 F.4th at 399.

In addition, the Plaintiffs have provided woefully insufficient evidence indicating that, systemically, individuals referred for GNETS services by their IEP Team seek community placement instead. 28 C.F.R. § 35.130(e)(1) (barring integration if opposed by the individual). The lack of citation to IDEA due process hearings (and certainly unsuccessful ones) supports this conclusion and the conclusion that the IEP Teams got it right. *See* 20 U.S.C. § § 1415. At the very least, the claim of "systemic" discrimination fails. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (requiring evidence of every "essential element" to overcome summary judgment).

4. Plaintiffs' Equal Protection Claim.

When denying the Defendants' motion to dismiss Plaintiffs' Equal Protection claim, this Court acknowledged that education is not a fundamental right, but applied

[13] The discussion on traceability shows the incompatibility of the Plaintiffs' generalized approach to deciding what constitutes "appropriateness" with *Olmstead*'s individualized approach.

a heightened scrutiny based on the Eleventh Circuit's decision in *Hispanic Interest Coalition of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1240 (11th Cir. 2012) ("*HICA*").[14] (Dkt. 77 at 31.) In the order denying the motion for judgment on the pleadings, the Court decided that the State had not shown evidence to support its substantial interest of providing educational services in an appropriate setting, and it said that the GNETS "policy" is facially discriminatory. (Dkt. 123 at 29-30.) These conclusions are inapplicable at summary judgment.

First, nothing in the GNETS statute constitutes facial discrimination. *See* O.C.G.A. § § 20-2-270.1(c). Moreover, nothing in the GNETS Rule discriminates on its face either. Ga. Comp. R. & Regs. 160-4-7-.15. These are the only relevant issues for determining whether there is facial discrimination. And, nothing in the statute or GNETS Rule shows that the "treatment of a person in a manner which but

[14] Seven years after the Eleventh Circuit issued its opinion in *HICA*, it upheld a Georgia education classification in *Estrada v. Becker*, 917 F.3d 1298 (11th Cir. 2019). There, the Court said that there is no authority to apply "heightened scrutiny to a classification that burdens education. Thus, we decline to extend heightened scrutiny to a classification that allegedly burdens postsecondary education." *Id.* at 1310. The Eleventh Circuit was presumably aware of the *HICA* decision, as it cited the trial court's opinion. *Id.* at 1303 n.5. The holding of *Estrada* suggests that heightened scrutiny should not apply in education cases, but the State acknowledges that it also may limit that conclusion to cases involving postsecondary education. If this Court decides that *Estrada* controls and a rational basis test applies, then the GNETS Program unquestionably survives judicial scrutiny given the Cout's prior recognition that the State has a "substantial interest in the provision of educational services in an appropriate setting," as well as the general interests that local control of education is a rational goal. (Dkt. 123 at 27.)

for that person's [disability] would be different." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991). This is unlike the employment policy cited by this Court that said "women who are pregnant or who are capable of bearing children" would not be placed in certain work environments. *Id.* at 192. Here, the alleged discrimination of segregation does not occur once someone has a disability; to the contrary, a team of professionals must determine that GNETS services are appropriate based on an individualized analysis and not generalization. *See supra* at II.A. Indeed, if the GNETS Rule is facially discriminatory, then so is the IDEA, because federal law requires states to provide education in the least restrictive environment appropriate. (20 U.S.C. § 1412(a)(5).)

Indeed, when this Court described aspects of Plaintiffs' **allegations**, it considered the **effects** of a policy and not any particular **text** of the policy itself: "But for these students' disabilities, they would not be segregated into GNETS." (Dkt. 123 at 30-31.) The lack of facial discrimination is supported by the fact that not all students with behavior-related disabilities are referred to the GNETS Program, as evidenced by Plaintiffs' own allegations. (See generally Dkt. 1.) Even then, as described previously, any discrimination does not occur from any act or omission of the State.

Without a finding of facial discrimination, the Plaintiffs must show intentional

discrimination and causation. They cannot meet this burden. Indeed, any claim brought pursuant to Section 1983 (as Plaintiffs' is) must establish "proof of an affirmative causal connection between the actions taken by a particular person 'under color of state law' and the constitutional deprivation." *Williams v. Bennett*, 689 F.2d 1370, 1381 (11th Cir. 1982). Plaintiffs have not made this causal showing. Nor have Plaintiffs shown any legislative history, testimony, or other analysis of the GNETS Rule or GNETS statute that would satisfy recent Eleventh Circuit precedent establishing the burden for showing intentional discrimination. *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1324 (11th Cir. 2021). This ends the inquiry.

CONCLUSION

For these reasons, the State requests that this Court GRANT its motion for summary judgment.

Respectfully submitted, this 15th day of December, 2023.

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LOCAL RULE 7.1(D) CERTIFICATION

I certify that Defendants' Brief in Support of Motion for Summary Judgment has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1. Specifically, this document has been prepared using 14-pt Times New Roman font and type.

/s/ Josh Belinfante
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