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Re: *Civil Rights Complaint against the State of Georgia and the Georgia Department of Education*

Introduction

This complaint is brought by the Southern Poverty Law Center (“SPLC”) against the State of Georgia (“State”) and the Georgia Department of Education (“GaDOE”) on behalf of students with disabilities attending Georgia’s public schools.¹

The complainant maintains that the State and GaDOE discriminate against students with disabilities by creating and implementing an educational funding scheme that promotes the segregation of students with disabilities in violation of Title II of the American with Disabilities Act of 1990 (“Title II”)² and Section 504 of the Rehabilitation

¹ SPLC is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. SPLC is based in Montgomery, Alabama and has offices in Atlanta, New Orleans, Jackson, and Miami.

² American with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq. (1990); 28 C.F.R. § 35 et seq. (2010).

Act of 1973 (“Section 504”).³ In 1985, the Georgia General Assembly passed the Quality Basic Education Act (“QBE”), establishing state-wide policies governing the funding of public education in Georgia.⁴ To determine local funding allocations, the QBE created a financing system designed to compensate local education agencies (“LEAs”) for the additional per pupil costs they incur beyond providing general education.⁵

The financing system in the QBE relies largely on a weighted formula to determine local education costs. Under the formula, each student is assigned a numerical “weight.” For students with disabilities, the weight is calculated with a bonus multiplier based in part on the student’s disability and placement. The higher the weight a student is assigned, the more money the LEA receives for the student. Students with disabilities served in segregated settings are assigned the highest weight and therefore receive one of the highest rates of reimbursement. Students with disabilities in included settings net the second lowest amount of reimbursement from the school system.

In contrast to the additional funding offered in segregated settings, Georgia’s funding system undercompensates for services and staff necessary for effective inclusive education. For instance, to fully fund a paraprofessional aide in the inclusive environment, there must be approximately 3 to 4 special education students in the classroom. Students in need of related services net a substantially greater amount of

³ Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq. (2002); 34 C.F.R. § 104 (2011).

⁴ GA. CODE ANN. § 20-2-160 (2011).

⁵ Michael M. Hidek, *Funding and Decision-Making in Special Education at the Local Level: Perceptions of Directors of Special Education* 31 (Jan. 2001) (unpublished Ph.D. dissertation, University of Virginia), <http://proquest.umi.com>.

funding for those services if the students are served in segregated settings rather than inclusive environments.

As set forth in detail below, by assigning a separate, lower weight to students in the inclusive setting and by failing to promulgate funding for related services such as paraprofessionals and counseling, Georgia's funding formula promotes the unnecessary segregation of students with disabilities in violation of Title II and Section 504. This effect has been documented by researchers, advocates and countless parents of children with disabilities moved to more restrictive environments despite doing well in the lesser restrictive environment. As articulated by the United States Supreme Court in its seminal *Olmstead* decision, the unjustified segregation of persons with disabilities is discrimination.⁶

Jurisdiction

The Department of Justice has authority to investigate violations and enforce the provisions of Title II of the ADA and Section 504 of the Rehabilitation Act. The Respondents are governmental units or public entities and are recipients of federal financial assistance and are therefore subject to Title II and Section 504. The discrimination detailed in this complaint is continuing and has occurred within the last 180 days.

Statutory Framework

⁶ *Olmstead, et al. v. L.C. et al.*, 527 U.S. 581 (1999).

Enacted over 25 years ago, the Quality Basic Education Act (“QBE”) created a new way to fund public education in Georgia.⁷ The QBE Act was designed to promote equitable funding across the state. Under the QBE, local school districts receive funding based on an estimation of student need – not local revenue. Georgia uses the Quality Basic Education formula to calculate how much special education funds LEAs receive from the state. The QBE requires school districts to assign each student a weight based on the student’s placement and disability.

Although founded on important principles, Georgia’s funding system has become outdated and has failed to adapt to the legal requirement that students with disabilities be included with their typical peers to the maximum extent appropriate.⁸ Rather than encourage integration, the QBE funding formula discriminates against students with disabilities by unnecessarily promoting their placement in segregated environments.⁹

Georgia’s Weighted Formula

To determine local district special education funding, Georgia’s financing system relies largely on a weighted formula created by the QBE Act. The QBE formula assigns a base amount of 1.00 to a high school student in general education who receives no

⁷ GA. CODE ANN. §§ 20-2-130 to 20-2-322 (2011).

⁸ TOM PARRISH & JENNIFER HARR, AMERICAN INSTITUTES FOR RESEARCH, RECONSIDERING SPECIAL EDUCATION FUNDING IN GEORGIA 12 (June 2005).

⁹ There are several different ways state education agencies can fund LEAs. Other systems fund the cost of instructional units, such as teachers and support services, or the excess cost or a fixed percentage of providing services. Some states, like North Carolina and Maryland fund special education through a per student flat grant. Hidek, at 31-33. *See also* Thomas B. Parrish & Jay G. Chambers, *Financing Special Education*, 6 THE FUTURE OF CHILDREN: SPECIAL EDUCATION FOR STUDENTS WITH DISABILITIES 1, 128-129 (Spring 1996).

special services.¹⁰ All other students receive a higher weight, including students with disabilities and students who receive early intervention services in elementary school. A student's weight is calculated six times – one for each segment, or class, throughout the day. If a student spends three segments, or classes, in a special needs or gifted and talented classroom, which theoretically have higher teacher-student ratios, the student receives a greater weight for those three segments.¹¹ The FTE Program Weights and Teacher-Pupil Ratios are listed in Table 1.¹²

Table 1.

Program	Weight	Teacher : Pupil Ratio
Kindergarten	1.6587	1:15
Kindergarten Early Intervention	2.0496	1:11
1 st -3 rd grade	1.2855	1:17
1 st -3 rd grade early intervention	1.8029	1:11
4 th -5 th grade	1.0323	1:23
4 th -5 th grade early intervention	1.7971	1:11
6 th -8 th grade	1.0162	1:23
9 th -12 th grade	1.0000	1:23
9 th -12 th grade Vocational lab	1.1847	1:20
Category I disabilities	2.3940	1:8
Category II disabilities	2.8156	1:6.5
Category III disabilities	3.5868	1:5
Category IV disabilities	5.8176	1:3
Category V disabilities	2.4583	1:8
Category VI Gifted & Talented	1.6673	1:12
Remedial education	1.3128	1:15
Alternative education	1.6025	1:15
English for speakers of other languages	2.5306	1:7

GA. CODE ANN. § 20-2-161(b).

¹⁰ GA. CODE ANN. § 20-2-161(a).

¹¹ The QBE formula is driven by the following analysis: “As the cost of instructional programs varies depending upon the teacher-student ratios and specific services typically required to address the special needs of students enrolled, state authorized instructional programs shall have the following program weights and teacher-student ratios.” GA. CODE ANN. §20-2-161(b).

¹² GA. CODE ANN. § 20-2-161(b) (2011).

To determine the increased weight for students with disabilities, the QBE formula divides them into five disability categories (see Table 2).¹³ Students with disabilities are only assigned the listed categorical weight when served in special education classrooms. Categories I through IV describe various specific mental or physical conditions, and Category V, as discussed below, is reserved for students served in the inclusive environment. Category IV includes the most serious and potentially debilitating impairments. Students in this fourth category are assigned the highest weight, 5.8176, and therefore receive the most funding. Although this funding formula may appear appropriate, because it is extremely complex, it results in wildly different funding amounts for students with the same disability and provides one of the least amounts of funding for students with disabilities who are served in inclusive environments.¹⁴

Category V students include those with any disability; however, because of their placement in the general education environment, they are funded at the Category V level, one of the lowest funded categories under the QBE formula. When the QBE funding formula was first enacted in 1985, it only included Categories I through IV. Georgia's instruction model was based on a "pull out" model where special education students received most of their instruction in segregated classrooms.¹⁵ Category V was not added to the QBE funding formula until 1995, nearly ten years after the original formula was enacted, but the fundamental structure promoting segregation remains. Under Georgia's

¹³ There are a total of six categories for students in "special education." Category VI is limited to students who are "intellectually gifted." GA. CODE ANN. §§ 20-2-152; 20-2-161.

¹⁴ PARRISH & HARR, *supra* note 8, at 9.

¹⁵ VIRGINIA ROACH, NAT'L ASS'N OF STATE BD. OF EDUC., REPORT COMMISSIONED BY THE GEORGIA GOVERNOR'S COUNCIL ON DEVELOPMENTAL DISABILITIES (2005) (Attachment A).

special education formula, students in Categories I through IV who receive special instruction or aids “in the least restrictive environment, including the regular classroom and who receive such services from personnel such as paraprofessionals, interpreters, job coaches, and other assistive personnel” are considered Category V students. With the exception of Category I, students in Category V receive the lowest amount of funds of all students with disabilities.

Table 2. Special Education Weights

Category I	2.3940	Self-contained specific learning disabled and self-contained speech-language disordered
Category II	2.8156	Mildly mentally disabled
Category III	3.5868	Behavior disordered, moderately mentally disabled, severely mentally disabled, resourced specific learning disabled, resourced speech-language disordered, self-contained hearing impaired and deaf, self-contained orthopedically disabled, and self-contained other health impaired
Category IV	5.8176	Deaf-blind, profoundly mentally disabled, visually impaired and blind, resourced hearing impaired and deaf, resourced orthopedically disabled, and resourced other health impaired
Category V	2.4583	Those special education students classified as being in Categories I through IV, as defined in this subsection whose Individualized Educational Programs specify specially designed instruction or supplementary aids or services in alternative placements, in the least restrictive environment, including the regular classroom and who receive such services from personnel such as paraprofessionals, interpreters, job coaches, and other assistive personnel
Category VI	1.6673	Intellectually gifted

GA. CODE ANN. §§ 20-2-152; 20-2-161.

Although the QBE formula weights are not directly tied to the location of services, by linking weight to the number of segments a student receives in a special education classroom, the formula still provides an incentive for school districts to place students in

more restrictive settings. A 2005 report found that Georgia had the second highest rate of students in special education that had been identified with a “higher cost” disability.¹⁶

This placement-driven funding is documented in a brochure on GaDOE’s website.¹⁷ The brochure provides additional information for parents interested in special needs vouchers. If parents enroll their children in the voucher program, they are given funds equal to local school district allocations for the student during the previous school year. Parents can use these funds toward private school placement. Table 3 demonstrates how profoundly placement determines funding.¹⁸

Both Student #1 and Student #2 in Table 3 could have the same disability. However, because Student #2 has 3 segments or classes that are limited to special education students, Student #2 will receive \$3420 more than Student #1. Arguably, this difference in placement and funding is based on student need, but several studies have found that special education directors manipulate data or “game the system” to achieve the desired funding levels.¹⁹ As the recession deepens, and budgets are cut, districts have increasing incentives to place students in more restrictive environments to secure necessary funding for special education services. In addition to the placement-driven funding weights, the

¹⁶ K. Mahitivanichacha & T. Parrish, *The Implications of Fiscal Incentives on Identification Rates and Placement in Special Education: Formulas for Influencing Best Practice*, J. OF EDU. FINANCE (2005) cited in Parrish & Harr, at 9.

¹⁷ Georgia Dep’t of Educ., Georgia Special Needs Scholarship Program, Understanding the Program 10 (2011), <http://www.doe.k12.ga.us/DMGetDocument.aspx/2011-12%20SB10%20Understanding%20the%20Program%20FTP%20072511.pdf?p=6CC6799F8C1371F6F85C493397E388721D4E75C6C897496F4152BC4FFF56EDFB&Type=D> (last viewed October 31, 2011).

¹⁸ *Id.*

¹⁹ ROACH, *supra* note 15, at 27. See also Hidek, *supra* note 5, at 42-43; PARRISH & HARR, *supra* note 8, at 11.

QBE formula contains several other barriers to the effective inclusion of students with disabilities.

Table 3.

Segments for 2010 - 2011 & 2011 - 2012 School Year	Per Segment (class) amount	Student #1		Student #2	
		Per Segment (class) amount	Earnings	Per Segment (class) amount	Earnings
Kindergarten	679		0		0
Kindergarten EIP	839		0		0
Grades 1-3	526		0		0
Grades 1-3 EIP	738		0		0
Grades 4-5	422	6	2,532	3	1,266
Grades 4-5 EIP	735		0		0
Grades 6-8 Middle Grades	415		0		0
Grades 6-8 Middle School					
Incentive	459		0		0
Grades 9-12	409		0		0
Vocational Labs	484		0		0
Special Education I	979		0		0
Special Education II	1,152		0	2	2,305
Special Education III	1,468		0		0
Special Education IV	2,381		0	1	2,381
Special Education V	1,005		0		0
Gifted	682		0		0
Remedial	537		0		0
Alternative Program	656		0		0
Eng. to Speakers of other Langs. (ESOL)	1,036		0		0
		Total of 6 Segments	2,532	Total of 6 Segments	5,952

Georgia Dep't of Educ., Georgia Special Needs Scholarship Program, Understanding the Program 10 (2011).²⁰

Georgia's Scheme Fails to Fully Fund Supplemental Aids and Services Necessary for Effective Inclusive Education

The Georgia funding formula fails to fully fund related services, paraprofessionals, and co-teaching – all crucial components of successful inclusion.²¹ The QBE formula is intended to cover the cost of these services; however, special education students only receive the higher, categorical weights when they are served in the special education

²⁰ Available at: <http://www.doe.k12.ga.us/DMGetDocument.aspx/2011-12%20SB10%20Understanding%20the%20Program%20FTP%20072511.pdf?p=6CC6799F8C1371F6F85C493397E388721D4E75C6C897496F4152BC4FFF56EDFB&Type=D> (last viewed October 31, 2011).

²¹ ROACH, *supra* note 15, at 26-27; PARRISH & HARR, *supra* note 8, at 8-10.

classroom. Georgia's failure to fully fund these services severely restricts effective inclusion.

With the exception of speech language therapy, Georgia's formula does not fully fund related services such as physical therapy or psychological services for students with disabilities.^{22 23} The QBE formula provides more funding for these services when students receive the services in the special education classroom.²⁴ If a student required the support of a physical therapist to achieve meaningful inclusion in the general education environment, the student would only receive the funds allowed under Category V. To fully fund the position, the related service provider would also have to meet the minimum and maximum class size requirements making it even more difficult to meet the needs of a student who may require intensive, individualized assistance.²⁵

The funding formula also does not fully fund paraprofessional support in the general education classroom.²⁶ In order to fully support a paraprofessional aide in the inclusive environment, there must be approximately 3 to 4 special education students in the classroom.²⁷ There are no direct provisions for reimbursement for a student who needs a one-on-one aide, which makes it extremely difficult to support a student in the inclusive environment who needs more intensive paraprofessional support to succeed.²⁸

²² PARRISH & HARR, *supra* note 8, at 11.

²³ In addition, the QBE formula does not factor in transportation and other local costs into the formula. As a result, even the most accurate QBE formula finding is an underestimate of actual costs. *Id.* at 7.

²⁴ ROACH, *supra* note 15, at 26-27; PARRISH & HARR, *supra* note 8, at 8.

²⁵ PARRISH & HARR, *supra* note 8, at 6-8.

²⁶ PARRISH & HARR, *supra* note 8, at 11; ROACH, *supra* note 15, at 27.

²⁷ PARRISH & HARR, *supra* note 8, at 11.

²⁸ *Id.*

Georgia's system also discourages co-teaching and approaches it as if there were two separate classrooms.²⁹ Co-teaching models that require both one regular educator and one special education teacher in a single classroom are only fundable when you place a significant number of students with disabilities in the classroom.³⁰

While it creates disincentives to placing students in the regular education classroom, the QBE formula simultaneously produces incentives to the placement of students in the special education classroom. Under Georgia's system, in order to fund a special education teacher, there must be a minimum of five students in the class. Even if there are four students who need to be in the self-contained classroom, Georgia's system requires districts to place a fifth student in the classroom to fund the teaching position.³¹ These services and specialized professionals are often necessary for students being served in the general education classroom. Failing to fully fund these services only exacerbates the fiscal incentive for districts to serve students in more restrictive placements. All of these factors combine and increase the potency of Georgia's placement-driven funding formula.

The Quality Basic Education Funding Formula Creates a Financial Disincentive to the Placement of Students in the Least Restrictive Environment

By linking placement to funding, the QBE formula creates a financial incentive for local districts to unnecessarily serve students with disabilities in segregated classrooms in violation of Title II and Section 504. "This type of incentive will occur any time that a

²⁹ *Id.*

³⁰ *Id.*

³¹ ROACH, *supra* note 15, at 27; PARRISH & HARR, *supra* note 8, at 6.

more restrictive placement will generate more state aid *in relation to local costs* than its less restrictive alternative.”³² If it costs a school district more to educate a student in a general education classroom and this cost is not fully funded by the state, it creates an incentive for the LEA to recover these costs in other ways, including by placing that student in a more restrictive environment.

This fiscal disincentive has been well-documented over the years. In 1992, the National Association of State Boards of Education (“NASBE”) released a strong policy statement urging local districts to break the linkages between funding, placement and disability labels.³³ In 1997, the amendments to the Individuals with Disabilities Education Act (“IDEA”) banned funding-driven placement decisions. According to the IDEA regulations, “A State must not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability FAPE according to the unique needs of the child, as described in the child's IEP.”³⁴ This prohibition was reiterated and strengthened in the 2004 reauthorization of the IDEA, which demands that a State revise its funding mechanisms “as soon as feasible” to ensure students with disabilities are included in the regular education environment to the maximum extent appropriate.³⁵

Special education administrators across the country have articulated the damaging effects discriminatory funding formulas have on students. A 1994 study interviewed 18

³² Parrish & Chambers, *supra* note 9, at 129.

³³ *Id.*

³⁴ 34 C.F.R. § 300.114(b)(i-ii) (2011).

³⁵ 20 U.S.C. § 1412(a)(5) (2011).

special education directors in 6 states and found when choosing the least restrictive environment, special education funding was “the cornerstone of influence.”³⁶ One director remarked, “If we place children in general education and move away from the use of labels to identify students for particular services, we are in jeopardy of losing our funds.”³⁷ Special education directors in Georgia have expressed similar concerns.

In a 2001 study, eight directors of special education from the wealthiest and poorest school districts in Georgia were interviewed. Seven of the eight special education directors reported that funding affects placement decisions.³⁸ As a result of funding concerns, none of the directors considered “a full cascade of options” in placement decisions for students with disabilities.³⁹ Funding is such a burden that one district administrator reported that each fall, its special education program managers spend half a day figuring out how to count special education students so that they will get the desired funding.⁴⁰

We have heard several complaints from Georgia parents whose children were placed in more restrictive environments even though the children were functioning well in a lesser restrictive environment. Some of these students were removed to classrooms for children with their disability despite functioning well in general education

³⁶ S.B. Hasazi, et. al., *A qualitative policy study of the least restrictive environment provision of the Individuals with Disabilities Education Act*, 60 EXCEPTIONAL CHILDREN 6, 491-507 (1994).

³⁷ *Id.* at 497.

³⁸ Hidek, *supra* note 5, at 102-3.

³⁹ *Id.* at 128.

⁴⁰ PARRISH & HARR, *supra* note 8, at 7.

environments. Private practitioners assisting families of children with disabilities in the Atlanta area have referred to the current climate as an “epidemic of segregated settings.”

Although programmatic decisions are made by local officials, they “are often affected by the incentives created through the state’s funding system.”⁴¹ IEP teams often consist of special education administrators, teachers and paraprofessionals. In Georgia to fully fund a special education teacher, there must be at least five students in the classroom. These types of rules coupled with budget constraints create conflicts of interest and force IEP team members to play dual roles.⁴²

Despite clear warnings of the illegality of the funding formula, the State of Georgia and the GaDOE’s response has been superficial and fleeting.⁴³ In 2003, the Georgia Governor’s Council on Developmental Disabilities (“DD Council”) began receiving reports from school staff partners that Georgia’s funding formula made it difficult to serve students in integrated settings without incurring a substantial loss in revenues.⁴⁴ As noted by one local administrator, “The system forces schools to do things that are inappropriate for children because that is how [they] get paid.”⁴⁵ In response, the DD Council commissioned the National Association of School Boards of Education to

⁴¹ Parrish & Chambers, *supra* note 9, at 128.

⁴² Hidek, *supra* note 5, at 45.

⁴³ In a 2009 Atlanta Journal Constitution editorial, two researchers at the Manhattan Institute warned Georgia that its formula might drive revenue-driven placement and eligibility decisions. Jay P. Green & Marcus A. Winters, *Funding may push special ed labeling*, ATLANTA JOURNAL CONSTITUTION, September 23, 2009.

⁴⁴ PARRISH & HARR, *supra* note 8, at i.

⁴⁵ ROACH, *supra* note 15, at 27.

conduct a study on special education financing in Georgia.⁴⁶ The NASBE study concluded that Georgia's special education funding formula created disincentives to inclusion because it was complex, rigid and inequitable; that it did not provide adequate resources; and that it created financial disincentives to placing students with special needs in general education classrooms.⁴⁷

In 2004, the DD Council formed the Special Education Funding Formula Committee, facilitated by Dr. Tom Parrish, to further evaluate the problem. Dr. Parrish produced a report that provided clear, inexpensive recommendations on how Georgia could make its funding formula less placement-driven. In 2005, the Committee presented this report to the Governor, the General Assembly, and the Georgia Department of Education. Every three years, the Governor appoints a task force to review the effectiveness of existing program weights and recommend changes to the General Assembly. Despite slight increases for inflation, the state of Georgia has consistently upheld its discriminatory funding formula.

The recent loss of stimulus money has exacerbated the fiscal disincentive for Georgia school districts. Georgia received approximately \$313 million through the American Recovery and Reinvestment Act ("ARRA") for students with disabilities.⁴⁸ Local school districts had discretion over how to disperse the funds, as long as funds

⁴⁶ The DD Council is a separate state agency that functions as a planning council. It was created by the Developmental Disabilities Act and is under the umbrella of the Georgia Department of Human Resources. Additional information available at:
<http://gcdd.georgia.gov/01/home/0,2197,2141044,00.html>.

⁴⁷ ROACH, *supra* note 15. *See also* Green & Winters, *supra* note 44.

⁴⁸ Stimulus Funding for Education, <http://www.doe.k12.ga.us/stimulus.aspx>.

were used by September 2011. ARRA funds allowed school districts to hire paraprofessionals and fund other positions to support special education. The loss of these funds threatened these new jobs.⁴⁹ According to the Atlanta Journal Constitution, the Chief Financial Officer of Fulton County Schools said the school system “could not justify keeping the special ed [paraprofessionals] and teachers after about \$6 million in federal stimulus money that's been paying their salaries for two years dried up.”⁵⁰

Georgia Statistics Reflecting Overall Increases in Inclusion are Unreliable

From 2010-2011, the overall rate of inclusion in Georgia increased, from 62.1% to 62.9%, a significant increase, but still less than the state goal of 65%.⁵¹ Although increases in Georgia’s inclusion data appear straightforward, there are several factors that suggest they are not entirely accurate. In 2007, the special education rate in Georgia dropped from 12.1 percent to 11.3 percent – a loss of 7,386 students. Several researchers attributed part of this decline to the creation of the Georgia Special Needs Scholarship (“GSNS”) program, which started in 2007, however only 889 students used the scholarship the first year.⁵² What happened to the remaining students? A recent audit documenting the fundamental flaws in Georgia’s education data may provide some insight.

⁴⁹ Nancy Badertscher, *Fulton schools cutting special education paraprofessionals*, THE ATLANTA JOURNAL-CONSTITUTION, May 10, 2011.

⁵⁰ *Id.*

⁵¹ These statistics reflect the number of students taught in general education classrooms over 80% of the time.

⁵² See also Green & Winters, *supra* note 44.

Since its inception, participation in the GSNS program has consistently increased. In 2010-2011, 2,550 students received the Scholarship – an increase of 482 students from the previous year. The GSNS program gives parents a voucher they can use to transfer to another public school, public school system, state school, or approved participating private school. To be eligible for the voucher, students must have been served by an Individualized Education Plan in their previous public school placement and must abandon the district’s special education services.⁵³ Participating private schools are not required to follow a student’s IEP nor are they required to provide special education services to a student.⁵⁴ Although some have applauded the GSNS program for serving students with special needs, because of the lack of accountability and oversight, it is not clear GSNS students receive an adequate education or are served in the least restrictive placement.⁵⁵ In fact, it is more likely than not that students with special needs are entering more restrictive placements. Of the top ten most attended GSNS-approved private placements, half are schools for children with special needs. If students with more serious disabilities are leaving the public schools, this may explain the increase in

⁵³ Acceptance of the scholarship has the same effect as a parental refusal to consent to services under the IDEA. Georgia Dep’t of Educ., Georgia Special Needs Scholarship Program, Understanding the Program 6-7 (2011), <http://www.doe.k12.ga.us/DMGetDocument.aspx/2011-12%20SB10%20Understanding%20the%20Program%20FTP%20072511.pdf?p=6CC6799F8C1371F6F85C493397E388721D4E75C6C897496F4152BC4FFF56EDFB&Type=D> (last viewed October 31, 2011).

⁵⁴ *Id.*

⁵⁵ There is almost no accountability over the success of students in the GSNS program. Private schools do not have to use standard testing or assessments to measure academic achievement. Participating private schools must simply report whether students achieved “progress of less than one school year,” “no progress,” “progress of one school year,” or “progress of more than one school year.” In 2008-2009, over 55 different assessment instruments were used to measure achievement. Georgia Dep’t of Educ., 2008-2009 Georgia Special Needs Scholarship Program, End of the Year Report 10-11 (2009).

inclusion. However, as discussed below, there are larger, deeper concerns with the data trends in Georgia.

A recent statewide assessment raised broader problems with reported data. A 2010 United States Department of Education audit found Georgia's data reporting system to be grossly inadequate. The audit found that "LEAs could be providing inaccurate or unsupported performance data to GaDOE."⁵⁶ A specific review of Georgia's Special Education Office found that it did not even possess sufficient documentation to assess LEA compliance with required data reporting.⁵⁷ GaDOE's Accountability Office informed federal auditors that it does not "monitor or verify" data reported by local school districts.⁵⁸ Rather, they accept information from local school districts as accurate until told otherwise.⁵⁹

Large and unexplained discrepancies in figures reflect this broken data reporting system. Between 2003-2004 and 2009-2010, the rate of inclusion in Wilcox County increased by 57.2%.⁶⁰ During that same period, the inclusion rate for Wheeler County rose by 50% from 0.80% to 50.80%.⁶¹ Although large increases in inclusion are possible, Georgia has not achieved the improvements in academic outcomes associated with effective inclusion.⁶²

⁵⁶ *Id.* at 16.

⁵⁷ *Id.* at 15.

⁵⁸ Denise M. Wempe, Office of Inspector General, U.S. Dep't of Educ., Final Report ED-OIG/A04J0003 11 (2010) (Attachment B).

⁵⁹ *Id.*

⁶⁰ Memorandum from Thomas B. Parrish (Sept. 16, 2011) (Attachment C).

⁶¹ *Id.*

⁶² Parrish, *supra* note 62.

Recent research reveals Georgia has not achieved the academic outcomes consistent with meaningful inclusion, another indication that Georgia's data is false or unreliable. Inclusion, when accompanied by the necessary supports and services, increases academic achievement for students with disabilities.⁶³ One study assessed the relationship between class placement and educational outcomes and found students with various disabilities in mainstream classrooms made greater overall academic gains than their peers served in segregated environments.⁶⁴ Recent analysis of students in special education in Georgia found no increases in academic achievement that would be consistent with Georgia's reported inclusion data raising concerns about both the reliability of this data and the method of inclusion.⁶⁵ The lack of academic improvements in spite of reports of increased inclusion may reflect the placement of students in inclusive environments without these necessary supports. To be effective, inclusion must be accompanied by the appropriate services and supports.

⁶³ J. Katz & P. Mirenda, *Including students with developmental disabilities in general education classrooms: Educational benefits*, 17 INTERNATIONAL JOURNAL OF SPECIAL EDUCATION 2 (2002); Caroline Moore, *Educating Students with Disabilities in General Education Classrooms: A Summary of the Research*, WESTERN REGIONAL RESOURCE CENTER, UNIVERSITY OF OREGON, available at: http://www.spedlawyers.com/outcomes_research.htm#Educating_Students_with_Disabilities_in_General_Education_Classrooms:_A_Summary_of_the_Research (1998); J. E. Downing, A.P. Morrison, & M.A. Bercin-Rascon, *Including elementary school students with autism and intellectual impairments in their typical classrooms: Process and Outcomes*, 24 DEVELOPMENTAL DISABILITIES BULLETIN 20-45 (1996).

⁶⁴ M.C. Wang & E.T. Baker, *Mainstreaming programs: Design features and effects*, 19 JOURNAL OF SPECIAL EDUCATION 503-521 (1985-1986).

⁶⁵ Analysis based on the percentage of students in special education who scored proficient or above in math and language arts on state tests by district. Memorandum from Thomas B. Parrish (July 28, 2011) (Attachment D).

Both the NASBE and DD Council reports noted that district administrators constantly feel pressured to “game the system” or manipulate data to ensure full funding for their students with special needs and staff.⁶⁶ For FY2004, the highest funded district received four times as many QBE earnings per student than the lowest.⁶⁷ Gaming the system, whether by manipulating data or implementing perfunctory inclusion, is illegal and ultimately harms the students the system is designed to serve.⁶⁸ By implementing a funding formula that incentivizes segregation and then failing to appropriately monitor local reports, Georgia’s funding structure not only allows these practices, it encourages them.

Legal Claims

The placement of students with disabilities in unnecessarily segregated environments is a clear violation of Title II of the ADA and Section 504 of the Rehabilitation Act. The State of Georgia and the Georgia Department of Education violate these provisions by their enactment and continued enforcement of this discriminatory funding formula that promotes and incentivizes segregated settings. Both Section 504 of the Rehabilitation Act and Title II of the American with Disabilities Act prohibit public institutions from discriminating against persons with disabilities.

Title II provides: “No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public

⁶⁶ ROACH, *supra* note 15, at 27; PARRISH & HARR, *supra* note 8, at 11.

⁶⁷ Parrish, *supra* note 8, at 13.

⁶⁸ *Cf.* Parrish, *supra* note 8, at 4.

entity.”⁶⁹ The “integration mandate” in Title II regulations states that “a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”⁷⁰ Section 504 has a similar mandate requiring “[r]ecipients [to] administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.”⁷¹ The Georgia funding formula creates a financial disincentive to administering services in the most integrated setting. This formula discourages integration and encourages segregation. As articulated in the Supreme Court decision *Olmstead v. L.C.*, Congress explicitly identified “unjustified segregation of persons with disabilities as a form of

⁶⁹ 28 C.F.R. § 35.130 (2011). Section 504 has a similar provision: “No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...” 29 U.S.C. § 794(a) (2011).

⁷⁰ 28 C.F.R. § 35.130(d) (2011). *See also* 42 U.S.C. §§ 12101(a)(2), (3), (5) (2011) *cited in* *Olmstead v. L.C.*, 527 U.S. at 588-9.

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; (3) discrimination against individuals with disabilities persists in such critical areas as ... education...; (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion ... overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

⁷¹ 28 C.F.R. § 41.51(d) (2011). *See also* 29 U.S.C. 701(a)(3)(F) (2011) (“[D]isability is a natural part of the human experience and in no way diminishes the right of individuals to ... enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society.”).

discrimination.”⁷² By continuing to enact and enforce the current formula, the State of Georgia and the Georgia Department of Education clearly violate these provisions.

Conclusion and Request for Relief

The current funding formula enacted by the State of Georgia and enforced by the Georgia Department of Education promotes unnecessary segregation of students with disabilities in violation of Title II and Section 504. The QBE system is illegal and harms some of Georgia’s most vulnerable children. It must be changed.

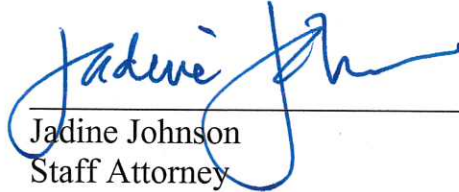
Complainants therefore ask the Department of Justice to:

1. Accept jurisdiction and fully investigate our claims;
2. Take all necessary action to ensure that the Georgia funding scheme ceases to operate in a way that leads to segregation of students with disabilities;
3. Require initial and ongoing training by the Georgia Department of Education to local school districts on how to implement reformed funding formula.

⁷² *Olmstead v. L.C.*, 527 U.S. at 600. In *Olmstead*, the Supreme Court considered, amongst other things, whether the public entity administering services to two women with mental retardation was required to do so in the least restrictive environment and whether the unnecessary segregation of these women constituted discrimination. The Court conclusively held that Congress clearly established in the provisions of Title II of the American with Disabilities Act that unjustified isolation of persons with disabilities is a form of discrimination. The Court also noted that Congress used “mandatory language to proscribe discrimination against persons with disabilities” citing the Section 504 provision that “[n]o otherwise qualified individual with a disability... shall, solely by reason of her or his disability, be excluded ... or be subjected to discrimination.” 29 U.S.C. § 794(a) (2011). Relying on Congressional standards, the Court also noted, “[t]he most integrated setting appropriate to the needs of qualified individuals with disabilities” is “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.” 28 C.F.R. § 35, App. A, p. 450 (1998) *cited in* *Olmstead*, at 592.

Thank you for your attention to this complaint and corresponding requests for relief. Please feel free to contact us if you have any questions.

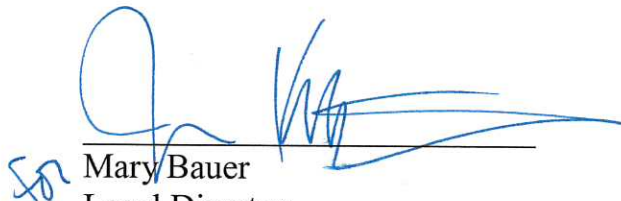
Sincerely,



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