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LITIGATION AND REGULATORY LAW

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Ms. Vanita Gupta
Principal Deputy Assistant Attorney General
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W. – R.F.K.
Washington, D.C. 20530

Re: Georgia Network for Educational and Therapeutic Support

Dear Deputy Assistant Attorney General Gupta:

This letter is in further response to the July 15, 2015 Letter of Findings (“Letter of Findings”) issued by the Department of Justice (“DOJ”) regarding the Georgia Network for Educational and Therapeutic Support Network (“GNETS”) and addresses DOJ’s recent request for additional information related to the GNETS Program and the State’s plans for it.

INTRODUCTION

As conveyed to DOJ attorneys in our October and December meetings, we respectfully disagree with the DOJ’s contention that the administration of the GNETS program violates the Title II of the Americans with Disabilities Act (“ADA”), and DOJ’s Letter of Findings fails to include sufficiently detailed facts to put the State on notice of any alleged “systemic” violation(s). Absent such information, the State cannot further evaluate the generalized allegations in the Letter of Findings. We are, however, pleased that our meetings have resolved in the negative the question of whether the existence of the GNETS program, including its freestanding facilities, constitutes a facial violation of the ADA.

Contrary to the allegations in the Letter of Findings, the administration of the GNETS Program complies with the ADA, the Individuals with Disabilities in Education Act (“IDEA”), 20 U.S.C. § 1400, *et seq.*, and other federal and State laws. Decisions to refer students to the GNETS program are made pursuant to an Individualized Education Program (“IEP”) team recommendation, without exception. The State funding formula does not in any instance influence the IEP recommendation. Instead, each student receiving services through a GNETS program is placed by his IEP team, and the placement process is carried out through the intricate procedural requirements

mandated by IDEA and other federal and State law. Each IEP team (which by definition includes the parent or guardian of the individual student) determines what constitutes the least restrictive environment in which the individual student's education and related supports and services can be delivered successfully and in the manner most likely to serve the student's best interests. Each IEP team begins that inquiry with the assumption that the general education setting is appropriate and considers more restrictive placement settings only when a less restrictive environment cannot effectively deliver the necessary education and related services. An IEP team that determines a GNETS placement is the least restrictive environment that can serve a particular student then determines the least restrictive GNETS setting in which the student is likely to benefit from the services he or she receives. Thus, the IEP team first considers GNETS program services delivered in the general education setting (if any) and, only where that setting is unlikely to be adequate and appropriate, more restrictive settings.

Further, contrary to DOJ's suggestion, GNETS is not the default placement for students diagnosed with emotional and behavioral disorders ("EBD"). IDEA and State administrative regulations establish clear standards that govern the referral of a student to a GNETS program. An IEP team may recommend GNETS program placement for a student only where there is documentation of one or more of the characteristics of the disability category of EBD marked by a high level of severity, duration, frequency and intensity. This documentation must include prior extension of less restrictive services and data that indicate such services have not enabled the student to benefit educationally. GNETS programs are part of the local school systems' continuum of services for students with disabilities. Additionally, each local school district is required to annually report to the Georgia Department of Education ("GDOE") the total financial assistance as well as in-kind support provided to its GNETS Program.

Given this, the only reasonable conclusion that the State can reach is that DOJ relies on outdated information. This is complicated by the DOJ's decision to refuse to provide the State with specific instances or evidence providing the basis of its Letter of Findings.¹ We can, therefore, surmise only that that the DOJ is relying primarily on information gathered prior to the GDOE's development and implementation of a strategic plan to improve the GNETS programs.

¹ Despite the State's assurances that it will promptly and thoroughly remedy any actual violations, the DOJ has provided very little specific information, and we address those few specific allegations in this correspondence. DOJ's position appears limited, therefore, to its characterization that "this is a systemic investigation of the State's creation and operation of GNETS and we do not believe that it will be resolved by spending time discussing individual complaints." And, the State has not been provided with sufficient information to evaluate such generalized allegations.

The strategic plan is in response to the State's 2010 performance audit of the GNETS program. Thereafter, DOJ reportedly opened an investigation of the GNETS Program in response to a November 9, 2011 complaint received from the Southern Poverty Law Center ("SPLC"). The SPLC alleged that the State's funding formula encouraged the unnecessary placement of special education students into separate classrooms. However, the SPLC's letter is based on research and data collected prior to November 2011. And, at a public meeting, an attorney who worked with the SPLC acknowledged that the IDEA remedied the issues that concerned the SPLC, but she explained, the SPLC was "not satisfied" with the individualized approach mandated by the statutory text. This disappointment with Congressional intent led the SPLC to, in the words of the attorney, "pull the *Olmstead* decision off the dusty shelf" to see if it had any application to education policy. This acknowledged legal adventurism and misguided attempt by third parties to change enacted law through judicial fiat will not be entertained by the State. For similar reasons, we disagree with the DOJ's legal theory. The State cannot be placed in the untenable position of being forced to choose between complying with the IDEA and the ADA. Moreover, it remains unclear to the State what decisions, acts or programs actually discriminate in the provision of public services. Unless the DOJ questions the IEP process, which it lacks jurisdiction to do, there seems no articulated act of discrimination in the administration of the GNETS program by State actors. In further support of our position, the State offers the following information.

THE GNETS PROGRAM²

The GNETS Programs "provide comprehensive educational and therapeutic support services to students who might otherwise require residential or other more restrictive placements due to the severity of one or more of the characteristics of the disability category of emotional and behavioral disorders (EBD)."³ "GNETS Programs

² "GNETS Program" refers the program created by O.C.G.A. § 20-2-270.1. "GNETS Programs" refers to individual GNETS programs administered by educational entities throughout the state. This would include the GNETS centers and GNETS school-based classrooms as referenced in the Letter of Findings by the DOJ.

³ The number of autistic children who have been assigned to a GNETS program during the last several years has increased (at the same time that overall enrollment in GNETS schools has continuously declined). The increase in autistic children enrolled in GNETS is consistent with the increase of children being diagnosed as autistic. Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 UC Davis J. Juv. L. & Pol'y 217 (2005) (noting that in some cases it is the parent advocating for placement in a more restrictive environment). No autistic child is referred to a GNETS program unless the local school district has complied with the State Rules governing such referrals. See discussion in Section C, *infra*. GNETS Operations Manual at 1. The GNETS Operations Manual is available at <http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Special-Education-Services/Documents/GNETS/FY14%20Operations%20Manual.pdf>.

provide an array of therapeutic and behavioral supports as well as specialized instruction for students. These supports are designed to assist the student to progress in the general curriculum and graduate ready for work or postsecondary studies. In addition, the GNETS program provides supports to families and works collaboratively with other agencies serving students.”⁴ Any student enrolled in a GNETS program has been assigned to that school based on a determination that the student requires the intensive therapeutic interventions and educational support that GNETS program are designed to provide.

There are currently 24 GNETS Programs across the State. Each program serves a specific geographical area of the State.⁵ There are a total of 507 GNETS classes (with class size generally ranging from 4 to 8 students). The number and size of GNETS classes operated by each GNETS Program is determined based on student population in that geographic area and the number of students living in that area whose EBD-related IEP requires special education, including therapeutic services, to be provided in a separate classroom. Over the past several years, many GNETS classes have been relocated so they now are located on the same campus as a school serving typical peers.

However, Georgia is a large state and contains 194 school districts. It is not economically feasible for each general education school in every school district to maintain a separate GNETS classroom on site. This is particularly true in the rural areas of the State. Several GNETS Programs provide services to 7 or 8 counties. These Programs operate multiple classes that are located across the geographic area in order to provide as much geographic proximity between the GNETS class and the student’s home school as possible. Additionally, the local school district provides transportation between the GNETS classes and the home school in order to facilitate the student’s transition back to the home school as well as participation in extra-curricular activities. Some GNETS Programs consolidate classes at a center location and may only have a handful of students while other programs may educate up to one hundred students at a central location. Larger GNETS Programs may include multiple classrooms and are typically located in metropolitan areas which have a higher density of population.

⁴*Id.*

⁵A copy of the GNETS map is attached and also available at <http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Special-Education-Services/Documents/GNETS/GNETS%20Map%20FY10.pdf>.

Governance of GNETS

The State Rules governing the GNETS Program mandate that no student shall be assigned to a GNETS Program unless or until the local school district has documented that efforts to educate the student in a general education environment have been unsuccessful even with the use of supplementary aids and services.⁶ Rule 160-4-7-.07(1). *See also* Rule 160-4-7-.07(3)(d).

Before a decision can be made to assign a student to a GNETS Program, the school must:

[Document] the severity of the duration, frequency and intensity of one or more of the characteristics of the disability category of emotional and behavioral disorders (EBD). *This documentation must include prior extension of less restrictive services and data which indicate such services have not enabled the child to benefit educationally.*

Rule 160-4-7-.15(2)(a)(emphasis added). Exit criteria “must be developed upon, or prior to, initiating services through a GNETS program.” *Id.* *See also* Ga. Rule 160-4-7-.07(1)(b).

GNETS Enrollment and Temporary Services

During the 2014-15 school year, 4,635 students were enrolled in a GNETS Program for some period of time during the school year.⁷ Any student enrolled in a GNETS Program for 10 or more days during the school year is included in this number. Thus, on any given day, the total enrollment in GNETS programs during the 2014-15 school year was less than 4,635. This number represents a significant reduction in the number of students enrolled in a GNETS Programs since 2005. That year, 5,910 students were enrolled in GNETS; by 2010 the number had decreased to 5,471. The reduction in GNETS enrollment is evidence of the continuing and consistent efforts by the State, the staff of the GNETS Programs and local school districts to ensure that no child is assigned to a GNETS Program unless efforts to educate the child in a general

⁶ In this letter, use of the term “general education environment” is intended to refer to schools that educate both special education and non-special education students.

⁷ The total number of students in Georgia who received special education services during the 2014-15 school year was 225,085. The total number of students attending public school in Georgia was over 1.7 million. Thus, the number of students assigned to GNETS Programs during the 2014-15 school year was approximately 2.05 percent of the total number of students receiving special education services and approximately .27 percent of the total population of students educated in Georgia.

education environment have been unsuccessful, even with the use of supplementary aids and services. Further, this reduction is a reflection of the strategies adopted by the State in the GNETS strategic plan for staff training and other efforts focused on transitioning students back to their home schools as quickly as possible.

While it is true that certain students will remain enrolled in a GNETS Program for several years, the number of these students is very small. On any given day, up to 30% of students enrolled in any GNETS program are in the process of transitioning back to the home school. The transition process for each student is designed to address the particular needs and interests of the individual student. Local school districts provide necessary transportation to facilitate the transition process. Each child is unique. Generalizations are therefore dangerous and counterproductive. It is common for a GNETS student who is transitioning back to his/her home school to spend part of the day (one or two classes or half a day) at the home school and the rest of the day at the GNETS school so that the student is provided with the support necessary to ensure a smooth transition back to the general education environment. A student's participation in an extra-curricular activity at his/her home school can be an integral part of the transition process (although participation in such activities is not limited to students who are in the process of transitioning back to their home school).

The services required by a student to access education for any student enrolled in a GNETS Program are set forth in the IEP. The IEP team with the parent determines the appropriate environment to deliver the services. The local school district is further required to set exit criteria either prior to or upon enrollment into a GNETS Program. Rule 160-4-7-.15 (2)(b). The determination of service environment and the exit criteria to determine movement to a less restrictive environment must be individualized because they are based on the specific behaviors and educational needs of each unique student.

Each GNETS Program employs a number of full-time staff to provide therapeutic and counselling services to students and family members. In addition, all GNETS Programs contract with outside providers as necessary to provide additional therapeutic services. The State is unaware of any GNETS Program that is failing to provide the necessary and appropriate therapeutic services to its students.⁸ If DOJ has specific information that such services are not being provided by a particular GNETS Program and are needed by a student or required by his or her IEP, the State urges DOJ to

⁸ The Letter of Findings states: "no GNETS regions that we visited were able to offer a wide array of therapeutic services to all of their students." Letter of Findings at 10, n. 13. However, the Letter of Findings failed to include any specific facts or to otherwise explain how DOJ reached this sweeping conclusion.

provide that information and the State will investigate any such complaint and take appropriate corrective action if necessary.

The State is unaware of any instance in which the exit criteria established for a GNETS student required the student to “maintain physical self control 100 percent of the time,” as alleged in the Letter of Findings at 10. In its letter, DOJ stated that this alleged exit criteria has been applied to “numerous” students. *Id.* If DOJ will provide the State with more specific information regarding this allegation, the State will investigate any such complaint and take appropriate corrective action if necessary.

Staff at GNETS Programs encourage students to participate in extra-curricular activities at their home schools. Indeed, participation in such activities can be an integral part of a student’s transition back to the home school. We can provide DOJ with numerous examples of GNETS students who are attending GNETS Programs (including GNETS classes that are not adjacent to the student’s home school) who participate in extra-curricular activities at their home Program in order to facilitate this transition. Many GNETS Programs also have their own athletic teams and clubs in order to encourage students’ interest in such extra-curricular activities. Additionally, GNETS Programs routinely engage their students in special projects that allow the students the opportunity to get out of the classroom. Students are regularly taken on outings, which gives the students an opportunity to interact with the community. These outings and field trips include, for example, bowling, going to a restaurant for lunch, or grocery shopping. Different GNETS Programs have different special programs to engage its students in activities outside of the classroom. For example, the FUTURES GNETS Program provides equestrian therapy. The Flint Area Learning Program has an agriculture program and students helped build the barn used as an outdoor classroom.

The only reason a GNETS student might be denied a request to participate in an extra-curricular activity is because the student’s IEP Team has made a determination the student does not have the behavioral control or emotional self-regulation to participate. These opportunities are reviewed periodically by the IEP Team. A student is not required to have 100% control of his/her behavior in order to be eligible to participate in extra-curricular activities at the home school or other special programs provided by the GNETS program.

Freestanding GNETS Programs

DOJ alleges that GNETS classes are housed in old school buildings that previously served as schools for black students during *de jure* segregation.⁹ DOJ Letter of Findings at 16. The State acknowledges that some GNETS facilities are in need of repair. However, some would argue the same about certain general education schools in Georgia – or, we suspect, in any other State in the country. The State denies that GNETS –classes are more likely to be located in inferior facilities.

Nevertheless, following the 2010 performance audit of the GNETS Program and as part of GDOE’s strategy to improve the GNETS Program, the Georgia General Assembly approved the issuance of a \$12 million bond offering to fund capital improvements to Georgia’s GNETS facilities. GDOE commissioned a study to evaluate the current status of each GNETS facility. Based on that study, GDOE is in the process of determining how the funding should be allocated.

On page 9 of the Letter of Findings, DOJ describes a Flint Area Learning Program GNETS facility located co-adjacent to the Sumter County 9th Grade Academy (now a 7-8 grade school) High School. This GNETS facility is located in a separate wing of the building and has its own entrance. The walk from the main entrance of the school to the GNETS wing is a very long walk through a very large, highly populated school. A separate entrance to the GNETS facilities allows students to be dropped off much closer to the entrance and ensures that those GNETS students who are not currently able to cope with a large, noisy environment are not routinely exposed to it. We can provide examples of students attending this GNETS program, who spend part of their day attending classes in the main wing of the high school. What DOJ views as unnecessary segregation is actually an effort to provide a quieter and safer environment for these sometimes fragile students to thrive.

The GNETS program at Ringgold High School does have one classroom located in the basement, along with school offices. However, several other GNETS classrooms are located above-ground. One of the reasons this GNETS class is located here is because Ringgold was hit by a tornado and therefore classroom space was limited. Students in this GNETS program are involved in an agriculture program and they helped build a barn. The basement classroom provides access to the barn, which is used as an outdoor classroom. No one at the Northwest GNETS Program is aware of a “detention” sign ever having been posted at the entrance to the classroom in the basement or any other

⁹ No specific schools were identified in the Letter of Findings.

classroom. Ringgold High School has its own detention room and the GNETS classroom located in the basement is not used for that purpose.

THE GNETS PROGRAM AUDIT AND RESPONSIVE STATE STRATEGIC PLAN

The GNETS Program was subjected to a performance audit 2010. In response to that audit, GDOE developed a strategic plan for making improvements to the GNETS Program.¹⁰ The GDOE issued the original strategic plan on May 6, 2011, to “address[] recent audit findings, recommendations from stakeholder meetings, and general improvement strategies the [GDOE] has been addressing over time with the network.” *Id* at 2. “The strategic plan embodies input from these sources and focuses on seven major areas including; (1) program operations (2) accountability, (3) student placement, (4) therapeutic interventions and supports, (5) educational programs, (6) program funding and (7) location of programs and service areas.” Since the original strategic plan was issued in 2011, Georgia’s GNETS Programs have made substantial improvements in each of these seven areas.

Beyond this, GDOE issued two updated strategic plans on December 19, 2012 and November 1, 2013.¹¹ As part of its ongoing efforts to improve and enhance the GNETS Program, GDOE created a full-time position and has recently hired a “GNETS Coordinator.” The SPLC’s report could not have considered the updated strategic plans, and their impact appears to be minimized in the Letter of Findings. DOJ has not acknowledged the improvements consistently made in the GNETS Program since the State’s 2010 performance audit. These improvements continue today and are planned for the future.

THE LACK OF EVIDENCE SUPPORTING CLAIMS OF SYSTEMIC DISCRIMINATION

DOJ, in the Letter of Findings and subsequently, asserts that local school districts unnecessarily refer students to GNETS programs and thereby engage in a pattern and practice of unlawful segregation in violation of ADA. However, DOJ refuses to notify the State of any local school district that it contends is engaging in such a “pattern and practice,” which prevents the State from addressing the articulated concerns of alleged discrimination. This problem is compounded because both IDEA and the applicable State Rules mandate that the local school district cannot refer a student to a GNETS

¹⁰ See <http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Special-Education/Services/Documents/GNETS/GNETS%20Strategic%20Plan%20with%20Cover%20Sheet.pdf>.

¹¹ See <http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Special-Education-Services/Pages/Georgia-Network-for-Special-Education-and-Supports.aspx>.

program without first documenting that efforts to educate the student in a general education environment have been unsuccessful even with the use of supplementary aids and services.

The State is aware of the fact that DOJ has met with parents who have complained about the educational and/or therapeutic services being provided to their child in a GNETS program. If there are instances in which a student is not receiving the educational and/or therapeutic services to which he/she is legally entitled in the least restrictive environment, the State wants to address it now. But, it cannot evaluate DOJ's allegations and findings, let alone address shortcomings, because DOJ provides no supporting facts.

We are further aware of media outlets' stories about the DOJ's investigations. In a PBS Newshour broadcast that aired on July 31, 2015, an Atlanta Journal Constitution writer described the case of a student who was placed in seclusion and subsequently hung himself. This incident occurred in 2004. No similar incidents have occurred since then. Furthermore, in response to this incident, GDOE adopted a policy governing seclusion and restraint. Rule 160-5-1-.35. Georgia was one of the first states in the country to adopt such a policy.

On August 10, 2015, PBS/WABE aired a segment in which it interviewed K.P., an eleven- year-old sixth grader in Fayette County who complained that he was being denied the opportunity to attend science lab at his home school.¹² We spoke with the GNETS director at Mainstay (the GNETS Program for Fayette County) and the Special Education Director for Fayette County about this student's complaint. An IEP meeting was held with K.P. and his mother on September 16, 2015. During the meeting, the GNETS staff made it clear that they were willing to arrange for K.P. to attend sixth grade science class and lab at his home school. However, K.P.'s mother was adamantly opposed. We can provide additional details regarding this student at our next meeting.

As importantly, Georgia's GNETS program is not unique. DOJ has repeatedly represented to State representatives that Georgia is the only State or jurisdiction in the country that has a program like GNETS; i.e. a program that provides education and therapeutic services for EBD students in a separate classroom. We have not done exhaustive research regarding how all other states educate and treat children with EBD.

¹² GNETS program facilities do not maintain laboratories because the bunson burners, chemicals and other potentially dangerous materials necessary to any properly functioning laboratory could cause serious injury to students and/or teachers if improperly used. Similarly, most GNETS programs have separate bathrooms, both for the sake of convenience and in order to protect the safety of students and staff.

However, based on a quick search, we found that the District of Columbia's special education program for EBD students is virtually identical to the GNETS Program.¹³

The State is prepared, indeed eager, to investigate any individual student complaint or any complaint that a GNETS program or local school district is failing to comply with ADA, IDEA, and State Rules in placing or maintaining students in GNETS programs. However, we cannot do so unless DOJ decides to share specific information.

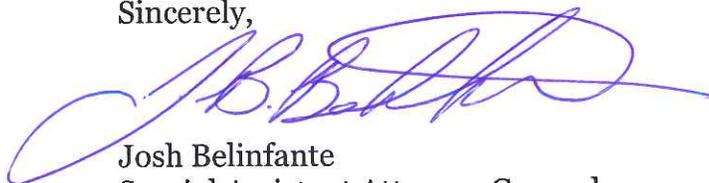
REQUEST FOR INFORMATION AND COMMITMENT TO ADDRESS SHORTCOMINGS

Georgia is committed to providing transformational emotional and behavioral support to students in need. Georgia is committed to the principles of ADA and IDEA. We want to eradicate any lingering problem that may exist in GNETS. The State has undertaken a significant strategic plan to further improve GNETS programs. The State has undertaken investigation of DOJ's 2015 findings.

The State again asks DOJ to engage in good faith efforts to improve GNETS as DOJ alleges is necessary to comply with ADA. We welcome robust participation and disclosure.

Please let us know if you have any questions.

Sincerely,



Josh Belinfante
Special Assistant Attorney General

JBA/klm
Enclosure

cc: Alexa R. Ross, Special Assistant Attorney General (w/encl.)
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Jennifer Hackemeyer, Georgia Department of Education (w/encl.)
Stacey Suber-Drake, Georgia Department of Education (w/encl.)

¹³ See

<http://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/Programs%20and%20Resources%20Guide-English-opt3.pdf>.