NOTES

SEGREGATION OF GEORGIA SCHOOLCHILDREN WITH DISABILITIES: A VIOLATION OF INTERNATIONAL LAW?

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I. INTRODUCTION

Do you expect your government to treat you equally? More importantly, do you expect your government to treat your children equally in the context of education? If your child has an emotional or behavioral disability, does this entitle the state to segregate your child away from other students, providing him or her with an education that is unequal in comparison to general education? Children and young adults with behavioral and emotional disabilities are entitled to education that is equivalent to the education other students receive. It is important to examine local systems of education to ensure that students with disabilities are being treated equally.

On August 23, 2016, the U.S. Department of Justice filed suit against the State of Georgia, a constituent state of the United States. The complaint in the suit, captioned United States v. Georgia, targeted the Georgia Network for Educational and Therapeutic Support (GNETS), a state funded program that provides education to students with emotional and behavioral disabilities. It alleged GNETS impermissibly segregates and discriminates against students with behavioral and emotional disabilities.

The case stems from an incident in 2004, when a thirteen-year-old boy, Jonathan King, hanged himself in an isolation room in a GNETS facility. An investigation was launched. The Department of Justice decided to file a civil action after federal-state negotiations failed. In the complaint, the United States alleged that the manner in which GNETS is currently being administered is a violation of Title II of the Americans with Disabilities Act because it unnecessarily segregates students with disabilities from their peers.

What does the United Nations Human Rights Committee think about segregating schoolchildren with disabilities in a manner that makes their education unequal to the education of other students? The International Covenant on Civil and Political Rights is considered by many to be the leading authority on human rights standards in the international sphere. What does this mean for the problem at hand? The Covenant sets forth obligations that must be followed by the party states. The United States

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3 Complaint, supra note 1, ¶ 1.
ratified the Covenant in 1992, which means that U.S. practices and procedures must meet the Covenant’s human rights standards, including its standards in the education of children with disabilities.

This Note aims to provide a deeper understanding of the current lawsuit between the United States and the State of Georgia and the applicability of international law to the problem. By analyzing the applicable provisions of the Covenant and its jurisprudence, this Note explores whether GNETS practices are discriminatory under international law standards. Part II of this Note will discuss the recent complaint that has been filed and the factual findings that were made by the DOJ in its 2015 investigation report. Part III will provide an overview of the International Covenant on Civil and Political Rights, the specific provisions that are applicable to the problem, and the status of the Covenant in the United States. Part IV provides an analysis of the manner in which the practices of GNETS violate international law standards and a discussion of the scope and limits of the Covenant in the United States.

II. SEGREGATIONIST PRACTICES AS A CASE STUDY IN U.S. LAW ON SCHOOLCHILDREN WITH DISABILITIES

The United States filed a civil action against the State of Georgia. The United States alleged that Georgia’s GNETS Program is a violation of the Americans with Disabilities Act because it unnecessarily segregates students with disabilities from their peers and provides them with unequal opportunities compared to those provided to students who are not in the program.6

A. State Practices Followed in GNETS, the Georgia Network for Educational and Therapeutic Support

The Georgia Network for Educational and Therapeutic Support (GNETS) consists of twenty-four state-funded programs throughout the State of Georgia that provide comprehensive and therapeutic support to students with disabilities between the ages of three and twenty-one.7 In the United States’ Complaint, GNETS is described as a program that the State, through the

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Georgia Department of Education, “plans, funds, administers, licenses, manages, and oversees,” and it determines which mental health and therapeutic services will be provided, who will provide them, what settings they will be provided in, and how to allocate state and federal funds.\(^8\) Students in the program have one or more of the severe characteristics within the disability category of emotional and behavioral disorders.\(^9\) Local schools throughout the state refer students to receive services from GNETS through the Individual Education Program, a process that evaluates students’ emotional and behavioral disorders based on the severity, frequency, and duration of the disorder.\(^10\) The State sets not only the criteria for students’ eligibility but also the entry and exit standards.\(^11\) Even though many of these students could be educated in an environment that is more integrated with other students, the State has chosen to provide services for students with behavioral-related disabilities almost exclusively in a segregated GNETS center or classroom.\(^12\)

The U.S. Department of Justice launched an investigation into Georgia after Jonathan King hanged himself at the Alpine center located in Gainesville, Georgia in 2004.\(^13\) The media attention that surrounded the incident, coupled with a lawsuit that the child’s parents filed against the Georgia Department of Education (DOE), prompted the federal investigation.\(^14\) Following a Georgia trial court’s grant of the DOE’s motion for summary judgment, the parents appealed to the Georgia Court of Appeals on grounds that “questions of material fact remain as to whether the Pioneer RESA [local school system managing Alpine] violated Jonathan’s substantive due process rights and further arguing that their claims against DOE were not barred by sovereign immunity.”\(^15\) In a unanimous decision issued in 2009, a three-member panel of the Georgia Court of Appeals held that there was not a substantive due process violation because there was no evidence that the two school employees who placed Jonathan in the seclusion room had acted with deliberate indifference; in particular, the court

\(^8\) Complaint, supra note 1, ¶ 5.
\(^9\) Id.
\(^10\) Id. ¶¶ 5–6.
\(^11\) Id. ¶ 5.
\(^12\) Id.
\(^15\) Id. at 10.
concluded that these employees were not aware that Jonathan had threatened suicide weeks prior.\textsuperscript{16}

In July 2015, the United States Department of Justice issued a “letter of findings” addressed to Georgia’s governor and attorney general, outlining the results of their investigation into GNETS.\textsuperscript{17} The letter also laid out the legal conclusions and minimum steps that it said Georgia was required to take in order to comply with the Americans with Disabilities Act (the ADA).\textsuperscript{18} The U.S. Department of Justice letter concluded that the manner in which GNETS is administered has resulted and continues to result in segregation and discriminatory practices because students with disabilities are unnecessarily segregated from their peers and are not given opportunities equal to those available to other students.\textsuperscript{19}

The Department of Justice based its conclusion on a number of factors outlined in the letter. First, the letter concluded that the State of Georgia failed to provide services to students that have been placed in GNETS in the most integrated setting possible to meet each student’s needs.\textsuperscript{20} Two-thirds—3,100—of GNETS students attend school in a completely segregated and isolated setting that has provided students with little to no interaction with other students who are in general education school buildings.\textsuperscript{21} Generally, the GNETS buildings are separate, run-down buildings located at a distance away from general education buildings.\textsuperscript{22} The GNETS centers that are situated in general education schools are either in separate wings of the school with separate entrances or in the school’s basement.\textsuperscript{23} The State incentivized general education schools to rely on GNETS to provide education for students with behavioral-related disabilities so local schools did not have to provide and fund the services that these students required in an integrated setting.\textsuperscript{24} This resulted in many students receiving poorer quality services than those received by students in general education schools.\textsuperscript{25} It is the State’s responsibility to ensure that these students receive the behavioral and therapeutic services that they require in the most integrated setting possible, but the structure and manner in which the State has operated GNETS base decisions on factors, such as geography and the

\begin{itemize}
\item \textsuperscript{16} Id. at 15.
\item \textsuperscript{17} GNETS Letter of Findings, supra note 6, at 1.
\item \textsuperscript{18} Id. at 1.
\item \textsuperscript{19} Id. at 3.
\item \textsuperscript{20} Id. at 8.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id. at 9.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. at 8, 10.
\item \textsuperscript{25} Id. at 10.
\end{itemize}
Second, the letter concluded that GNETS provides unequal educational opportunities to students in comparison to those provided to the general education student population. Many GNETS students only have the opportunity to learn core subjects (i.e., math, science, reading, writing) and are provided no opportunity to learn extra-curricular subjects (i.e., “art, music, foreign language, vocational courses . . .”) that are commonly provided to general education students. GNETS students are also excluded from general education school events like sport events, dances, and other social events that contribute to emotional and social education and development. Further, the learning environments of GNETS are not equal to that of general education schools. Many GNETS buildings are older and lack effective air conditioning, proper light, and extra-curricular facilities like science labs, playgrounds, libraries, media centers, and physical education rooms. Additionally, the majority of the classrooms do not allow for sufficient grade-level instruction because the classes are taught with multiple-grade levels in a single classroom where each student possesses a different type and level of disability. GNETS classrooms do not foster the development of student-teacher relationships because most instruction comes from computer-based lessons. These computer lessons also fail to provide proper educational stimulation. Thus, as the letter stated, the goal and aims of the GNETS are admirable in that the program purports to provide for the educational and therapeutic needs of students with disabilities and to fill a gap that existed in education since the 1970s. While these are the stated aims, the manner in which the State is currently administering the program does not meet such goals.

The Department of Justice concluded that the State can “redirect existing services, resources, training, and financial and human capital to appropriately integrate students with disabilities in the GNETS into general education schools and offer them full and equal opportunities to participate in the

26 Id. at 10–12.
27 Id.
28 Id. at 15.
29 Id. at 16.
30 Id.
31 Id. at 17.
32 Id.
33 Id. at 15.
34 Georgia Network for Educ. And Therapeutic Support (GNETS), supra note 7.
electives, extracurricular activities, coursework, and other educational benefits and services enjoyed by their peers.\(^{35}\)

Negotiations between Georgia and federal government officials failed. As a result, the United States initiated a civil action against Georgia for its non-compliance with the Americans with Disabilities Act.

**B. The Department of Justice Sues the State of Georgia for Non-Compliance**

After the investigation, the United States filed a civil suit against the State of Georgia in the U.S. Court for the Northern District of Georgia on August 23, 2016.\(^{36}\) The United States alleged that the complete segregation, lack of opportunities for extracurricular activities, and unequal educational settings for students in GNETS is a violation of Title II of the Americans with Disabilities Act.\(^{37}\) Title II focuses on public services of the state and local governments and prohibits discrimination by “public entities.”\(^{38}\) The complaint alleged that GNETS violates Title II of the Act because it unnecessarily segregates and discriminates against students with disabilities who could be taught in a general education setting.\(^{39}\) The United States said that the requirement of integrating students with disabilities comes from the community integration mandate provision in the ADA.\(^{40}\) In the 1999 U.S. Supreme Court case *Olmstead v. L.C.*, the Court held that states must make services available to people with disabilities, including children with disabilities, in the most integrated setting possible.\(^{41}\)

Many of the factual allegations stated in the complaint mirror the details of the “letter of findings.” First, the complaint asserted that GNETS’s educational centers are institutionalized segregated settings.\(^{42}\) These students are either segregated in GNETS self-contained buildings located at a distance from general education schools or in GNETS classrooms located in separate wings or isolated parts of the schools. As a result, students in the program

\(^{35}\) GNETS Letter of Findings, *supra* note 6, at 18.

\(^{36}\) Complaint, *supra* note 1, ¶ 1.

\(^{37}\) Id.


\(^{39}\) Complaint, *supra* note 1, ¶ 1.

\(^{40}\) Id. (“This segregation is unnecessary for the vast majority of students and, therefore, violates Title II of the Americans with Disabilities Act (“ADA”), which prohibits unnecessary segregation of persons with disabilities in state programs, services, and activities. 42 U.S.C. §§ 12131–12134. Such unjustified isolation and segregation of persons with disabilities violates the ADA’s mandate that public entities ‘administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.’ ”); see also *Olmstead v. L.C.*, 527 U.S. 581 (1999).

\(^{41}\) *Olmstead*, 527 U.S. at 607.

\(^{42}\) Complaint, *supra* note 1, ¶ 1.
are not provided with the opportunity to benefit from the range of possible interactions that would be available in a general education school.\footnote{Id. \( \S \) 2.}

Second, the complaint states that it is the manner in which the GNETs services are provided that has caused the unnecessary segregation in the centers and classrooms.\footnote{Id. \( \S \) 1.} The State has done this through its conduct. For example, it has failed to provide sufficient funding for integrated services, failed to provide general education teachers with adequate training regarding students with behavioral-related disabilities, and used exit and entrance criteria that effectively screened out students with disabilities from integrated settings.\footnote{Id. \( \S \)\( \S \) 38–41.}

Third, the complaint alleged that there are students with behavioral-related disabilities in GNETs who are qualified to receive services in a more integrated setting.\footnote{Id. \( \S \)\( \S \) 3–4.} Some students received mental health and therapeutic educational services in an integrated setting but the number was low, and the services available were relatively limited.\footnote{Id. \( \S \) 45.} The majority of students in GNETs would be able to participate in integrated, general education schools, the complaint alleged, if the State were to undertake what the complaint terms “reasonable” modifications of its methods of education for these children.\footnote{Id. \( \S \)\( \S \) 57–58.}

Fourth, the complaint alleged that the State failed to offer students in the GNETs Program equal opportunities to participate in electives, extracurricular activities, and general educational opportunities.\footnote{Id. \( \S \) 48.} The typical GNETs classroom is conducted with computer-based instruction, which stands in contrast to general education instruction that consists of a certified teacher for each subject area.\footnote{Id. \( \S \) 47.} GNETs students do not have the ability to participate in electives, extracurricular activities, or after-school athletic programs within the GNETs Program or with their “home school,” the original public school the child attended.\footnote{Id. \( \S \) 47.} Additionally, many of the buildings in which the GNETs Centers are located are inferior facilities in comparison to the general education buildings; these buildings often lack various amenities or features of a general education school such as libraries, cafeterias, science labs, music rooms, and playgrounds.\footnote{Id. \( \S \) 49.} Overall, the
complaint alleged that the approximate five thousand students with behavior-related disabilities in the Georgia GNETS have been placed in “separate, segregated and unequal settings, and placed other students at serious risk of entering such settings, failing to comply with the Americans with Disabilities Act.”53

As remedies for these alleged violations, the United States sought numerous types of injunctive relief. First, it requested a declaratory judgment that the State violated Title II of the Act.54 Second, the U.S. also sought to enjoin Georgia to both provide integrated mental health and therapeutic educational services that allow students to be placed in integral settings and to cease discriminatory practices against students in or entering the program by placing them in “the most integrated setting appropriate to the[ir] needs.”55 The position advanced in the complaint was that the most integrated, appropriate setting would be one in which the students could interact with, learn alongside, and learn from students without disabilities and in which they could enjoy access to equal educational materials and opportunities.56

After months of negotiations and the ultimate failure to come to an agreement, the United States filed suit against the State of Georgia on August 23, 2016 in the U.S. District Court for the Northern District of Georgia.57 The lawsuit has been filed under the category of civil rights and the ADA.58 As of late November 2016, the complaint by the Department of Justice was the only major document that had been filed in the court, but there has also been an order of recusal of the judge originally assigned the case and various applications of admission for attorneys that will be appearing for the United States.59 The State of Georgia has not filed an answer or any documents with the court at this time.

C. Relevant Law Within the United States

The United States’ complaint alleged the letter of findings and all of factual allegations stated in the complaint demonstrate the State of Georgia’s violation of the Americans with Disabilities Act through the “unnecessary
1. The Americans with Disabilities Act of 1990

The Americans with Disabilities Act was signed into law on July 26, 1990. The Act is one of the United States’ most comprehensive pieces of civil rights legislation that protects individuals from discrimination and ultimately guarantees that people with disabilities have the same opportunities that other Americans have available to them.

a. Background and Overview

The Americans with Disabilities Act prohibits any discrimination based on disability. In order to be protected by the Act, a person must satisfy three statutory elements. First, the person must have a disability, a term defined with respect to an individual person as a physical or mental impairment that substantially limits one or more major life activities of such individual. Second, there must be a record of such impairment. Third, the person must be regarded as having an actual or perceived physical or mental impairment. The Act prohibits the covered entities from discriminating against individuals on the basis of disability in the areas of applications for employment, hiring procedures, promotions of employees, discharge of employees, compensation of employees, training of employees, and overall employment privileges. The Act also “prohibits state or local governments, departments, agencies, or other public entities from denying the benefits of services, programs, or activities of a public entity.”

Title I of the Act focuses on employment, specifically the type of employer, and guidelines for equal employment opportunities and reasonable accommodation processes. Title II of the Act concentrates on public services of the state and local governments and prohibits discrimination by “public entities.” Title III of the Act is centered on public accommodations and services that are operated by private entities and prohibits places of

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60 See id. ¶ 1; see also GNETS Letter of Findings, supra note 6, at 14.
63 Id.
65 Id. §§ 12131–12165.
b. Key Provisions

Georgia’s operation of GNETS is alleged to be discriminatory conduct under Title II of the Act because the state program, a public entity, is the source of possible discriminatory practices. This Title mandates that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination.”

A public entity engages in discriminatory practices based on disability when it engages in any of the following conduct:

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

In addition to the requirements that a public entity provide equal aid, benefit, and services to a qualified person, Title II requires public entities to provide services in the most integrated setting possible that are suitable to the

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66 Id. §§ 12181–12189.
67 Id. § 225.
69 Id. § 12131.
needs of those individuals with disabilities.\textsuperscript{71} This aspect of Title II has been referred to as the “integration clause,” and its meaning was outlined in \textit{United States v. Olmstead}, a 1999 Supreme Court decision.\textsuperscript{72}


The United States Supreme Court case, \textit{United States v. Olmstead}, consolidated challenges by two female patients with mental disabilities regarding the Georgia Regional Hospital’s decision to keep them in psychiatric isolation.\textsuperscript{73} The Court was tasked with determining whether financial constraints of the hospital that prevented it from integrating the two patients should entirely determine whether states comply with the Act.\textsuperscript{74} In a 6–3 decision, the Court concluded that the Act required individuals with mental disabilities be integrated when they have been cleared, expressed a personal desire, and resources are available to transfer them into integrated settings.\textsuperscript{75} The Court recognized that unjustified segregation reflects judgments that “[i]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwanted assumptions that persons so isolated are incapable or unworthy of participating in community life” and “institutional confinement severely diminishes individuals’ everyday life activities.”\textsuperscript{76}

In order to comply with the Act’s regulations, the Department of Justice has stated ways in which Georgia must change its policies, practices, and procedures. The complaint generally stated that the services and supports that were currently being provided in the GNETS could be provided in a more integrated setting, “such as general education classrooms, community-based settings near schools, and students’ homes.”\textsuperscript{77} These changes would fundamentally alter Georgia’s program, and it would allow for the students’ needs to be more appropriately met, taking into account Georgia’s resources and responsibilities to other students with disabilities throughout the State.\textsuperscript{78}

There has been debate over what is meant by the terms “segregation” and “discrimination” within the Act, which is discussed in \textit{Olmstead} through Justice Scalia’s dissenting opinion.\textsuperscript{79} Justice Scalia begins his dissent with

\textsuperscript{71} 28 C.F.R. § 35.130(d) (1991).
\textsuperscript{73} Id. at 581.
\textsuperscript{74} Id. at 587.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 583.
\textsuperscript{77} Complaint, \textit{supra} note 1, ¶ 55.
\textsuperscript{78} Id. ¶ 59.
concerns regarding the misuse of the traditional meanings of the words by stating that terms such as “segregation were used in the more general sense, pertaining to matters such as access to employment, facilities, and transportation” and that without a clear congressional directive in the alternate it would be improper to assume a different meaning of the terms. 80

Next, he argued that based on the canons of construction, the definition used by the majority in Olmstead was imported from Title I, but because Congress said “segregation” in one part of the Act and not in Title II, this shows a purposeful and intentional omission.81

The United States alleged that Georgia GNETS is a violation under the Americans with Disabilities Act. External norms and international treatment of individuals with disabilities is relevant and useful in answering the question of whether Georgia’s GNETS system of educating students with disabilities away from general education school is discrimination.

III. INTERNATIONAL LAW PERTAINING TO CHILDREN WITH DISABILITIES AND THE RIGHT TO EDUCATION

This Note focuses on two relevant international treaties that set forth international norms in the area of discrimination: the 1996 International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities.

A. 1996 International Covenant on Civil and Political Rights


80 Id. at 621.
81 Id.
82 NOWAK, supra note 5, at XI.
83 Id. at XVII.
1. Background and Overview

In 1993, shortly after the end of the Cold War, the United Nations held the second World Conference on Human Rights in a period of political change. The goal of the Conference was to focus on violations of human rights and the methods that could be implemented to protect these rights. The International Bill of Human Rights was formed during this period and is currently seen as the most influential and “universally recognized minimum standard” of conduct for states in the area of human rights laws and procedures. The International Covenant on Civil and Political Rights came into force on March 23, 1976; at this point in time, over two-thirds of U.N. member states have joined as parties.

The United Nations defines human rights as rights that are “inherent to all human beings, without distinction as to race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status.” Within the category of human rights there are both civil rights and political rights that are covered by the Covenant on Civil and Political Rights. Civil rights “guarantee liberal freedom of the individual from the State” and political rights “guarantee the democratic freedom of access to the State.” Some of the broad and fundamental rights laid out in the Covenant of Civil and Political Rights are rights to: self-determination; life; family; participation in the electoral process; due process and a fair trial; freedom from torture, slavery, genocide; freedoms of speech, expression, conscience, and religion; and the enjoyment of equal protection of the laws and to these rights by women, men, children, and minorities.

2. Compliance Mechanism

States Parties assume various obligations and duties that protect human rights when they ratify the Covenant on Civil and Political Rights. The obligation to respect these rights means that the States must not interfere with these rights, must protect individuals from human rights violations, and must take action in facilitating the protection of these rights.

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84 Id.
85 Id.
86 Id.; see also International Covenant on Civil and Political Rights, supra note 4, art. 2 ¶ 1.
88 NOWAK, supra note 5, at XVII.
89 International Covenant on Civil and Political Rights, supra note 4.
Under Article 2, “the States Parties commit themselves to respect the human rights recognized in the Covenant [on Civil and Political Rights] and to ensure them without discrimination to all individuals...”91 The State’s obligations are laid out in Article 2(1) and guarantee that each State assumes the responsibility of ensuring that all people within their territory are afforded the protection of all rights laid out in the Covenant.92 This section is further complemented by Article 2(2), which “requires the States Parties ‘to adopt such laws or other measures as may be necessary to give effect to the rights’ guaranteed in the Covenant whenever such provisions do not already exist in its domestic law.”93 Under the Covenant there is an immediate obligation on the State Party to take any and all measures necessary to ensure that the rights and proclamations contained in the Covenant are being protected.94

International covenants are treaties. Along with the status of an international treaty, each covenant creates legally binding obligations the member states must follow and any noncompliance issues that arise are subject to international law, not solely domestic law.95 Following ratification of the Covenant on Civil and Political Rights, domestic law and measures became the main channel through which human rights are protected and guaranteed under international law.

In addition to the responsibilities that domestic states are given, each international covenant has its own enforcement mechanism to ensure that the States are complying with all of the obligations set forth in the Covenant. The Human Rights Committee, or Committee, is the monitoring body as set forth in Part IV Article 28 through Article 45 on Civil and Political Rights.96 Article 28 states that the Committee will be comprised of eighteen members that are either nominated or elected by the States Parties.97 One of the enforcement procedures of the Covenant on Civil and Political Rights is the

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91 Nowak, supra note 5, at XXII.
92 Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. International Covenant on Civil and Political Rights, supra note 4, art. 2, ¶ 1.
94 Buergenthal et al., supra note 93, at 52.
95 Id. at 33.
96 International Covenant on Civil and Political Rights, supra note 4.
97 Id. at 179.
monitoring mechanism in Article 40 that allows States Parties to self-report any factors that are influencing or hindering their ability to implement the Covenant.98 It is the Committee’s principal purpose to examine all of the monitoring reports submitted by the States Parties.99 There is no expressed power conferred to the Committee to conduct investigations into the conduct of the States Parties after reviewing the reports, but the Committee may question State Party officials who are required to be present while their reports are being examined.100 The examination of States Parties’ reports by an independent, unbiased group of experts in the field has proven to be “an effective instrument for monitoring domestic implementation measures.”101

3. Status in the United States

In the United States, a treaty will be ratified when the Senate gives it’s “Advice and Consent” by a two-thirds majority.102 In 1992, the United States became the one hundred and fifteenth state party to the International Covenant on Civil and Political Rights. There has been and continues to be debate surrounding the topic of the United States’ ratification of the Covenant. One scholar at the U.S. State Department’s Office of the Legal Advisor, David P. Stewart, contended that the ratification of this treaty marked the United States’ long-standing commitment to the protection of individual human rights and liberties and to the promotion of these rights

98 The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) . . . whenever the Committee so requests. . . . All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant. . . . The Secretary-General of the United Nations may . . . transmit to the specialized agencies . . . copies of . . . parts of the reports as may fall within their field of competence. . . . The Committee shall study the reports. . . . It shall transmit its reports, and such general comments . . . to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports. . . . The States Parties to the present Covenant may submit . . . observations on any comments that may be made in accordance with paragraph 4 of this article.
International Covenant on Civil and Political Rights, supra note 4.
99 Buergenthal et al., supra note 93, at 53.
100 Id. at 54.
101 Nowak, supra note 5, at XIX.
102 U.S. Const. art. II, § 2, cl. 2.
internationally. And additionally, that the ratification marked a cornerstone in U.S. diplomacy because the Covenant is considered by many to be the most important human rights treaty in international law and because the unanimous approval by the U.S. Senate marked a neutralization in “a persistent thread of hostility in that body and in the American legal community to ratification of human rights treaties.” Another scholar at the University of Quebec, William A. Schabas, focused on the fact that the United States’ ratification came accompanied with several reservations and declarations, two of which aim to exclude the United States from the Covenant’s scope. While this paper focused on the legality of the reservations, it represents a split among legal scholars on the overarching meaning and result of the United States’ ratification of the Covenant. Agreement is seen by William Schabas’s conclusory statement that the United States’ ratification of the Covenant represented a cornerstone in U.S. diplomacy because ratification indicated a recognition of contemporary international human rights law.

The United States came out of the Second World War as a leader and advocate “of a treaty-based international system for the protection of human rights,” but the United States’ policy developed into one of total non-participation in international agreements mainly due to the fear of an emergent “world government.” The United States did not ratify any major international treaty or post-war treaty, even ones that supported international consensus, on the subject of human rights until 1988 when it ratified the Genocide Convention.

When the United States ratified the Covenant, it did so without allowing the treaty to be self-executing in the United States, which means that the Covenant provisions cannot be enforced in U.S. courts. Due to the nature of the ratification process the Executive has developed a system of “reservations, understanding, and declarations” or RUDs that are designed to address and overcome any objections the Senate will have to ratification.

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103 David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations, 42 DePaul L. Rev. 1183, 1184–85 (1993); Buergenthal et al., supra note 93, at 412.
104 Stewart, supra note 103, at 1184.
106 “The accession to the Covenant, after decades of isolationism, indicated a recognition by the United States that its previous indifference to contemporary international human rights law was a source of embarrassment and had become a political liability.” Id. at 324.
107 Buergenthal et al., supra note 93, at 413.
108 Id. at 416.
109 Id. at 433.
In effect, these RUDs are modifications to the terms of the treaty as it pertains to the agreement between the state that made the RUPs and the states that are accepting the RUDs. As Louis Henkin, professor emeritus at Columbia Law School and chairman of the Center for the Study of Human Rights at Columbia University, noted, there are five main categories that are attached to human rights treaties: first, the United States will not undertake any treaty that is inconsistent with the United States Constitution; second, the United States adherence to an international human rights treaty should not affect—or promise—change in existing U.S. law or practice; third, the United States will be subject to jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions; fourth, every human rights treaty to which the United States adheres should be subject to a “federalism clause”; fifth, every international human rights agreement should be “non-self-executing.”

All nation-states that ratify the Covenant on Civil and Political Rights are allowed to attach various reservations to their agreement to ratify, but the United States’ attachment of multiple RUDs to human rights treaties has brought great criticism. The non-self-executing RUDs have received the greatest criticism because of the large impacts that this provision has on a State’s obligations under the treaty. The United States’ non-self-executing mechanisms effectually precluded a U.S. citizen from filing petitions charging the State with violations of their rights under the Covenant in U.S. Courts. Critics of this provision have argued that this decision “effectively nullifies the treaty as a legal instrument that defined U.S. government’s obligations to its citizens.” Along with the practical criticism, there has been a policy criticism that the decision not to adopt the self-executing provision is another way that the United States is avoiding external criticism from foreign states and maintaining the face of the strongest state in the international realm.

110 Id.
112 Id. at 104.
113 Id. at 107.
115 Venetis, supra note 111, at 109 (quoting Professor Henkin, “the reservation designed to deny international obligations serve to immunize the United States from external judgment, the declaration that a convention shall be non-self-executing is designed to keep its own judges from judging the human rights conditions in the United States by international standards”).
The extent to which intentional law or customary international practices and principles apply to the United States has always been a topic of debate. This discussion comes up in the context of whether it is appropriate for U.S. domestic courts to look at international norms in their decision-making process or whether international and foreign law may be cited as a reference point in domestic cases. Using international law and international norms as an interpretive tool has been a tradition of U.S. law for a large part of the nation’s history and this is referred to as the *Charming Betsy* canon.\(^{116}\)

The *Charming Betsy* canon of interpretation comes from the 1804 Supreme Court case *Murray v. Schooner Charming Betsy* where the Court held that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .”\(^{117}\) The case presented the issue of whether the *Charming Betsy* ship was subject to seizure and condemnation for violating a law of the United States.\(^{118}\) Since the *Charming Betsy* case, this canon has become an important part of the U.S.’s legal relationship with international law.\(^{119}\) According to Curtis A. Bradley, Duke University School of Law Professor of Public Policy Studies, one conception of this canon is that it is grounded in separation of powers concerns, and stand for the proposition that unless Congress specifically states its intent to violate international norms, the U.S. courts will not interpret legislation in a way that will place the United States in violation of international law.\(^{120}\)

The *Charming Betsy* canon of interpretation is particularly useful when the terms of legislation are either ambiguous or absent. Curtis A. Bradley quoted Phillip R. Trimble who stated: “[W]hen actual congressional intent is ambiguous or absent, applying the *Charming Betsy* canon is the same as creating a rule that the government regulatory scheme cannot violate international law.”\(^{121}\) This principle and means of interpretation are relevant to the discussion of the Americans with Disabilities Act because of the ambiguities in the key terms—segregation and discrimination—used


\(^{117}\) *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

\(^{118}\) Id. at 118.

\(^{119}\) Bradley, *supra* note 116, at 482; see also *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (AM. LAW INST. 1987)*.

\(^{120}\) Bradley, *supra* note 116, at 526.

\(^{121}\) Id. at 483 (quoting Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 675 (1986)).
b. Use of External Legal Norms as Aids of Interpretation

Under the International Covenant on Civil and Political Rights, a cause of action for Georgia’s GNETS programs that is separate from the current civil action *United States v. Georgia* will not be created. Even though a separate cause of action will not stand, the Covenant on Civil and Political Rights is still relevant to interpret key statutory or constitutional provisions. It is not necessary that a relevant norm govern a situation, but the fact that the norm is relevant deems it worth considering.122

There are various viewpoints that address the issue of whether or not the Covenant, or any legal treaty that the United States is a party to, has any legal effect on the State. One understanding is based in Article VI of the United States Constitution that states, “[t]his Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .”123 This view asserts that treaties that have been ratified become domestic law that hold the same normative rank as the U.S. Constitution as long as it does not conflict with constitutional provisions and that treaty law may triumph federal and state law.124 Another view is based on precedent of the United States Supreme Court where the Court has rejected claims under the Covenant without consideration of the merits due to RUD conditions that have been attached to the ratification of international treaties, which precludes the Covenant from being a source of international law.125 The position of the Covenant, and international law in general, stands at a middle ground of authority and has been disputed in various federal and state court cases. The non-self-executing RUDs have precluded American courts from treating international treaty law as a source of domestic law, but at the same time American courts are expected to give effect to the treaty law. The United States as a whole is expected to uphold the obligations of the Covenant.126

123 U.S. CONST. art. VI, § 2.
124 BURGENTHAL ET AL., supra note 93, at 418.
126 Venetis, supra note 111, at 107; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (AM. LAW INST. XXXX).
The United States has often been seen as isolationist in its general approach of not considering external legal norms and practices when making internal decisions. In 2003, two landmark Supreme Court decisions, *Lawrence v. Texas* and *Gratz v. Bollinger*, marked an era of change with the United States moving away from isolationism and towards the use of external norms.\(^{127}\) Both of these cases overruled the Court’s prior interpretation of the U.S. Constitution.\(^{128}\) Diane Marie Amann, Faculty Co-Director of the Dean Rusk International Law Center, stated that the 2003 judgements of the Supreme Court marked the “Court’s willingness to look beyond U.S. borders when circumstances warrant” and shared that external norms are relevant for internal matters to the degree that they “resonate with American values and American experience.”\(^{129}\) The Court’s decision to seek guidance from external norms has not been consistent. As Amann stated, every member of the Court has become more receptive of consulting external norms, but the Court’s consultation of external norms has been selective and “unbounded by any coherent criteria.”\(^{130}\) External norms are relevant to internal matters. Therefore, the question becomes under what circumstances an external norm will be relevant.\(^{131}\) Courts are national institutions, so they are subject to the continued globalization of human activities and, thus, the courts too must adapt to external norms.\(^{132}\)

According to Amann, the label of “comparable legal standards” as a criterion for referencing an “external” norm is a misnomer, because the external norms the United States Supreme Court has looked to matter by virtue of their link to an internal norm.\(^{133}\) Thus, the external norms the Court has looked at are norms currently held by the Court. The reference then comes in as a means of persuasive authority by the Court looking at the ways that external bodies treat a particular norm.\(^{134}\) Following World War II, liberty and equality norms dominated.\(^{135}\) The United States endorsed these norms when it ratified the International Covenant on Civil and Political Rights.\(^{136}\) The provisions and terms of the Covenant promote values held by the United States.\(^{137}\) Consulting external norms is not seeking guidance from

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\(^{127}\) Amann, *supra* note 122, at 597.
\(^{128}\) *Id.*
\(^{129}\) *Id.* at 598.
\(^{130}\) *Id.* at 604.
\(^{131}\) *Id.* at 605.
\(^{132}\) *Id.*
\(^{133}\) *Id.* at 606.
\(^{134}\) *Id.*
\(^{135}\) *Id.* at 607.
\(^{136}\) *Id.*
\(^{137}\) *Id.*
a different value system; rather, it is “finding internal resonance with practices that are labeled external.” A court is free to apply or disregard a relevant external norm, but that decision has no bearing on whether or not the norm is in fact relevant.


The League of Nations formed the Committee for the Protection of Children in 1919 and adopted the Declaration of the Rights of the Child in 1924. The intention of these treaties was not to create a binding set of domestic laws but to set up a body of guiding principles for States to look to when formulating their own domestic law. In addition to its role as the Covenant on Civil and Political Rights enforcer, the Human Rights Committee functions as a body that interprets the Covenant’s provisions. Throughout the years, the Committee has adopted nearly three dozen General Comments designed to present guidance to States Parties in discharging their obligations under the Covenant. These General Comments do not create binding international law, but under Article 40(4) of the Covenant, these are generally complied with and “considered to be the most authoritative interpretation of the Covenant’s provisions.” General Comments created by the Human Rights Committee are comparable to a judicial body that interprets the Covenant’s provisions with such authority that the comments are relied upon when evaluating whether or not a State Party has complied with the Covenant’s obligations in examining the state reports or in private citizen adjudication.

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138 Id. at 608–09 (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 322 (Clarendon Press 2d ed. 1996) (“Recognizing that the United States has promoted and embraced international human rights standards deriving from ours, Justices might yet conclude that a decent respect to the opinions of mankind requires that we look to international standards to illuminate our constitutional values of liberty, equality, property.”)).
139 Id. at 609.
140 TREVOR BUCK, INTERNATIONAL CHILD LAW 21 (3d ed. 2014).
141 Id. at 22.
142 See BUERGENTHAL ET AL., supra note 93, at 59.
143 The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
144 Id.; see also NOWAK, supra note 5, at XIX.
145 BUERGENTHAL ET AL., supra note 93, at 59.
There are various relevant provisions in the Covenant that address the issue of whether the State of Georgia’s operation of the GNETS, exhibits segregation or is discriminatory in nature.

a. Article 24: Non-Discriminatory Protection of the Child

   i. Text of Article 24

   Article 24 of the Covenant on Civil and Political Rights sets out the “rights of the child,” and states:

   1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
   2. Every child shall be registered immediately after birth and shall have a name.
   3. Every child has the right to acquire a nationality.146

This section does not set forth any specific rights to the child, nor does it guarantee general applicability of all Covenant provisions to the child. Instead, ratifying states pledge to uphold this provision by taking steps to ensure the child is protected either by family, other means of a support system, or through the Covenant’s own functions.147 These protections include minimum norms for civil processes, e.g., regulation between parents and children; laws of custody; norms of heritage and guardianship; and special criminal law treatment—including minimum standards for harming a child, establishment of an age for criminal liability, and standards of criminal treatment for juveniles.148 Additionally, there are protections to ensure the child has proper nutrition, housing, recreation, medical care, security, and education.149 Article 24 also prohibits discrimination based on any of these categories; this provision is violated when a child does not receive the protection she is entitled to or “receives less protection than other children.”150

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146 International Covenant on Civil and Political Rights, supra note 4, art. 24.
147 NOWAK, supra note 5, at 424.
148 Id. at 425.
149 Id. at 425–26.
150 Id. at 427.
ii. Jurisprudence Interpreting Article 24: General Comment No. 17 (Rights of the Child)

The Human Rights Committee’s General Comment No. 17, issued in 1989, addressed the rights of the child provided in Article 24 of the Covenant on Civil and Political Rights. General Comment 17 discusses the special rights and protections given to children under the Covenant solely based on their status as minors. The particular age that a person receives child status under the Covenant is left to the State Party to determine based on social and cultural norms, but the Covenant specifies that a State Party cannot absolve itself of providing these protections for persons under the age of eighteen.

The Comment sets forth certain procedures that are necessary to provide special protection to children, but the majority of procedural decisions are left to the States to determine based on the specific needs within their jurisdiction. The Comment specifically addresses the issue of education by stating that with respect to children: “In the cultural field, every possible measure should be taken to foster the development of their personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression.” The Comment characterizes Article 24 as affording every child, without discrimination on any basis, the stated procedures and unstated procedures that are necessary to protect the child and foster the child’s development solely on the basis that the person is afforded the special child status protections.

b. Article 26: Rights to Equal Protection

Another applicable provision in the Covenant of Civil and Political Rights is Article 26 which lists the rights under the Covenant that are necessary in order for there to be equality.

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152 Id. at 1–2.
153 Id.
154 Id. at 1.
155 Id.
156 Id.
i. Text of Article 26

Article 26 states that all persons are equal and entitled to equal protection of the law. Additionally, Article 26 states the law shall guarantee all persons equal and effective protection against discrimination on any ground such as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Historically, Article 26 developed out of a general consensus that equality stood as the foundation of human rights law. Within Article 26 there are various protections that relate to equality that have been discussed in detail due to proposed amendments and their surrounding debates.

Article 26 of the Covenant on Civil and Political Rights affords three different protections to the persons within States Parties that form the Article’s independent right to equality: the right to equal protection of the law, the right to the prohibition of discrimination, and the right to protection against discrimination. The right to equality before the law is not directed at the legislature, but at judges and government officials to ensure that the law is applied and enforced equally with regard to all individuals. These principle states that different treatment of individuals must be based on objective factors; the factors are not exclusively the characteristics listed in the second sentence of Article 26. The Article guarantees the equal protection of the law in the first sentence, then in the second sentence of the Article sets forth the negative and positive prohibitions and protections that the national legislatures must accomplish in order to provide that protection. This interpretation comes from the connector words that start the second sentence, “[i]n this respect,” and while this phrase was originally intended to only apply to equality before the law, the extended meaning was given through the adoption of the Indian amendment. Through Article 26, States Parties have an obligation to ensure that their legislation provides substantive equality to all persons in their jurisdiction, and courts have

157 International Covenant on Civil and Political Rights, supra note 4, art. 26.
158 Id.
159 See NOWAK, supra note 5, at 458 (stating that “[a]long with liberty, equality is the most important principle imbuing and inspiring the concept of human rights”).
160 Id. at 469.
161 Id. at 466–67.
162 Id. at 468.
163 Id. (citing VIERDAG, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW (1973) (THE HAGUE) (“The Indian delegate rejected this addition with the argument that these are two different concepts of equality and that equal protection of the law does not result from equality before the law.”)).
looked to the meaning of discrimination to determine whether or not this has been accomplished.\textsuperscript{164}

\textit{ii. Jurisprudence Interpreting Article 26: General Comment No. 18 (Non-Discrimination)}

The Committee’s General Comment 18, issued in 1989, discusses the non-discrimination provision set forth in Article 26 of the Covenant on Civil and Political Rights.\textsuperscript{165} Article 26 not only entitles all persons to equality before the law and equal protection of the law but also prohibits any discrimination under the law and guarantees all persons protection against discrimination on grounds such as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”\textsuperscript{166} This listed criteria, or categories of discrimination, has been chosen because these characteristics are seen as particularly problematic as a basis for distinction due to the fact that these are inherent personal characteristics that cannot be changed by the person and have been subject to a history of negative treatment.\textsuperscript{167}

The Human Rights Committee states that the Covenant has not specifically defined the term discrimination and has not detailed what constitutes discrimination. Instead, the Covenant lists personal characteristics that indicate discrimination when used as the basis for determining whether a person may receive a benefit, aid, or services.\textsuperscript{168} By looking at the ways other antidiscrimination has been defined, the Human Rights Committee stated that in its view the term as used on the Covenant shall mean:

to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition,

\begin{footnotesize}
\textsuperscript{164} Id. at 469.
\textsuperscript{166} Id. ¶ 1.
\textsuperscript{167} See NOWAK, supra note 5, at 44, 474 (discussing the Committee’s interpretation of impermissible grounds for distinction under Article 2(1) of the Covenant).
\textsuperscript{168} U.N. Human Rights Committee (HRC), supra note 165, ¶ 6.
\end{footnotesize}
enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.\(^{169}\)

Further, General Comment 18 said that there may be times when affirmative action, or specific action to correct discriminatory conditions, is needed to combat conditions that “cause or help to perpetuate discrimination prohibited by the Covenant.”\(^{170}\) The Committee indicated that if the general conditions of a subset of the population limits or prevents those individuals from enjoying the human rights they are afforded, then it may be necessary for the State Party to implement special or preferential treatment for that group.\(^{171}\) This is considered to be legitimate differentiation under the Covenant’s terms because it is needed to remedy the discrimination that is occurring.\(^{172}\)

Article 2 of the Covenant on Civil and Political Rights provides protection against discrimination, limited to those provisions specifically set forth in the Covenant; whereas, Article 26 is not limited in that way and provides protection against discrimination and the right to equality on any enumerated grounds.\(^{173}\) The Committee stated that this is a separate and more expansive right from the one stated in Article 2 and that Article 26 prohibits all “discrimination in law or in fact in any field regulated and protected by the public authorities.”\(^{174}\) States Parties’ current legislation and enforcement of legislation must comply with the non-discrimination obligation under Article 26, which applies to more than those rights stated in the Covenant.\(^{175}\)

In evaluating whether there has been a discrimination violation under Article 26, the Human Rights Committee stated that differentiation of treatment is not discrimination when “the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”\(^{176}\) The Covenant on Civil and Political Rights uses the word “discrimination,” not “distinction.”\(^{177}\) Manfred Nowak asserted that this choice was made to allow distinctions when they are justified but not allow invalid distinctions based on “unfavourable and odious distinctions which lacked any objective or reasonable basis.”\(^{178}\)

\(^{169}\) Id. ¶ 7.

\(^{170}\) Id. ¶ 10.

\(^{171}\) Id.

\(^{172}\) Id.

\(^{173}\) Id. ¶ 12.

\(^{174}\) Id.

\(^{175}\) Id.

\(^{176}\) Id. ¶ 13.

\(^{177}\) NOWAK, supra note 5, at 473 n.76.

\(^{178}\) Id.
Therefore, an invalid “distinction” is “discrimination” only when it is not based on reasonable and objective criteria. The conclusion as to whether a distinction is in fact “discrimination” is based on all of the surrounding, relevant circumstances, evaluated on a case-by-case basis. According to Manfred Nowak, discrimination will be found “when the parties concerned find themselves in a comparable situation and when the distinction is based on unreasonable and subjective criteria.”

B. 2007 Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities was adopted by the United Nations in 2006, and it went into effect in May 2008. The Convention represented the development of international law in which the international community sought to create effective responses to abuses of persons with disabilities. While the United States has signed but not yet ratified this treaty, certain provisions of the treaty are useful to amplify an understanding of what constitutes impermissible discrimination against children under the Covenant of Civil and Political Rights. The Covenant provided characteristics of the persons to be protected from discrimination, and it expanded on the conduct that constitutes discrimination of students with disabilities. The Convention provides a better understanding of international law’s position on what constitutes discrimination in schools against students with disabilities, which may in turn aid the interpretation of relevant U.S. law.

1. Background, Overview, and Compliance Mechanism

The Convention on the Rights of Persons with Disabilities targets the discrimination against persons with disabilities and aims to guarantee those persons the exercise of basic human rights. The Convention on the Rights of Persons with Disabilities, like the Covenant on Civil and Political Rights, has a body of experts that monitor the implementation of the Convention by

179 Id. at 473.
180 Id.
181 Id. at 473–74.
184 Convention on the Rights of Persons with Disabilities, supra note 182, art. 1.
The Optional Protocol of the Convention gives the body of experts the ability to examine individual complaints with regards to alleged violations. Further, like the Covenant, the Convention’s body of eighteen independent experts interpret the Convention’s articles in the form of general comments.

The United States has not yet chosen to ratify this Convention, and therefore, the obligations are not applicable to the United States. Nevertheless, the Convention can be used to inform the broader meaning and understanding of the Covenant on Civil and Political Rights because of the fuller discussion and focus of the Convention on persons with disabilities.

2. Key Provisions

There are two main articles in the Convention on the Rights of Persons with Disabilities: Article 2 provides a definition of discrimination on the basis of disability and Article 24 details the rights to inclusive education.

a. Article 2: Definition of “Discrimination on the Basis of Disability”

The Convention focuses solely on disability with many of the terms discussed in the Covenant defined in the Convention in the context of disability.

i. Text of Article 2

The Convention requires that measures be implemented without discrimination on the basis of disability. Article 2 of the Convention sets out definitions for the Convention:

“For the purposes of the present Convention: . . . “Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It

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185 Buergenthal et al., supra note 93, at 114.
186 Id.
188 Id. art. 2.
includes all forms of discrimination, including denial of reasonable accommodation.\textsuperscript{189}

Article 2 further defines reasonable accommodation as the

\[N\]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.\textsuperscript{190}

The definition of discrimination and reasonable accommodation are both applicable to further understanding the terms used in Article 24 of the Covenant on Civil and Political Rights, which sets forth non-discriminatory protection of the child.

\textit{b. Article 24: Right to Inclusive Education}

Article 24 of the Convention on the Rights of Persons with Disabilities discusses the rights of persons with disabilities to inclusive education.

\textit{i. Text of Article 24}

The relevant portions of this Article set out the necessary requirements to ensure that students with disabilities are being educated in a non-discriminatory manner. First, Article 24 paragraph 1 states that persons with disabilities have the right to education free from discrimination and on the basis of equal opportunity ensured through inclusive education directed to:

(a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
(b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
(c) Enabling persons with disabilities to participate effectively in a free society.\textsuperscript{191}

\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id. art. 24 ¶ 1.}
Next, Article 24, paragraph 2 of the Convention states that persons with disabilities should not be excluded from the general education system on the basis of disability and have access to an inclusive, quality education on an equal basis with others; persons with disabilities should receive the support required, within the general education system that facilitates their effective education consistent with the goal of inclusion.192

Finally, Article 24, paragraph 4 of the Convention states that States Parties should take appropriate measures to employ teachers and staff at all levels of education and train them in a way that incorporates disability awareness and the use of appropriate augmentative and alternative modes, means, and formats of communication, educational techniques, and materials to support persons with disabilities.193

ii. Jurisprudence: General Comment No. 4 (Right to Inclusive Education)

The Convention on the Rights of Persons with Disabilities was the first legally binding instrument that contained a reference to the concept of quality inclusive education.194 The Convention’s General Comment No. 4 asserted that, according to their own study, inclusive education is the only way that persons with disabilities can be educated equally, both in terms of the quality of education and in a way that provides necessary social developments.195 Inclusive education is defined as:

Inclusion involves a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and environment that best corresponds to their requirements and preferences.196

192 Id. art. 24 ¶ 2.
193 Id. art. 24 ¶ 4.
194 Committee on the Rights of Persons with Disabilities (CRDP), CRDP General Comment No. 4: Article 24 (Right to Inclusive Education), (Sept. 2, 2016), U.N. Doc. CRPD/C/GC/4, http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx (follow “Article 24: Right to Inclusive Education” hyperlink; then follow “English PDF” hyperlink) [hereinafter CRDP General Comment No 4: Article 24].
195 Id. ¶ 2.
196 Id. ¶ 11.
According to General Comment 4, inclusive education is required under Article 24, paragraph 1 of the Convention in all levels of education and extracurricular and social activities associated with schools.\(^{197}\) Integrating disabled students into the general education schools does not automatically transition education from segregation to inclusion; instead, inclusive education involves a “whole systems” approach that considers a whole educational environment and the whole person, along with supported teachers, respect for and value of diversity, learning-friendly environment, effective transitions, recognition for partnerships, and monitoring on a continued basis.\(^{198}\)

Article 24, paragraph 1(a) reiterates the aims of education that must be focused on the full development of the human potential, including the sense of dignity and self-worth, which prohibits the exclusion of persons with disabilities from the general education system.\(^{199}\) Article 24, paragraph 1(b) states that the education of persons with disabilities should not be in the form of a deficit approach—one focused on actual or perceived impairments—instead, education should be focused on the development of personality, talents, and mental and physical abilities to their fullest potential.\(^{200}\) In order to achieve this, the education system must comprise four interrelated criteria: first, availability of sufficient programs in public and private schools; second, accessible buildings, information, and communication; third, acceptability of all requirements, cultures, and languages; fourth, adaptable learning environments provided by teachers and other staff.\(^{201}\) Article 24, paragraph 1(c) asserts the aims of education must be to enable persons with disabilities to fully participate in a free society.\(^{202}\)

Article 24, paragraph 2 requires the States Parties to provide reasonable accommodations for disabled students that enable them to access education on an equal basis with others.\(^{203}\) This section affirms that disabled students are entitled to individualized support that is necessary to facilitate their effective education, including availability of services and sufficiently trained teaching staff, psychologists, and other relevant professionals.\(^{204}\) These measures must be implemented with the goal of inclusion and in a manner

\(^{197}\) Id. ¶ 8.

\(^{198}\) Id. ¶ 12.

\(^{199}\) Id. ¶ 15.

\(^{200}\) Id. ¶ 16.

\(^{201}\) Id. ¶¶ 20–22, 25–26.

\(^{202}\) Id. ¶ 17.

\(^{203}\) Id. ¶ 28.

\(^{204}\) Id. ¶ 32.
that strengthens the opportunities for students with disabilities to participate in the classroom and in out-of-school activities alongside their peers.205

Article 24, paragraph 4 requires that States Parties take measures to employ administrative, teaching, and other staff with skills necessary to work effectively with disabled students in inclusive environments.206 A school must have an appropriate number of qualified professionals to work with disabled students to maintain effective inclusive education environments.207

The Convention’s detailed explanation of the terms and procedures necessary to ensure students with disabilities are not being discriminated against in the education system is useful in analyzing whether the State of Georgia GNETS programs are currently being conducted in a discriminatory manner under the Covenant because of the similarity in terms and goals.

IV. EXISTENCE AND EXTENT OF VIOLATION

A. Is There a Violation Under International Law?

The propriety of Georgia’s use of GNETS is a close case under the Americans with Disabilities Act, but the manner in which GNETS has been administered is a clear violation based on intentional law standards. GNETS is a violation of Article 26 of the International Covenant on Civil and Political Rights because GNETS students do not receive a quality of education equal to that of students in general education schools in multiple facets, and because the environment of education segregates GNETS students away from general education schools and activities.

B. Equality Violation Under Article 26 of the ICCPR

Article 26 provides three distinct rights to which persons within States Parties to the Covenant on Civil and Political Rights are entitled: the right to equal protection of the law, the right to prohibition of discrimination, and the right to protection against discrimination.208 The issue here is not whether a specific law in the United States is being administered in an unequal manner; rather, the issue is whether GNETS is being administered in a discriminatory manner. In reaching a conclusion on the issue, this Note will look: first, at the basis for distinction between students who are in the GNETS Programs; second, at whether the separation is based on reasonable and objective

205 Id. ¶ 34.
206 Id. ¶ 36.
207 Id.
208 International Covenant on Civil and Political Rights, supra note 4, art. 26.
First, the separation of GNETS students from general education schools is based on a student having one or more severe characteristics that are indicative of an emotional or behavioral disability.209 Article 26 lists a number of inherent, personal characteristics that are immediately suspect when a person is classified based on them. These inherent qualities include traits like race, gender, religion, and “other status.”210 The decision to include the last term “other status” indicates the Covenant’s goal of protecting discrimination on any grounds that is an inherent trait and to dissuade the interpretation that protections are only afforded to the specific enumerations listed. The status of a person with an emotional or behavioral disability falls into the category of “other status,” and is therefore protected by Article 26, the Covenant’s Equality provision.

Second, Article 26 has been interpreted as requiring that the differentiation be based on reasonable and objective criteria.211 In this case, the decision to place a student into the GNETS Program begins with a referral from general education school for an evaluation. The evaluation is later conducted by referencing the State Party’s criteria for entry and exit standards. Much of this process of evaluation looks at the severity, frequency, and duration of the disorder.212 The ultimate decision of placement is made by the student’s local school based on these three types of manifestations of the disability that have been documented.213 There is no further information, criteria, or descriptions of what makes a student eligible for the GNETS Program; this decision appears to be a subjective decision by the local school team members after there has been a referral from the general school. The local school considers objective criteria in making the decision of whether a student should be placed into GNETS, but the overall process of making that decision does not appear to be sufficiently objective or reasonable as required by the Covenant.

Third, Article 26 inquires into whether the purpose of the distinction is legitimate under the Covenant.214 The asserted purpose of the separation of

209 Complaint, supra note 1.
210 International Covenant on Civil and Political Rights, supra note 4, art. 26.
211 CCPR General Comment No. 18: Article 26, supra note 165, at 3.
213 Id. at 13.
214 CCPR General Comment No. 18: Article 26 (Non-Discrimination), supra note 165, at 3.
GNETS students from places of general education is to provide them with comprehensive educational and therapeutic support services. In connection with this purpose, the goal is to provide students with services in a public setting instead of in a residential or more restrictive placement. Providing students with behavioral and emotional disabilities the level of attention and programs they need to learn is certainly a legitimate purpose. The factual allegations suggest that the manner in which GNETS is currently being conducted does not achieve this goal.

Finally, even when there are arguably objective criteria and a legitimate purpose, Article 26 will still be violated if the means of achieving that purpose are not appropriately suited. GNETS is a violation of this provision and is discriminatory not because the students are being separated but for the following two reasons: first, GNETS students do not have access to a wide range of activities and resources making their education unequal; second, GNETS students are not being afforded the opportunity to be educated in an integrated setting because of the lack of resources allocated by the State to ensure this opportunity.

The GNETS Program is not equal to general education schools because of the lack of opportunities to take elective subjects, the exclusion from extra-curricular activities, the lack of subject certified teachers, and the reliance on computer based teaching. First, GNETS Program students are not given the opportunity to participate in elective classes like art, foreign language, and vocational course that the students in general education schools are exposed to. The lack of exposure to electives keeps GNETS students from being as well-rounded in their education and skill sets as their general education peers.

Second, GNETS Program students are not allowed to participate in the extra-curricular activities that take place at their home school, nor do they have extra-curricular activities of their own. The Convention General Comment No. 4 focused on the fact that the aim of education should be on the full development of students, which is a goal that cannot be achieved when students with disabilities are excluded from the general education system and activities. Extra-curricular activities include attending sports games, dances, and other social events that commonly take place at schools.

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216 GNETS Letter of Findings, supra note 6, at 15.
217 Id.
218 Id.
219 CRDP General Comment No. 4: Article 24, supra note 194, ¶ 2.
The lack of inclusion in the activities at their home schools necessarily leads GNETS students to have feelings of inferiority, exclusion, and differentness. Also, these activities further the development of social and emotional education. Learning to work together on a school team or being focused on an activity are practical skills that general education schools foster through these types of activities that the GNETS students will not be exposed to.

Third, the overall quality of education in GNETS programs is generally not equal to the education in general education schools. For most of the GNETS programs, the students are taught through computer based programs. The attention and education that is facilitated by a physical teacher in a classroom is not comparable to learning from a computer screen. Many GNETS facilities are in poor physical condition and most lack additional extra-curricular facilities like libraries, playgrounds, and science labs. Under Article 26, this excludes the GNETS students from enjoying human rights, specifically the right to a quality education that is comparable to general education students, that they are entitled to receive.

The separation and distinction of students due to a behavioral or emotional disability alone would not provide for a violation under Article 26, but the GNETS programs are not equal to general education programs. The unequal conditions and education in the GNETS programs fits within the Convention’s definition of discrimination because it is an exclusion on the basis of disability that has the effect of impairing the exercise of a right that is on an equal basis with others. These students are not being allowed to reach their full mental, physical, or creative potential due to the differences in education.

GNETS programs have not allowed students that are willing and able to be integrated into general education schools. Once students are placed into the GNETS programs they are completely isolated and segregated from their peers. Many of the GNETS programs are located in separate buildings that are at different locations than general education schools, and even when programs are on the same campus, they are located in basements or separate wings of the school. There is not any interaction between the two groups of students. After a student has been placed into the GNETS program it is difficult for them to return to general education school due to the strict exit criteria. It is easy for a school to send students that become a behavioral

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220 Id. ¶ 56.
221 Id. ¶ 58.
222 CCPR General Comment No. 18: Article 26, supra note 165, ¶ 1.
223 Convention on the Rights of Persons with Disabilities, supra note 182, art. 2.
224 GNETS Letter of Findings, supra note 6, at 9.
disruption in the classroom away, and there is little incentive to accommodate those students in the general classroom.

The lack of integration or efforts to integrate is a violation under Article 26, because the Covenant requires that affirmative steps be taken in order to combat conditions that "cause or help to perpetuate discrimination prohibited by the Covenant."\(^{225}\) The Human Rights Committee suggested that when certain groups are discriminated against, it may be legitimate to treat those groups with preferential treatment to remedy the discrimination.\(^{226}\) The Convention expands on this proposition by stating that students with disabilities should be educated in the general education schools as long as they are willing and that specialty teachers and conditions should be included in the general classrooms that facilitate the inclusion.\(^{227}\) The GNETS are discriminatory because it does not attempt to integrate the students in any manner.

C. The Limits and Scope on Enforceability

The scope of enforceability of Article 26 of the Covenant will be limited in scope by the United States’ decision not to implement non-self-executing RUDs upon ratification of the Covenant, which precludes a person from bringing a cause of action under the Covenant’s provisions in the United States. More importantly, when the United States ratified the Covenant it did so with a series of “reservations, understandings, and declarations” that limit the applicability of certain obligations in the Covenant to the United States.

V. CONCLUSION

In the end, the goal of the lawsuit in United States v Georgia is to force the State of Georgia to bring its educational systems for students with disabilities into compliance with the ADA. The goal and stated purpose of the GNETS Program, to provide students with disabilities the therapeutic services that they need, is a legitimate and admirable purpose, but the manner in which the program is currently functioning does not meet that purpose. Instead, students with disabilities are being segregated and educated in a way that is unequal to students in general education. The inequality of electives, extra-curricular classes, access to resources and teachers, and the lack of efforts to integrate the students who could be

\(^{225}\) CCPR General Comment No. 18: Article 26, supra note 165, ¶ 10.

\(^{226}\) Id.

integrated arguably makes the GNETS Program a violation of the ADA and also a violation of international human rights law.

There are a number of manners in which the State of Georgia could remedy this problem. The DOJ listed a few changes that the State could make in order to comply with the ADA. The two suggestions focus on equality and integration. First, the State should make all efforts necessary to provide integrated and therapeutic mental health services that will allow students to be placed in more integrated settings. The level of integration should be specific to each individual student, but it is necessary that the State takes affirmative steps to integrate GNETS students in a way that best suits the educational needs of those students. Second, the State should stop discrimination practices against the students currently in or entering the GNETS program. Since certain students may be able to focus and learn more efficiently in a segregated setting, it is necessary for the State to ensure that all of the class and extra-curricular opportunities, resources, and environments are equal to what is being provided to general education students. Further, appropriate steps should be taken to guarantee that teachers and staff members that are certified in the subject area and methods of teaching students with behavioral and emotional disabilities are placed in the integrated and separated educational settings. Educators should be trained in ways that incorporates disability awareness and the appropriate educational techniques and formats of communication that are effective to support persons with disabilities.

The national and state governments are in the best position to ensure that the country’s children with disabilities are not being discriminated against, and this begins with educating them equally and in a manner that will foster their development to reach their full potential. The current GNETS schools in Georgia does not adequately meet this goal. The administration of the GNETS program does not meet the standard of international human rights law. The current problem and lack of compliance by the State demonstrated the need for a civil suit to be initiated. In determining whether or not Georgia’s conduct is acceptable it is important to view the issue against the backdrop of international standards.

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228 Complaint, supra note 1.
229 Id.