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

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| BRANDON COBB, et al., etc.,<br><br>Plaintiffs,<br><br>v.<br><br>GEORGIA DEPARTMENT OF COMMUNITY SUPERVISION, et al., etc.,<br><br>Defendants. | CIVIL ACTION NO.<br><br>1:19-cv-03285-WMR |

**DEFENDANTS' BRIEF OPPOSING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

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## I. Introduction

This brief opposes Plaintiffs' motion for class certification. Plaintiffs seek certification of their claims under Title II of the Americans with Disabilities Act (ADA), as amended, 42 U.S. Code § 12131, et seq., Section 504 of the Rehabilitation Act of 1973 (RA), as amended, 29 U.S.C. §§794, et seq., and under the Due Process Clause of the Fourteenth Amendment. (Doc. 1 ¶¶ 58-62).

Plaintiffs' motion falls short of the requirements for class certification because: (1) Plaintiffs lack standing (both now and when suit was filed), (2) their claims are or will be moot; (3) Plaintiffs proposed class definition does not provide a sufficient method for identification of class members and fails ascertainability standards; (4) Plaintiffs do not meet the commonality, typicality, and adequacy

requirements of Fed. R. Civ. P. 23(a); and (5) they do not satisfy the generality and cohesion requirements of Rule 23(b)(2).

## II. Requirements for Class Certification

There are many requirements for a viable class action. The proposed representatives must have standing, i.e., a case or controversy, with the defendants. O'Shea v. Littleton, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").[1]

Moreover, Plaintiffs must propose a sufficiently defined and ascertainable class. *See* Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012) (plaintiffs must "establish that the proposed class is adequately defined and clearly ascertainable").

Additional requirements are expressly stated in Fed. R. Civ. P. 23. Plaintiffs must show that the four criteria of Rule 23(a) are met:

(1) "the class is so numerous that joinder of all members is impracticable,"

(2) "there are questions of law or fact common to the class,"

(3) "the claims or defenses of the representative parties are typical of the claims

[1]Due to space limitations, all citations are omitted and emphases are added in this brief unless otherwise noted. Also, the court filings are cited by ECF pagination.

or defenses of the class," and

(4) "the representative parties will fairly and adequately protect the interests of the class."

Fed. R. Civ. P. 23(a)(1-4).

A further condition must also be met. Rule 23(b) states that "[a] class action may be maintained as a class action if Rule 23(a) is satisfied, and if" one of the 23(b) requirements is met. Plaintiffs argue that 23(b)(2) is applicable. (Doc. 53-1, at 29-30). The subsection provides:

> (2) "the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

Fed. R. Civ. P. 23(b)(2).

And the burden is on the plaintiff(s) to establish the requirements. *See* Heaven v. Trust Co. Bank, 118 F.3d 735, 737 (11th Cir. 1997) (The burden of establishing the [requirements of certification under Rule 23] is on the plaintiff who seeks to certify the suit as a class action.").

Plaintiffs cannot carry their burden as to several of these conjunctive requirements. They cannot show they have standing to seek the injunctive and declaratory relief they request. Plaintiffs fail the definition and ascertainability requirement. Nor can Plaintiffs meet the Rule 23(a) requirements of commonality, typicality, adequacy, or those of Rule 23(b)(2).

Defendants agree with Plaintiffs that 40 potential class members, though borderline, can satisfy the numerosity criterion. (Doc. 53-1, at 10). *See* Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986) ("while there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors").

Defendants also do not dispute that Plaintiffs' counsel are well qualified to act as class counsel, meeting the requirements of Fed. R. Civ. P. 23(g). (Doc. 53-1, at 30-32).

## III. Plaintiffs Lack Standing to Seek Injunctive and Declaratory Relief.

Plaintiffs seek injunctive and declaratory relief for their proposed class of hearing impaired offenders. They do not seek damages. (Doc. 1 ¶¶ 3, 15, 62, 70, 80, 90, Prayer). For many reasons, Plaintiffs do not have standing to seek such relief.

In order to maintain any claim in federal court, the plaintiff must have standing. The Supreme Court has recognized that standing serves to " 'identify those disputes which are appropriately resolved through the judicial process.' " Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). In the same case the Court held:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' Second, there must be a causal connection between the injury

> and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. Moreover, "[t]he party invoking federal jurisdiction bears the burden of establishing these elements." Id.

Standing requires a factual showing. Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001) ("resolution of this standing/mootness challenge . . . requires that we examine factual proffers, through affidavits and other evidentiary documents").

Moreover, a plaintiff must, in order to establish standing to pursue injunctive or declaratory relief, show a substantial likelihood of future injury from Defendants' conduct that she seeks to enjoin. "In order to demonstrate that a case or controversy exists to meet the Article III standing requirement when a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co., 938 F.3d 1170, 1179 (11th Cir. 2019).

Indeed, the risk of future injury from the threatened misconduct must approach a certainty. The Supreme Court has strongly emphasized the requirement that a plaintiff seeking federal injunctive relief must show a realistic threat of future injury. In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Court held that

Lyons lacked standing to seek an injunction against the future use by the City of Los Angeles of chokeholds, although he had been injured by one. Id. at 101-02 (cits. omitted). The Court emphasized that " '[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.' " Lyons, 461 U.S. at 102 (*quoting* O'Shea, 414 U.S. at 495-96). The Court held that Lyons' past experience with the chokehold did "nothing" to establish standing to seek injunctive relief against the use of such holds. The Court elaborated that in order to have standing Lyons would have to show far more than that he and others had been victimized by the chokeholds in the past. Lyons, 461 U.S. at 105-06. The Court ruled that, for standing to seek injunctive relief, Lyons would have to allege and prove "that ***strangleholds are applied by the Los Angeles police to every citizen who is stopped or arrested*** regardless of the conduct of the person stopped." Id. at 108.

Abundant additional case law also supports the conclusion that a plaintiff who seeks injunctive relief must establish standing which requires in turn a substantial threat of future irreparable harm. *See* Kerr v. City of West Palm Beach, 875 F.2d 1546, 1548, 1551, 1554-56 (11th Cir. 1989) (applying Lyons to a claim for injunctive relief against the use of police dogs by the West Palm Beach Police Department and holding that, despite "high ratios of bites to apprehensions" and "no

specialized internal procedures for monitoring the performance of the canine unit," the plaintiffs lacked standing to seek injunctive relief); Barrett v. Walker County School District, 872 F.3d 1209, 1220 (11th Cir. 2017).

Standing is necessary for a named plaintiff to pursue a class action suit. The Supreme Court has held:

> [I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class . . . . Abstract injury is not enough. It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury . . . The injury or threat of injury must be both real and immediate, not conjectural or hypothetical.

O'Shea v. Littleton, 414 U.S. 488, 494 (1974). *See also* Wooden v. Board of Regents of Univ. Sys. of Georgia, 247 F.3d 1262, 1287 (11th Cir. 2001) ("it must be established that the proposed class representatives have standing to pursue the claims as to which classwide relief is sought."); Prado-Steiman v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000) ("prior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim").

As a general rule, a class action cannot be maintained unless there is a named plaintiff with a live controversy both at the time the complaint is filed and at the time the class is certified. *See* Tucker v. Phyfer, 819 F.2d 1030, 1033 (11th Cir. 1987) ("In a class action, the claim of the named plaintiff, who seeks to represent the class,

must be live both at the time he brings suit and when the district court determines whether to certify the putative class. If the plaintiff's claim is not live, the court lacks a justiciable controversy and must dismiss the claim as moot.").

And standing to seek injunctive relief should be decided before class certification. Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987) ("Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others."); Howard v. City of Greenwood, 783 F.2d 1311, 1312 n.2 (5th Cir. 1986) ("An action under [23(b)(2) was inappropriate because the plaintiffs had no standing to seek injunctive relief . . . . past exposure to illegal conduct would not in itself show a present case or controversy for injunctive relief ... if unaccompanied by any present adverse effects.")

Plaintiffs in our case have not shown standing to seek injunctive relief against DCS and Commissioner Nail. Plaintiffs repeat the mantra that they are subject to the "constant threat of incarceration" absent preliminary and permanent injunctions. (Doc. 1, ¶¶ 1, 2, 7, 11, 33, 46, 47, 51, 57, 87, 88). As Defendants showed in their brief opposing Plaintiffs' motion for preliminary injunction, none of the Plaintiffs has any revocation proceedings pending or has been charged with a violation of probation or parole. (Doc. 34-1, Exhibit A (Mitchell Decl., re Brandon Cobb), ¶ 16;

Doc. 34-2, Exhibit B (Mays Decl., re Jerry Coen), ¶ 5; Doc. 34-3, Exhibit C (Franklin Decl., re Herrera) ¶ 16; Doc. 34-4, Exhibit D (Worley Decl., re Nettles) ¶ 15; Doc. 34-5, Exhibit E (Dowdell Decl., re Wilson) ¶ 16; Doc. 34-6, Exhibit F (Branch Decl., re Woody) ¶ 16). Moreover, they have all been provided with the terms of their criminal sentences and probation/parole conditions. (Doc. 34-1 (Brandon Cobb) ¶¶ 9, 15; Doc. 34-2 (Jerry Coen), ¶¶ 9, 15; Doc. 34-3 (Herrera) ¶¶ 19, 15; Doc. 34-4 (Nettles) ¶¶ 9, 14; Doc. 34-5 (Wilson) ¶¶ 9, 15; Doc. 34-6 (Woody) ¶¶ 9,15).

Plaintiffs' repeated arguments that they are threatened with probation revocation without due process are fundamentally misguided. Under O.C.G.A. § 42-8-34.1, probation cannot be revoked unless the full panoply of due process requirements is provided. These include written notice, hearing, and proof by a preponderance of evidence. Moreover, Georgia court rules require interpreters for hearings and trials. Ga. Uniform Superior Ct. Rule 73; Ga. Supreme Ct. Rules, Use of Interpreters for Non-English Speaking and Hearing Impaired Persons. Indeed, Plaintiff Carlos Herrera was provided with two ASL interpreters in his criminal sentencing—one in the courtroom and the other to assist in his communications with his attorney. (Strauss Dep. (Oct. 4, 2019), at 166-72; Def. Exhibit 18).[2]

Although parole revocation proceedings, unlike probation revocations, are

[2]Strauss' deposition was taken by Plaintiffs for trial or testimonial purposes. If Plaintiffs have not filed Strauss' deposition, Defendants request that they file it now.

administrative in nature, "The same minimum constitutional due process requirements apply in both probation and parole revocation hearings." Williams v. Lawrence, 273 Ga. 295, 298 (2001). Due process requirements for parole revocation are secured by O.C.G.A. § 42-9-48, et seq.

In their motion for class certification, Plaintiffs spend much of their ammunition attacking the DCS written policy on interpreters. (Doc. 53-1, at 14-18). But DCS has not considered itself bound to this written policy and, as explained below, is putting in place a new ADA policy taking effect November 29, 2019. As of September 11, 2019, DCS has provided Video Remote Interpreting (VRI) for same location communications with hearing impaired offenders. This is through a statewide contract with Language Line Services, Inc. (Exhibit A ¶ 9). And DCS now has the capability to provide Communication Access Realtime Translation (CART) for those hearing impaired offenders who do not know ASL. This is under a statewide contract with AllWorld Language Consultants. (Exhibit A ¶ 11). Importantly, VRI and CART are the two primary accommodations Plaintiffs contend Defendants must provide in order to comply with the ADA and RA. (Doc. 1 ¶¶ 5, 11, 35, 44-45, 67 ("video-based telecommunications products and systems"); Straus Dep. (Oct. 4, 2019), at 64-65, 125, 173-76).

As noted, Defendants expect to have a new formal written ADA policy in effect at DCS by November 29, 2019. (Exhibit A ¶¶ 6-13). Defendants will advise

the Court of that development by supplementation. Even assuming that the previous DCS Interpreter policy is defective, the law does not forbid an entity from having a defective policy so long as the policy does not cause a violation of law. Rather, an entity is required simply not to violate the law. *See* City of L.A. v. Heller, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.").

Nevertheless, DCS expects to have this new policy in effect by the end of November. This policy will follow the practices outlined in the attached declaration of DCS ADA Coordinator Darrell Smith. (Exhibit A ¶¶ 9-13). Even if Plaintiffs ever had standing to seek injunctive and declaratory relief, which is not the case, their claims will be rendered moot by this new policy. Tucker v. Phyfer, 819 F.2d 1030, 1033 (11th Cir. 1987) ("In a class action, the claim of the named plaintiff . . . must be live both at the time he brings suit and when the district court determines whether to certify the putative class. If the plaintiff's claim is not live, the court lacks a justiciable controversy and must dismiss the claim as moot.").

Thus, named Plaintiffs lack standing for their claims. As a result, they also do not have standing to seek class certification for unnamed potential plaintiffs.

## IV. Plaintiffs' Proposed Class Definition Does not Meet Identification and Ascertainability Requirements.

After establishing standing, a plaintiff seeking class certification must identify a class that can be precisely defined. The Eleventh Circuit has held, "[T]he plaintiff must demonstrate that the proposed class is adequately defined and clearly ascertainable." Moreover, "An identifiable class exists if its members can be ascertained by reference to objective criteria." And the analysis of the objective criteria also should be administratively feasible, [which] means that identifying class members is a manageable process that does not require much, if any, individual inquiry." Bussey v. Macon Cty. Greyhound Park, Inc., 562 Fed. Appx. 782, 787–88 (11th Cir. 2014). *See also* Adashunas v. Negley, 626 F.2d 600, 603-04 (7th Cir. 1980) (upholding denial of certification for class consisting of all learning disabled children in Indiana since it was not adequately defined or ascertainable); 1 Newberg on Class Actions § 3:3 (5th ed.).

In a federal case from Georgia, the court considered the plaintiffs' request to certify a class including "[a]ll persons who have sustained personal injuries, have specifically evidenced a keratosis, and who have been exposed to the chemicals released from and emanating from the Southern Wood Piedmont facility in Richmond County, Georgia." Newton v. Southern Wood Piedmont Co., 163 F.R.D. 625, 632 (S.D. Ga. 1995). The court found the proposed class too vague and amorphous because identification of members required a medical diagnosis and

highly individualized inquiry into the length of time a plaintiff resided in the area, the duration of exposure of each plaintiff to the chemicals, the dosage of the exposure of the chemicals received by the plaintiff, the method of exposure by each plaintiff, and the individual health and medical histories. The court concluded that "[b]ecause there exists no uniform exposure by all putative class members, all of these elements are incapable of common proof." Id. at 632.

The identification of class members should not require individualized hearings. Accordingly, cases involving individual communications are particularly ill-suited for class treatment. Sprague v. Gen. Motors Corp., 133 F.3d 388, 398 (6th Cir. 1998) (claims dependent on individual communications, including "one-on-one meeting[s]," not "susceptible to class-wide treatment"); Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 597-98 (7th Cir. 1993) (proposed class representatives' claims not typical since "it is not known whether the communications were uniformly made" to city employees); In re LifeUSA Holding Inc., 242 F.3d 136, 145-46 (3d Cir. 2001) (reversing class certification, "plaintiffs assert claims arising not out of one single event or misrepresentation, but claims allegedly made to over 280,000 purchasers by over 30,000 independent agents" that were "neither uniform nor scripted"); Kline v. Security Guards, Inc., 196 F.R.D. 261, 266-67 (E.D. Pa. 2000) (proposed class of "all persons whose communications were intercepted by electronic surveillance" in the employee entrance of their work in

violation of Pennsylvania law required "mini-hearings," making it inappropriate for class action).

In their complaint, Plaintiffs offer the following class definition or description:

> "Plaintiffs seek to represent a class of all deaf and hard of hearing people subject to Defendants' supervision." "Plaintiffs use the term 'deaf and hard of hearing' to refer to individuals with hearing levels or hearing loss that qualify as disabilities under the Americans with Disabilities Act and the Rehabilitation Act. Plaintiffs use the term "Deaf" to refer to individuals who self-identify as culturally deaf. Throughout the Complaint, when Plaintiffs use the phrase "deaf and hard of hearing," Plaintiffs intend that phrase to include deaf, hard of hearing, d/Deaf-Disabled, d/DeafBlind, and Deaf individuals."

(Doc. 1 ¶ 2 & n.1; *see also* Doc. 53-1, at 8 & n.1). The proposed class definition stated in the complaint governs. Costelo v. Chertoff, 258 F.R.D. 600, 604 (C.D. Cal. 2009) ("The Court is bound to class definitions provided in the complaint, and absent an amended complaint, will not consider certification beyond it.").

As the above-discussed case law establishes, Plaintiffs must show that identification of prospective class members is ascertainable by means that do not require a "mini-trial." But their definition does not contain "objective criteria that allow for class members to be identified in an administratively feasible way." Karhu v. Vital Pharms., Inc., 621 Fed. Appx. 945, 946 (11th Cir. 2015).[3] "Identifying class

[3]Plaintiffs suggest that the "ascertainability requirement" may not apply to certification under Rule 23(b)(2). (Doc. 53-1, at 11 n.4). The Eleventh Circuit has recently confirmed, in a class case presented under Rule 23(b)(2), that "[e]very class must be adequately defined and clearly ascertainable." AA Suncoast Chiropractic

members is administratively feasible when it is a manageable process that does not require much, if any, individual inquiry." Id.

In their proposed definition, Plaintiffs state that self-identification applies only to the recognition of offenders who are "culturally deaf." They do not propose that their more general definition of "all deaf and hard of hearing people subject to Defendants' supervision" be recognized by self-identification.

The attached declaration of DCS ADA Coordinator Darrell Smith shows that the agency does not have any means of administratively identifying members of the proposed class other than through self-identification. Because DCS does not have custody of offenders under supervision and is not responsible for their medical care, it cannot require offenders to be screened for hearing, sight, or other disabilities. Moreover, DCS does not as part of its regular operations maintain records of the hearing status of offenders.[4] (Exhibit A (Dowdell Decl.) ¶ 14). Of course, the Georgia Department of Corrections, which operates the state prison system, does have custody of inmates and must provide for their health care, including hearing issues. Estelle v. Gamble, 429 U.S. 97, 103 (1976) (recognizing "the government's

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Clinic, P.A., 938 F.3d 1170, 1174 (11th Cir. 2019).

[4]Unlike in our case, the definition and ascertainability requirements may, in some cases, be met by medical records showing medical conditions. *See* Taylor v. CSX Transp., Inc., 264 F.R.D. 281, 286 (N.D. Ohio 2007) (holding class sufficiently defined consisting of "all persons who worked for Defendant railroads within the class period as engineers and conductors and who, at any time, have been diagnosed with asthma, COPD, or emphysema by a medical doctor").

obligation to provide medical care for those whom it is punishing by incarceration").

That the claims of Plaintiffs and other hearing impaired offenders involve one-on-one communications with DCS officers is another signpost pointing away from class certification. As shown by the case law discussed above, the contents and legal merits of individual communications are not suited for class handling. Importantly, the communications with hearing impaired offenders are necessarily different since they are not all subject to the same terms and conditions of probation and parole.

Moreover, Plaintiffs' proposed class is not sufficiently definite and ascertainable for other reasons. A large percentage of the U.S. population has some hearing impairment. This includes age-related hearing deterioration. According to a recent article by Johns Hopkins Medical School Professor Frank Lin,

> Using the World Health Organization's definition for hearing loss (not being able to hear sounds of 25 decibels or less in the speech frequencies), the researchers found that overall, about 30 million Americans, or 12.7 percent of the population, had hearing loss in both ears. That number jumps to about 48 million, or 20.3 percent, for people who have hearing loss in at least one ear. These numbers far surpass previous estimates of 21 to 29 million.

(https://www.hopkinsmedicine.org/news/media/releases/one_in_five_americans_has_hearing_loss) (visited October 20, 2019).

A workable definition of hearing impairment for ADA purposes would specify those persons who are unable to communicate effectively due to hearing impairment. But Plaintiffs' proposed definition does not provide any mechanism for separating persons with common hearing loss from those with hearing loss

serious enough to interfere significantly in their ability to communicate. By simply stating that the class would include "all individuals with hearing levels or hearing loss that qualify as disabilities," Plaintiffs offer no method for identifying class members. As noted, DCS does not have records allowing it administratively to identify offenders in that category. (Exhibit A ¶ 14). Because Plaintiffs offer no other solution, the Court would be required to hold mini-trials and hear evidence on every offender who may be hearing impaired.

Thus, the proposed class definition does not describe an identifiable and ascertainable class. For this additional reason, the motion should be denied.

## V. Plaintiffs' Proposed Class Fails the Commonality, Typicality, and Adequacy Requirements of Rule 23(a).

Plaintiffs also fall short of the commonality, typicality, and adequacy requirements of Rule 23(a). Defendants will discuss them together since they "tend to merge." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5 (2011) ("[t]he commonality and typicality requirements of Rule 23(a) tend to merge . . . [and] also tend to merge with the adequacy-of-representation requirement").

A plaintiff must provide a factual basis for the court to conclude that the class requirements are met. *See* General Telephone Co. v. Falcon, 257 U.S. 147, 160 (1982) ("the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action"). This requires a court entertaining a motion for class certification to apply a "rigorous

analysis" that may "overlap with the merits of the plaintiff's underlying claim." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51 (2011)

We also learn from Dukes, "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." Id. at 349-50. The Supreme Court explained:

> What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. at 350.

"Traditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff[s] in relation to the class." Piazza v. Ebsco Indus., 273 F.3d 1341, 1346 (11th Cir. 2001). "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under rule 23(a)(3)." Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001). While factual differences alone do not prevent typicality, so long as "there is a strong similarity of legal theories," here Plaintiffs' injuries depend on an individual assessment of their impairment and an individual assessment of the accommodation required for effective communication. Id. Such questions of individualized assessment "are best suited to a case-by-case determination." Chandler v. City of Dallas, 2 F.3d 1385,

1396 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994) (explaining that the "question whether an impairment constitutes a substantial limitation to a major life activity is best suited to a case-by-case determination").

Because Plaintiffs have not sufficiently defined the proposed class, it is difficult to determine whether there are common facts and issues, whether Plaintiffs' claims are typical of the proposed class, and whether Plaintiffs are adequate representatives.

Plaintiffs urge that their broad attacks on DCS policies and practices form common questions of law and fact. (Doc. 53-1, at 5-16). Plaintiffs propose the following, with various subparts, as "common questions" warranting class certification:

> "Whether GDCS denies class members equally effective communication and reasonable modifications."
>
> "Whether GDCS ls Denying Class Members Due Process by Failing to Provide Adequate Notice of Supervision Rules and Conditions."[5]

(Doc. 53-1, at 14-23). But these do not describe an alleged common injury, as required.

[5]As discussed earlier, Plaintiffs' arguments regarding alleged due process violations are entirely illusory. Georgia criminal procedure provides ample due process for probation and parole revocation proceedings. O.C.G.A. §§ 42-8-34.1, 42-9-48, et seq. And Georgia court rules require interpreters for hearings and trials. Ga. Uniform Superior Ct. Rule 73; Ga. Supreme Ct. Rules, Use of Interpreters for Non-English Speaking and Hearing Impaired Persons.

Instead of presenting a "common question," Plaintiff's quarrels with DCS are highly individualized. The six named Plaintiffs state that they have a wide variety of communications wishes and needs. Some want or need a single live ASL interpreter, two seek a team of ASL interpreters, one does not know ASL and wants text-based communications, and they have different levels of ability to read and write English. (Doc. 1 ¶¶ 3-4, 23-28, 40, 45-56). Plaintiffs' experts paint the same picture. Karen Peltz Strauss testified:

> So, again, ***every deaf person is different***. And I think the people that aren't familiar with the deaf community -- understandably, if you're not working in a particular field, you're going to group everybody kind of together. And so if that person's deaf, that person signs, anybody can communicate with them if they sign. But it's actually not like that. Again, every person is different. ***Every person has different capabilities, different educational backgrounds***, different income levels.

(Strauss Dep. (Oct. 4, 2019), at 15). Indeed, Plaintiffs' counsel themselves stated at the preliminary injunction hearing regarding hearing impaired persons "what they need is not always the same." (Doc. 59, at 23).

Under Wal-Mart Stores, Inc. v. Dukes, Plaintiffs must "demonstrate that the class members have suffered the same injury" in order to establish commonality. 564 U.S. at 349-50. This is necessary in order for a class action lawsuit "to generate common answers." And, as the Court explained in Dukes, "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." Id. at 350.

The differences in communications abilities and needs of hearing impaired persons defeat Plaintiffs' commonality, typicality, and adequacy arguments. These deficiencies are similar to the problems posed by Plaintiffs' proposed class definition discussed earlier in this brief.

The Eleventh Circuit has confirmed that where, like here, differences among the class members will result "in numerous mini-trials" on the merits, class certification should be denied. Truesdell v. Thomas, 889 F.3d 719, 726 (11th Cir. 2018). The plaintiff sued for violation of the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725, based on the defendant's accessing the plaintiff's personal information and that of potential class members. Because the defendant's "reasons for accessing each putative class member's personal information may vary for each class member, . . . resulting in numerous mini-trials," the plaintiff did not satisfy the commonality and typicality requirements. Id. at 722.

As noted above, Plaintiffs' complaint and declarations map their widely-varying communications needs and abilities. Thus, Plaintiffs cannot show that there are "questions of law or fact common to the class." Rule 23(a).

Regarding typicality, "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001). But, for the same reasons, Plaintiffs cannot show that their personal claims are typical of those

of classes either as defined.

Because, as discussed, Plaintiffs claims are not typical of claims of other inmates and there are no common questions of law or fact, Plaintiffs also cannot show that they "will fairly and adequately protect the interests of the class." Rule 23(a)(4). Thus, Plaintiffs do not meet the commonality, typicality, and adequacy requirements of Rule 23(a)(1-4).

## VI. Plaintiffs' Proposed Class Does not Satisfy the Requirements of Rule 23(b)(2).

For similar reasons, Plaintiffs do not meet the requirements of Fed. R. Civ. P. 23(b). The Court need not reach this question inasmuch as Plaintiffs cannot satisfy the above-discussed prerequisites, including those of Rule 23(a). But, putting aside their failure to meet 23(a) and other requirements, Plaintiffs also fail to satisfy 23(b).

Plaintiffs seek class certification under Rule 23(b)(2). Rule 23(b)(2) requires an "act" or "refusal to act" by the defendant "on grounds that apply generally to the class" in such a manner that "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

Reversing certification of a Title VII class under Rule 23(b)(2) class, the Supreme Court underscored in Dukes that "claims for *individualized* relief . . . do not satisfy the rule." Id. at 360 (emphasis original). The Court ruled:

> The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none

> of them. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant.

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011). The Court also emphasized that the proposed class should not interfere in the defendant's ability "to litigate its statutory defenses to individual claims." Id. at 366-67.[6]

Thus, Rule 23(b)(2) impose an element of cohesiveness among class members. The Eleventh Circuit has recognized:

> Subsection (b)(2) by its terms, clearly envisions a class defined by the ***homogeneity and cohesion*** of its members' grievances, rights and interests. Rule 23 itself provides for (b)(2) certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class. The import of this language is that the claims contemplated in a (b)(2) action are class claims, claims resting on the same grounds and applying more or less equally to all members of the class.

Holmes v. Cont'l Can Co., 706 F.2d 1144, 1155 (11th Cir. 1983); id. at 1158 ("the cohesive characteristics of the class are the vital core of a (b)(2) action"); Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001) (" 'While 23(b)(2) class actions have no predominance ... requirements, it is well established that the class claims must be cohesive.' ") (*quoting* Barnes v. American Tobacco Co., 161 F.3d 127, 143 (3rd Cir. 1998).

[6]Some courts have recognized that "unique defenses" which threaten to become a "major focus" of a proposed class action count against certification. *See* Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (collecting cases).

The cohesion requirement assures that the class action will be manageable. Shook v. Bd. of Cty. Commissioners of Cty. of El Paso, 543 F.3d 597, 604 (10th Cir. 2008) (Gorsuch, J.) (" 'A class action may not be certified under Rule 23(b)(2) if relief specifically tailored to each class member would be necessary to correct the allegedly wrongful conduct of the defendant.' So, if redressing the class members' injuries requires time-consuming inquiry into individual circumstances or characteristics of class members or groups of class members, 'the suit could become unmanageable and little value would be gained in proceeding as a class action.' . . . In short, under Rule 23(b)(2) the class members' injuries must be sufficiently similar that they can be addressed in an single injunction that need not differentiate between class members.") (*first quotation* 5 Moore's Fed. Prac. § 23.43(2)(b) at 23–195 (3d.2000); *second quotation* Barnes v. American Tobacco Co., 161 F.3d 127, 143 (3rd Cir. 1998)).

Our Plaintiffs cannot clear the Rule 23(b)(2) hurdles. Their disparate communications needs and abilities preclude "a single injunction or declaratory judgment" that "would provide relief to each member of the class," as required for a Rule 23(b)(2) class. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. at 360. In our case, Rule 23(b)(2) "does not authorize class certification [because] each individual class member would be entitled to a different injunction or declaratory judgment against the defendant[s]." Id. Unlike Rule 23(b)(3), which contains the predominance and

superiority components, Rule 23(b)(2) does not allow for a "case-specific inquiry." Id. at 362-63.

Moreover, Plaintiffs' proposed class action would interfere in Defendants' ability to assert their affirmative defenses of undue burden and fundamental alteration against individual claims. 28 C.F.R. § 35.164. For instance, Defendants may demonstrate at trial that Plaintiffs' Cobb's and Herrera's requests for a team of two (one hearing and one deaf) interpreters is an undue burden on the agency in terms of costs and administration, whereas providing VRI as requested by other offenders is not.

The problems with Plaintiffs' proposed class can be seen through the prism of this question: What single order could the Court enter that would meet Plaintiffs' divergent demands? As focused by Dukes and the cohesion element recognized in Holmes, Plaintiffs do not seek, and cannot be satisfied by, a single order providing specific class-wide relief. Rather, they seek a splintered order or series of orders with multiple variables based on the communications wishes, abilities, and perceived needs of various criminal offenders. Because there is no such single order, Plaintiffs cannot meet the requirements of Rule 23(b)(2).

## VI. CONCLUSION

For these reasons, the Court should deny the motion for class certification.[7]

[7]This brief has been prepared in Times New Roman (14 pt.) font, which has been approved by the Local Rules of this Court.

Respectfully Submitted,

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

| | |
|---|---|
| BRANDON COBB, et al., etc.,<br><br>Plaintiffs,<br><br>v.<br><br>GEORGIA DEPARTMENT OF COMMUNITY SUPERVISION, et al., etc.,<br><br>Defendants. | CIVIL ACTION NO.<br><br>1:19-cv-03285-WMR |

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day electronically filed the DEFENDANTS' BRIEF OPPOSING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 13th day of November, 2019.

s/George M. Weaver

| | |
|---|---|
| George M. Weaver | 43150 |
| Pat Dutcher | 140964 |
| Attorney for Defendants | |

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
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**DECLARATION OF DARRELL E. SMITH**

1. I, Darrell E. Smith, offer this declaration for the Court's consideration on Plaintiffs' motion for class certification and for all other purposes allowed by law. All statements in this declaration are within my personal knowledge.

2. During July 1, 2015 through the present, I have been employed by the Georgia Department of Community Supervision (DCS). My current position is Human Resources Manager/ADA Coordinator. My previous positions at DCS were HR Transactions Manager during 2015-2017; HR Project Manager during 2017-2018; Safety Manager during 2018-2019.

3. I was previously employed by Target Corporation as HR Manager during 2001-2003.

4. Other employment I have held are Target Executive Team Leader – Guest Experience during 2003-2008; HR Payroll Technician at Department of Behavioral Health and Developmental Disabilities during 2012-2014; and I have worked in Human Resources with TJ Maxx as well.

5. The documents referred to in, and attached to, this declaration are true and accurate copies of official records created or received by DCS. These records are maintained in the regular course of business and it is the regular and routine practice for DCS to maintain these records. The entries in these records were made at or near the time of the events to which they refer and were made by, or from information transmitted by, persons with knowledge. All documents referred to in, or attached to this declaration, were in effect at the times they indicate or, if no time is indicated, have been in effect during July 1, 2015 through the present. As an employee of DCS, I am familiar with the manner in which these records are created and maintained and have access to these records.

6. DCS is in the process of adopting a new Americans With Disabilities Act (ADA) and Rehabilitation Act (RA) policy, which will revise the Interpreters policy, number 3.103, that has been in effect since November 15, 2015. The new policy should be in force by November 29, 2019. While

the new ADA policy is being finalized, policy no. 3.103 is no longer being followed for ADA interpretation purposes.

7. DCS recognizes it is obligated to comply with the ADA and RA. In order to make sure it is in compliance, the current practice of DCS with respect to disabled offenders, including those who are hearing impaired, is as follows. DCS officers and employees are provided with a wide range of services, options, and processes that are available for assisting our hearing impaired or disabled offenders. As explained below, we have secured services and available interpretation methods with respect to communications with hearing impaired offenders.

8. Because the needs of hearing impaired offenders differ greatly on an individual basis, DCS now has the capability to provide a wide variety of accommodations to assist in providing effective communications.

9. As of September 11, 2019, DCS entered into a statewide contract with Language Line Services, Inc. to provide Video Remote Interpreting Service (VRI) to hearing impaired offenders who are supervised by DCS. This service provides qualified and certified American Sign Language (ASL) interpreters on a video monitor (including a cell phone, tablet, and laptop) who can sign ASL messages to and from hearing impaired persons. The same service also provides interpreters for other language. The persons

communicating in this fashion may be in the same location, without violating any FCC regulation or law. The VRI service can be accessed 24 hours every day by a login performed by any DCS Community Supervision Officer or other employee who needs to communicate with a hearing impaired offender.

10. DCS will pay for the VRI services according to the following terms. "Telephonic interpretation billed at the rate of $0.85 per minute for Spanish and $ 0.99 per minute for all other languages. Insight Video Remote Interpreting to be billed at $2 .95 per minute for American Sign Language, $1.85 for Spanish through video and $1.95 per minute for all other languages through video." A copy of the agreement is attached.

11. DCS also has the capability of providing Communication Access Realtime Translation (CART) for those hearing impaired offenders who do not know ASL. This service is provided through a statewide contract with AllWorld Language Consultants. A copy of the contract is attached.

12. I am aware of the following additional options. These services are available to DCS to facilitate communication with hearing impaired probationers and parolees:

    a. Engage a live interpreter paid for by DCS who will personally provide American Sign Language (ASL) translation for communications.

b. Text Telephone or Text Typewriter (TTY), through Georgia Relay (available 24 hours every day by dialing 7-1-1), which allows users to type messages make and forth on their phones.

c. Voice Carry-Over (VC), through Georgia Relay, which uses either a TTY (text telephone) and standard telephone or a specially designed telephone that also has a text screen. A Georgia Relay Communications Assistant (CA) and the VCO user reads those words on the text screen of his or her phone.

d. Hearing Carry-Over (HCO), through Georgia Relay, which uses a TTY or similar device. The HCO user types his or her side of the conversation, and the CA voices the typed words to the other person. When the other person speaks, the HCO user listens directly to what is being said.

e. Speech-to-Speech (STS), through Georgia Relay, which requires only standard telephone equipment. STS service is for people who have mild-to-moderate speech difficulties but who can hear what is being said over the phone. As the STS user speaks, a CA listens to the words. The CA then vocalizes those words to the other person. When the other person speaks, the STS user listens directly to what is being said.

f. CapTel®, which is separate from George Relay. It uses current voice recognition software to display the words stated by callers.

g. Sorenson Video Relay Service (see https://www.sorensonvrs.com/svrs) is also available to assist in communicating with hearing impaired probationers and parolees. My understanding is that this service is paid for by the government and is provided under the Telecommunications Relay Service fund (see https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs).

13. All of the services mentioned above are available without delay to any DCS officer or employee who needs to communicate in the field with a hearing impaired offender. The only exception is CART and a live person interpreter, which requires my approval as ADA Coordinator. My practice is to process and approve requests for CART and these other services within seven (7) business days of the request. The time frame will only be extended if there is more research needed for special services for the offender. The offender will be made knowledgeable that the extension is needed to assist them further.

14. DCS does not maintain custody of any Plaintiff in this case or generally of any other offenders whom it supervises. DCS does not provide health care

to offenders and has no authority to conduct medical evaluations of offenders. Also, DCS does not as a part of its operations maintain offenders' medical records, results of hearing tests, information about hearing capabilities, or information regarding hearing impairment. Accordingly, DCS generally learns that an offender is hearing impaired by: self-identification and request for hearing accommodation, doctor's statement provided by the offender, or apparent difficulty of the offender in communicating effectively. Once DCS learns that an offender is hearing impaired, the agency maintains that information in its records.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

This the 12 day of November, 2019.

Darrell Smith

Darrell Smith

# Purchase Order

**Ship To:** Dept of Community Supervision
270 Washington Street, SW
5th Floor, Suite 5-181
Atlanta, GA 30334

| Purchase Order | Type | Date | Revision | Page |
|---|---|---|---|---|
| 47700-FM1-0000012243 | OMP | 09/11/2019 | | 1 |
| **Payment Terms** | **Freight Terms** | | | **Ship Via** |
| Net 30 | Destination | | | COMMON |
| **Buyer / Phone:** Lukesha Diah 404/989-6147 | | | | |

**Vendor:** 0000203118
LANGUAGE LINE SERVICES INC
DBA LANGUAGELINE SOLUTIONS
1 LOWER RAGSDALE DR BLDG 2
MONTEREY, CA 93940

Bill To: Department of Community Supervision
270 Washington Street
Suite 5181
Atlanta, GA 30334

| Line-Sch | Item | Description | Quantity | UOM | PO Price | Extended Amt | Due Date |
|---|---|---|---|---|---|---|---|
| 1-1 | 96117 | Telephonic Interpretation | 1.0000 | EA | 8,850.0000 | 8,850.00 | 09/11/2019 |

**The State of Georgia Contract Terms and Conditions are applicable to this order. They can be viewed at:**
**http://doas.ga.gov/assets/State%20Purchasing/NEADocumentLibrary/GAStandardTerms-ConditionsforSuppliers.pdf**

<<LanguageLine Solutions

Telephonic interpretation billed at the rate of $0.85 per minute for Spanish and $0.99 per minute for all other languages. InSight Video Remote Interpreting to be billed at $2.95 per minute for American Sign Language, $1.85 for Spanish through video and $1.95 per minute for all other languages through video.>>

**Item Total** 8,850.00

**Total PO Amount** 8,850.00

All shipments, shipping papers, invoices, and correspondence must be identified with our Purchase Order Number. Overshipments will not be accepted unless authorized by Buyer prior to shipment.

**Authorized Signature** Constance A McCrary

# State of Georgia
## Statewide Standard Contract Form

| Solicitation Title | Solicitation Number | Contract Number |
|---|---|---|
| Translation, Interpretation, and Sign Language Solution | 99999-SPD0000134 | 99999-001-SPD0000134-0004 |

1. This Contract is entered into between the Agency and the Contractor named below:

Agency's Name
**Department of Administrative Services**
(hereafter called Agency)

Contractor's Name
**AllWorld Language Consultants, Inc.**
(hereafter called Contractor)

| 2. Contract to Begin: | Date of Completion: | Renewals: |
|---|---|---|
| October 30, 2017 | October 29, 2019 | 3 |

3. Performance Bond, if any: Other Bonds, if any:

4. Authorized Person to Receive Contract Notices for Agency: Authorized Person to Receive Contract Notices for Contractor:
**Carlos A. Scandiffio**

5. The parties agree to comply with the terms and conditions of the following attachments which are by this reference made a part of the Statewide Contract:

| |
|---|
| Attachment 1: **Statewide Contract Terms and Conditions for Services** |
| Attachment 2: **Solicitation (referenced above)** |
| Attachment 3: **Contractor's Final Response** |
| |

**IN WITNESS WHEREOF, this Contract has been executed by the parties hereto.**

6.

**Contractor**

Contractor's Name *(If other than an individual, state whether a corporation, partnership, etc.)*
**AllWorld Language Consultants, Inc.**

By *(Authorized Signature)* C. Scandiffio | Date Signed **August 17, 2017**

Printed Name and Title of Person Signing
**Carlos A. Scandiffio, President & CEO**

Address
**172 Rollins Avenue, Rockville, Maryland 20852-4005**

7.

**Agency**

Agency Name
**Department of Administrative Services**

By *(Authorized Signature)* L. E | Date Signed 10-5-17

Printed Name and Title of Person Signing
Lisa Eason Deputy Commissioner - State Purchasing

Address
200 Piedmont Ave., S.E. Atlanta, GA 30334-9010

Revised 07/06/16

SPD-SP007

# STATE OF GEORGIA
# STATEWIDE CONTRACT
## Attachment 1
## Contract Terms and Conditions for Services

## A. DEFINITIONS AND GENERAL INFORMATION

1. **Definitions.** The following words shall be defined as set forth below:

(i) **"Agency"** means the Department of Administrative Services of the State of Georgia.

(ii) **"Awarded Item Schedule"** means the summarizing document, if any, listing the Services as awarded and may also denote the Contractor providing such Services.

(iii) **"Contract"** or **"Statewide Contract"** means the agreement between the Agency and the Contractor as defined by the Statewide Contract Form and its incorporated documents.

(iv) **"Contractor"** means the provider(s) of the Services under the Statewide Contract.

(v) **"Purchase Instrument"** means the documentation issued by the Agency or User Agencies to the Contractor for a purchase of Services in accordance with the terms and conditions of the Statewide Contract. The Purchase Instrument should reference the Statewide Contract and may include an identification of the Services to be purchased, the time and location such Services will be utilized, and any other requirements deemed necessary by the Agency or User Agencies.

(vi) **"Response", "Contractor's Response" or "Final Response"** means the Contractor's submitted response to the RFX, including any modifications or clarifications accepted by the Agency.

(vii) **"RFX"** means the Request for Proposal, Request for Bid, or other solicitation document (and any amendments or addenda thereto) specifically identified in the Statewide Contract Form that was issued to solicit the Services that are subject to the Statewide Contract.

(viii) **"Services"** means the services and deliverables as provided in the RFX and as further described by the Response and the Statewide Contract.

(ix) **"State"** means the State of Georgia, the Agency, User Agencies, and any other authorized state entities issuing Purchase Instruments against the Statewide Contract.

(x) **"Statewide Contract Form"** means the document that contains basic information about the Statewide Contract and incorporates by reference the applicable Contract Terms and Conditions, the RFX, Contractor's Response to the RFX, the final pricing documentation for the Services and any mutually agreed clarifications, modifications, additions and deletions resulting from final contract negotiations. No objection or amendment by a Contractor to the RFX requirements or the Statewide Contract shall be incorporated by reference into this Statewide Contract unless the Agency has accepted the Contractor's objection or amendment in writing. The Statewide Contract Form is defined separately and referred to separately throughout the Statewide Contract Terms and Conditions as a means of identifying the location of certain

information. For example, the initial term of the Statewide Contract is defined by the dates in the Statewide Contract Form.

(xi) **"User Agency"** or **"User Agencies"** means any offices, agencies, departments, boards, bureaus, commissions, institutions, or other entities of the State of Georgia entitled to or required to make purchases from this Statewide Contract.

2. **Certified Source of Services.** Pursuant to Section 50-5-57 of the Official Code of Georgia Annotated (O.C.G.A.), the Agency hereby certifies the Contractor as a source of supply to the User Agencies of the Services identified in this Statewide Contract. Orders shall be placed individually and from time to time by the User Agencies. The execution of this Statewide Contract only establishes the Contractor as an authorized source of supply by the Agency and creates no financial obligation on the part of the Agency.

3. **Priority of Contract Provisions**. Any pre-printed contract terms and conditions included on Contractor's forms or invoices shall be null and void.

4. **Reporting Requirements.** Contractor shall provide all reports required by the RFX. In addition, unless otherwise provided in the RFX, Contractor shall keep a record of the purchases made pursuant to the Statewide Contract and shall submit a quarterly written report to the Agency, upon Agency's request.

## B. DURATION OF CONTRACT

1. **Contract Term.** The Statewide Contract shall begin and end on the dates specified in the Statewide Contract Form unless terminated earlier in accordance with the applicable terms and conditions.

2. **Contract Renewal.** The Agency shall have the option, in its sole discretion, to renew the Statewide Contract for additional terms on a year-to-year basis by giving the Contractor written notice of the renewal decision at least sixty (60) days prior to the expiration of the initial term or renewal term. Renewal will depend upon the best interests of the State, funding, and Contractor's performance. Renewal will be accomplished through the issuance of a Notice of Award Amendment. Upon the Agency's election, in its sole discretion, to renew any part of this Statewide Contract, Contractor shall remain obligated to perform in strict accordance with this Statewide Contract unless otherwise agreed by the Agency and the Contractor.

3. **Contract Extension.** In the event that this Statewide Contract shall terminate or be likely to terminate prior to the making of an award for a new contract for the Services, the Agency may, with the written consent of Contractor, extend this Statewide Contract for such period as may be necessary to afford the State a continuous supply of the Services.

## C. DESCRIPTION OF SERVICES

1. **Specifications in Bidding Documents.** All Services shall be provided in accordance with the specifications contained in the RFX, the terms of the Statewide Contract, and as further described in Contractor's Response.

2. **Product Shipment and Delivery.** All products, if any, shall be shipped F.O.B. destination. Destination shall be the location(s) specified in the RFX or any provided Purchase Instrument. All items shall be at the Contractor's risk until they have been delivered and accepted by the receiving entity. All items shall be subject to inspection on delivery. Hidden damage will

remain the responsibility of the Contractor to remedy without cost to the User Agencies, regardless of when the hidden damage is discovered.

3. **Non-Exclusive Rights.** The Statewide Contract is not exclusive. The Agency reserves the right to select other contractors to provide services similar to the Services described in the Statewide Contract during the term of the Statewide Contract. User Agencies may obtain similar services from other contractors upon prior approval of the Agency, which approval shall be made at the sole discretion of the Agency when it is deemed to be in the best interests of the State, and shall be conclusive.

4. **No Minimums Guaranteed.** The Statewide Contract does not guarantee any minimum level of purchases or use of Services.

## D. COMPENSATION

1. **Pricing and Payment.** The Contractor will be paid for Services provided pursuant to the Statewide Contract in accordance with the RFX and final pricing documents as incorporated into the Statewide Contract Form and the terms of the Statewide Contract. Unless clearly stated otherwise in the Statewide Contract, all prices are firm and fixed and are not subject to variation. Prices include, but are not limited to freight, insurance, fuel surcharges and customs duties. User Agencies are solely and individually financially responsible for their respective purchases. The Agency shall not be responsible for payment of any amounts owed by other User Agencies.

2. **Billings.** If applicable, and unless the RFX provides otherwise, the Contractor shall submit, on a regular basis, an invoice for the Services supplied to the User Agencies under the Statewide Contract at the billing address specified in the Purchase Instrument or Statewide Contract. The invoice shall comply with all applicable rules concerning payment of such claims. The User Agencies shall pay all approved invoices in arrears and in accordance with applicable provisions of State law.

   Unless otherwise agreed in writing by the Agency and the Contractor, the Contractor shall not be entitled to receive any other payment or compensation from the User Agencies for Services provided by or on behalf of the Contractor under the Statewide Contract. The Contractor shall be solely responsible for paying all costs, expenses and charges it incurs in connection with its performance under the Statewide Contract.

3. **Delay of Payment Due to Contractor's Failure.** If the User Agencies in good faith determine that the Contractor has failed to perform or deliver Services as required by the Statewide Contract, the Contractor shall not be entitled to any compensation under the Statewide Contract until such Service is performed or delivered. In this event, the User Agencies may withhold that portion of the Contractor's compensation which represents payment for Services that were not performed or delivered. To the extent that the Contractor's failure to perform or deliver in a timely manner causes the User Agencies to incur costs, the User Agencies may deduct the amount of such incurred costs from any amounts payable to Contractor. The User Agencies' authority to deduct such incurred costs shall not in any way affect the Agency's sole authority to terminate the Statewide Contract.

4. **Set-Off Against Sums Owed by the Contractor.** In the event that the Contractor owes the User Agency any sum or the User Agency must obtain substitute performance, the User Agency may set off the sum owed against any sum owed by the User Agency to the Contractor.

## E. TERMINATION

1. **Immediate Termination.** Pursuant to O.C.G.A. Section 50-5-64, any purchase made pursuant to this Statewide Contract will terminate immediately and absolutely if the User Agency determines that adequate funds are not appropriated or granted or funds are de-appropriated such that the User Agency cannot fulfill its obligations under the Statewide Contract, which determination is at the User Agency's sole discretion and shall be conclusive. Further, the Agency may terminate the Statewide Contract for any one or more of the following reasons effective immediately without advance notice:

   **(i)** In the event the Contractor is required to be certified or licensed as a condition precedent to providing the Services, the revocation or loss of such license or certification may result in immediate termination of the Statewide Contract effective as of the date on which the license or certification is no longer in effect;

   **(ii)** The Agency determines that the actions, or failure to act, of the Contractor, its agents, employees or subcontractors have caused, or reasonably could cause, life, health or safety to be jeopardized;

   **(iii)** The Contractor fails to comply with confidentiality laws or provisions; and/or

   **(iv)** The Contractor furnished any statement, representation or certification in connection with the Statewide Contract or the bidding process which is materially false, deceptive, incorrect or incomplete.

2. **Termination for Cause.** The occurrence of any one or more of the following events shall constitute cause for the Agency to declare the Contractor in default of its obligations under the Statewide Contract:

   **(i)** The Contractor fails to deliver or has delivered nonconforming services or fails to perform, to the Agency's satisfaction, any material requirement of the Statewide Contract or is in violation of a material provision of the Statewide Contract, including, but without limitation, the express warranties made by the Contractor;

   **(ii)** The Agency determines that satisfactory performance of the Statewide Contract is substantially endangered or that a default is likely to occur;

   **(iii)** The Contractor fails to make substantial and timely progress toward performance of the Statewide Contract;

   **(iv)** The Contractor becomes subject to any bankruptcy or insolvency proceeding under federal or state law to the extent allowed by applicable federal or state law including bankruptcy laws; the Contractor terminates or suspends its business; or the Agency reasonably believes that the Contractor has become insolvent or unable to pay its obligations as they accrue consistent with applicable federal or state law;

   **(v)** The Contractor has failed to comply with applicable federal, state and local laws, rules, ordinances, regulations and orders when performing within the scope of the Statewide Contract;

   **(vi)** The Contractor has engaged in conduct that has or may expose the Agency or the State to liability, as determined in the Agency's sole discretion; or



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Attachment 2

(vii) The Contractor has infringed any patent, trademark, copyright, trade dress or any other intellectual property rights of the Agency, the State, or a third party.

3. **Notice of Default.** If there is a default event caused by the Contractor, the Agency shall provide written notice to the Contractor requesting that the breach or noncompliance be remedied within the period of time specified in the Agency's written notice to the Contractor. If the breach or noncompliance is not remedied within the period of time specified in the written notice, the Agency may:

(i) Immediately terminate the Statewide Contract without additional written notice; and/or

(ii) Procure substitute services from another source and charge the difference between the Statewide Contract and the substitute contract to the defaulting Contractor; and/or,

(iii) Enforce the terms and conditions of the Statewide Contract and seek any legal or equitable remedies.

4. **Termination Upon Notice.** Following thirty (30) days' written notice, the Agency may terminate the Statewide Contract in whole or in part without the payment of any penalty or incurring any further obligation to the Contractor. Following termination upon notice, the Contractor shall be entitled to compensation from the User Agencies, upon submission of invoices and proper proof of claim, for Services provided under the Statewide Contract to the User Agencies up to and including the date of termination.

5. **Termination Due to Change in Law.** The Agency shall have the right to terminate this Statewide Contract without penalty by giving thirty (30) days' written notice to the Contractor as a result of any of the following:

(i) The Agency's authorization to operate is withdrawn or there is a material alteration in the programs administered by the Agency; and/or

(ii) The Agency's duties are substantially modified.

6. **Payment Limitation in Event of Termination.** In the event of termination of the Statewide Contract for any reason by the Agency, the User Agencies shall pay only those amounts, if any, due and owing to the Contractor for the Services actually rendered up to the date specified in the notice of termination for which the User Agencies are obligated to pay pursuant to the Statewide Contract or Purchase Instrument. Payment will be made only upon submission of invoices and proper proof of the Contractor's claim. This provision in no way limits the remedies available to the State under the Statewide Contract in the event of termination. The State shall not be liable for any costs incurred by the Contractor in its performance of the Statewide Contract, including, but not limited to, startup costs, overhead or other costs associated with the performance of the Statewide Contract.

7. **The Contractor's Termination Duties.** Upon receipt of notice of termination or upon request of the Agency, the Contractor shall:

(i) Cease work under the Statewide Contract and take all necessary or appropriate steps to limit disbursements and minimize costs, and furnish a report within thirty (30) days of the date of notice of termination, describing the status of all work under the Statewide Contract, including, without limitation, results accomplished, conclusions resulting therefrom, and any other matters the Agency may require;

(ii) Immediately cease using and return to the State, any of the State's personal property or materials, whether tangible or intangible, provided by the State to the Contractor;

(iii) Comply with the State's instructions for the timely transfer of any active files and work product produced by the Contractor under the Statewide Contract, which are the property of the State;

(iv) Cooperate in good faith with the Agency, the User Agencies, and their employees, agents and contractors during the transition period between the notification of termination and the substitution of any replacement contractor; and

(v) Immediately return to the User Agencies any payments made by the User Agencies for Services that were not delivered or rendered by the Contractor.

## F. CONFIDENTIAL INFORMATION

1. **Access to Confidential Data.** The Contractor's employees, agents and subcontractors may have access to confidential data maintained by the State to the extent necessary to carry out the Contractor's responsibilities under the Statewide Contract. The Contractor shall presume that all information received pursuant to the Statewide Contract is confidential unless otherwise designated by the State. If it is reasonably likely the Contractor will have access to the State's confidential information, then:

   (i) The Contractor shall provide to the State a written description of the Contractor's policies and procedures to safeguard confidential information;

   (ii) Policies of confidentiality shall address, as appropriate, information conveyed in verbal, written, and electronic formats;

   (iii) The Contractor must designate one individual who shall remain the responsible authority in charge of all data collected, used, or disseminated by the Contractor in connection with the performance of the Statewide Contract; and

   (iv) The Contractor shall provide adequate supervision and training to its agents, employees and subcontractors to ensure compliance with the terms of the Statewide Contract.

   The private or confidential data shall remain the property of the State at all times. Some Services performed for the Agency and/or User Agencies may require the Contractor to sign a nondisclosure agreement. Contractor understands and agrees that refusal or failure to sign such a nondisclosure agreement, if required, may result in termination of the Statewide Contract.

2. **No Dissemination of Confidential Data.** No confidential data collected, maintained, or used in the course of performance of the Statewide Contract shall be disseminated except as authorized by law and with the written consent of the State, either during the period of the Statewide Contract or thereafter. Any data supplied to or created by the Contractor shall be considered the property of the State. The Contractor must return any and all data collected, maintained, created or used in the course of the performance of the Statewide Contract, in whatever form it is maintained, promptly at the request of the State.

3. **Subpoena.** In the event that a subpoena or other legal process is served upon the Contractor for records containing confidential information, the Contractor shall promptly notify the State and cooperate with the State in any lawful effort to protect the confidential information.

4. **Reporting of Unauthorized Disclosure.** The Contractor shall immediately report to the State any unauthorized disclosure of confidential information.

5. **Survives Termination.** The Contractor's confidentiality obligation under the Statewide Contract shall survive termination of the Statewide Contract.

## G. INDEMNIFICATION

1. **Contractor's Indemnification Obligation.** The Contractor agrees to indemnify and hold harmless the State and State officers, employees, agents, and volunteers (collectively, "Indemnified Parties") from any and all costs, expenses, losses, claims, damages, liabilities, settlements and judgments, including reasonable value of the time spent by the Attorney General's Office, related to or arising from:

   **(i)** Any breach of the Statewide Contract;

   **(ii)** Any negligent, intentional or wrongful act or omission of the Contractor or any employee, agent or subcontractor utilized or employed by the Contractor;

   **(iii)** Any failure of Services to comply with applicable specifications, warranties, and certifications under the Statewide Contract;

   **(iv)** The negligence or fault of the Contractor in design, testing, development, manufacture, or otherwise with respect to the Services provided under the Statewide Contract;

   **(v)** Claims, demands, or lawsuits that, with respect to the goods (if any) or any parts thereof, allege product liability, strict product liability, or any variation thereof;

   **(vi)** The Contractor's performance or attempted performance of the Statewide Contract, including any employee, agent or subcontractor utilized or employed by the Contractor;

   **(vii)** Any failure by the Contractor to comply with the "Compliance with the Law" provision of the Statewide Contract;

   **(viii)** Any failure by the Contractor to make all reports, payments and withholdings required by federal and state law with respect to social security, employee income and other taxes, fees or costs required by the Contractor to conduct business in the State of Georgia or the United States;

   **(ix)** Any infringement of any copyright, trademark, patent, trade dress, or other intellectual property right; or

   **(x)** Any failure by the Contractor to adhere to the confidentiality provisions of the Statewide Contract.

2. **Duty to Reimburse State Tort Claims Fund.** To the extent such damage or loss as covered by this indemnification is covered by the State of Georgia Tort Claims Fund ("the Fund"), the Contractor (and its insurers) agrees to reimburse the Fund. To the full extent permitted by the Constitution and the laws of the State and the terms of the Fund, the Contractor and its

insurers waive any right of subrogation against the State, the Indemnified Parties, and the Fund and insurers participating thereunder, to the full extent of this indemnification.

3. **Litigation and Settlements.** The Contractor shall, at its own expense, be entitled to and shall have the duty to participate in the defense of any suit against the Indemnified Parties. No settlement or compromise of any claim, loss or damage entered into by the Indemnified Parties shall be binding upon Contractor unless approved in writing by Contractor. No settlement or compromise of any claim, loss or damage entered into by Contractor shall be binding upon the Indemnified Parties unless approved in writing by the Indemnified Parties.

4. **Patent/Copyright Infringement Indemnification.** Contractor shall, at its own expense, be entitled to and shall have the duty to participate in the defense of any suit instituted against the State and indemnify the State against any award of damages and costs made against the State by a final judgment of a court of last resort in such suit insofar as the same is based on any claim that any of the Services constitutes an infringement of any United States Letters Patent or copyright, provided the State gives the Contractor immediate notice in writing of the institution of such suit, permits Contractor to fully participate in the defense of the same, and gives Contractor all available information, assistance and authority to enable Contractor to do so. Subject to approval of the Attorney General of the State of Georgia, the Agency shall tender defense of any such action to Contractor upon request by Contractor. Contractor shall not be liable for any award of judgment against the State reached by compromise or settlement unless Contractor accepts the compromise or settlement. Contractor shall have the right to enter into negotiations for and the right to effect settlement or compromise of any such action, but no such settlement shall be binding upon the State unless approved by the State.

   In case any of the Services is in any suit held to constitute infringement and its use is enjoined, Contractor shall, at its option and expense:

   **(i)** Procure for the State the right to continue using the Services;

   **(ii)** Replace or modify the same so that it becomes non-infringing; or

   **(iii)** Remove the same and cancel any future charges pertaining thereto.

   Contractor, however, shall have no liability to the State if any such patent, or copyright infringement or claim thereof is based upon or arises out of:

   **(i)** Compliance with designs, plans or specifications furnished by or on behalf of the Agency as to the Services;

   **(ii)** Use of the Services in combination with apparatus or devices not supplied by Contractor;

   **(iii)** Use of the Services in a manner for which the same was neither designed nor contemplated; or

   **(iv)** The claimed infringement of any patent or copyright in which the Agency or any affiliate or subsidiary of the Agency has any direct interest by license or otherwise.

5. **Survives Termination.** The indemnification obligation of the Contractor shall survive termination of the Statewide Contract.

## H. INSURANCE

Contractor shall provide all insurance as required by the RFX.

## I. BONDS

The Contractor shall provide all required bonds in accordance with the terms of the RFX and as stated in the Statewide Contract Form.

## J. WARRANTIES

1. **Construction of Warranties Expressed in the Contract with Warranties Implied by Law.** All warranties made by the Contractor and/or subcontractors in all provisions of the Statewide Contract and the Contractor's Response, whether or not the Statewide Contract specifically denominates the Contractor's and/or subcontractors' promise as a warranty or whether the warranty is created only by the Contractor's affirmation or promise, or is created by a description of the Services to be provided, or by provision of samples to the State shall not be construed as limiting or negating any warranty provided by law, including without limitation, warranties which arise through course of dealing or usage of trade, the warranty of merchantability, and the warranty of fitness for a particular purpose. The warranties expressed in the Statewide Contract are intended to modify the warranties implied by law only to the extent that they expand the warranties applicable to the Services provided by the Contractor. The provisions of this section apply during the term of the Statewide Contract and any extensions or renewals thereof.

2. **Warranty – Nonconforming Services and Goods.** All services and any goods delivered by Contractor to the User Agencies shall be free from any defects in design, material, or workmanship. If any services or goods offered by the Contractor are found to be defective in material or workmanship, or do not conform to Contractor's warranty, the User Agencies shall have the option of returning, repairing, or replacing the defective services or goods at Contractor's expense. Payment for services and any goods shall not constitute acceptance. Acceptance by the User Agencies shall not relieve the Contractor of its warranty or any other obligation under the Statewide Contract.

3. **Compliance with Federal Safety Acts.** Contractor warrants and guarantees to the State that the Services provided under the Statewide Contract are in compliance with Sections 5 and 12 of the Federal Trade Commission Act; the Fair Packaging and Labeling Act; the Federal Food, Drug, and Cosmetic Act; the Consumer Product Safety Act; the Federal Environmental Pesticide Control Act; the Federal Hazardous Substances Act; the Fair Labor Standards Act; the Wool Products Labeling Act; the Flammable Fabrics Act; the Occupational Safety and Health Act; the Office of Management and Budget A-110 Appendix A; and the Anti-Kickback Act of 1986.

4. **Originality and Title to Concepts, Materials, and Goods Produced.** Contractor represents and warrants that all the concepts, materials, goods and services produced, or provided to the State pursuant to the terms of the Statewide Contract shall be wholly original with the Contractor or that the Contractor has secured all applicable interests, rights, licenses, permits or other intellectual property rights in such concepts, materials and works. The Contractor represents and warrants that the concepts, materials, goods and services and the State's use of same and the exercise by the State of the rights granted by the Statewide Contract shall not infringe upon any other work, other than material provided by the Statewide Contract to the Contractor to be used as a basis for such materials, or violate the rights of publicity or privacy of, or constitute a libel or slander against, any person, firm or corporation and that the

concepts, materials and works will not infringe upon the copyright, trademark, trade name, trade dress patent, literary, dramatic, statutory, common law or any other rights of any person, firm or corporation or other entity. The Contractor represents and warrants that it is the owner of or otherwise has the right to use and distribute the goods and services contemplated by the Statewide Contract.

5. **Conformity with Contractual Requirements.** The Contractor represents and warrants that the Services provided in accordance with the Statewide Contract will appear and operate in conformance with the terms and conditions of the Statewide Contract.

6. **Authority to Enter into Contract.** The Contractor represents and warrants that it has full authority to enter into the Statewide Contract and that it has not granted and will not grant any right or interest to any person or entity that might derogate, encumber or interfere with the rights granted to the State.

7. **Obligations Owed to Third Parties.** The Contractor represents and warrants that all obligations owed to third parties with respect to the activities contemplated to be undertaken by the Contractor pursuant to the Statewide Contract are or will be fully satisfied by the Contractor so that the State will not have any obligations with respect thereto.

8. **Title to Property.** The Contractor represents and warrants that title to any property assigned, conveyed or licensed to the State is good and that transfer of title or license to the State is rightful and that all property shall be delivered free of any security interest or other lien or encumbrance. Title to any supplies, materials, or equipment shall remain in the Contractor until fully paid for by the User Agencies. Except as otherwise expressly authorized by the Agency, all materials produced by Contractor personnel in performance of Services, including but not limited to software, charts, graphs, diagrams, video tapes and other project documentation shall be deemed to be work made for hire and shall be the property of the State of Georgia.

9. **Industry Standards.** The Contractor represents and expressly warrants that all aspects of the Services provided or used by it shall at a minimum conform to the standards in the Contractor's industry. This requirement shall be in addition to any express warranties, representations, and specifications included in the Statewide Contract, which shall take precedence.

10. **Contractor's Personnel and Staffing.** Contractor warrants that all persons assigned to perform Services under this Statewide Contract are either lawful employees of Contractor or lawful employees of a Subcontractor authorized by the Agency as specified in the RFX. All persons assigned to perform Services under this Statewide Contract shall be qualified to perform such Services. Personnel assigned by Contractor shall have all professional licenses required to perform the Services.

11. **State Security.** Agency requires that a criminal background investigation be made of any and all Contractor personnel utilized to provide Services to the State. Contractor represents and warrants that Contractor shall refrain from assigning personnel to any task under this Statewide Contract if such investigation reveals a disregard for the law or other background that indicates an unacceptable security risk as determined by the State. The Contractor's employees, agents and subcontractors may be granted access to state computers, hardware, software, programs and/or information technology infrastructure or operations to the extent necessary to carry out the Contractor's responsibilities under the Statewide Contract. Such access may be terminated at the sole discretion of the State. The Contractor shall provide immediate notice to Agency of any employees, agents and/or subcontractors suspected of

abusing or misusing such access privilege. The Contractor represents and warrants that Contractor shall provide notice to Agency of the changed status of any employee, agent or subcontractor granted access to state computers, hardware, software, programs and/or information technology infrastructure or operations, including, but not limited to, termination or change of the position or contract relationship.

12. **Use of State Vehicles.** Contractor warrants that no State vehicles will be used by Contractor for the performance of Services under this Statewide Contract. Contractor shall be responsible for providing transportation necessary to perform all Services.

## K. PRODUCT RECALL

If this Statewide Contract includes the provision of goods and in the event that any of the goods are found by the Contractor, the State, any governmental agency, or court having jurisdiction to contain a defect, serious quality or performance deficiency, or not to be in compliance with any standard or requirement so as to require or make advisable that such goods be reworked or recalled, the Contractor will promptly communicate all relevant facts to the Agency and undertake all corrective actions, including those required to meet all obligations imposed by laws, regulations, or orders, and shall file all necessary papers, corrective action programs, and other related documents, provided that nothing contained in this section shall preclude the Agency from taking such action as may be required of it under any such law or regulation. The Contractor shall perform all necessary repairs or modifications at its sole expense except to any extent that the Contractor and the State shall agree to the performance of such repairs by the State upon mutually acceptable terms.

## L. CONTRACT ADMINISTRATION

1. **Order of Preference.** In the case of any inconsistency or conflict among the specific provisions of the Statewide Contract Terms and Conditions (including any amendments accepted by both the Agency and the Contractor attached hereto and the Awarded Item Schedule, if any), the RFX (including any subsequent addenda and written responses to bidders' questions), and the Contractor's Response, any inconsistency or conflict shall be resolved as follows:

   **(i)** First, by giving preference to the Statewide Contract Terms and Conditions.

   **(ii)** Second, by giving preference to the specific provisions of the RFX.

   **(iii)** Third, by giving preference to the specific provisions of the Contractor's Response, except that objections or amendments by a Contractor that have not been explicitly accepted by the Agency in writing shall not be included in this Statewide Contract and shall be given no weight or consideration.

2. **Intent of References to Bid Documents.** The references to the parties' obligations, which are contained in this document, are intended to supplement or clarify the obligations as stated in the RFX and the Contractor's Response. The failure of the parties to make reference to the terms of the RFX or the Contractor's Response in this document shall not be construed as creating a conflict and will not relieve the Contractor of the contractual obligations imposed by the terms of the RFX and the Contractor's Response. The contractual obligations of the Agency cannot be implied from the Contractor's Response.

3. **Compliance with the Law.** The Contractor, its employees, agents, and subcontractors shall comply with all applicable federal, state, and local laws, rules, ordinances, regulations and

orders now or hereafter in effect when performing under the Statewide Contract, including without limitation, all laws applicable to the prevention of discrimination in employment and the use of targeted small businesses as subcontractors or contractors. The Contractor, its employees, agents and subcontractors shall also comply with all federal, state and local laws regarding business permits and licenses that may be required to carry out the work performed under the Statewide Contract. Contractor and Contractor's personnel shall also comply with all State, Agency, and User Agency policies and standards in effect during the performance of the Statewide Contract, including but not limited to the Agency and User Agencies' policies and standards relating to personnel conduct, security, safety, confidentiality, and ethics. Further, the provisions of O.C.G.A. Section 45-10-20 et seq. have not and must not be violated under the terms of this Statewide Contract. Contractor certifies that Contractor is not currently engaged in, and agrees for the duration of this Contract not to engage in, a boycott of Israel, as defined in O.C.G.A. §50-5-85.

4. **Drug-free Workplace.** The Contractor hereby certifies as follows:

   **(i)** Contractor will not engage in the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana during the performance of this Statewide Contract; and

   **(ii)** If Contractor has more than one employee, including Contractor, Contractor shall provide for such employee(s) a drug-free workplace, in accordance with the Georgia Drug-free Workplace Act as provided in O.C.G.A. Section 50-24-1 et seq., throughout the duration of this Statewide Contract; and

   **(iii)** Contractor will secure from any subcontractor hired to work on any job assigned under this Statewide Contract the following written certification: "As part of the subcontracting agreement with (Contractor's Name), (Subcontractor's Name) certifies to the contractor that a drug-free workplace will be provided for the subcontractor's employees during the performance of this Contract pursuant to paragraph 7 of subsection (b) of Code Section 50-24-3."

   Contractor may be suspended, terminated, or debarred if it is determined that:

   **(i)** Contractor has made false certification here in above; or

   **(ii)** Contractor has violated such certification by failure to carry out the requirements of O.C.G.A. Section 50-24-3(b).

5. **Amendments.** The Statewide Contract may be amended in writing from time to time by mutual consent of the parties and upon approval by the Agency. All amendments to the Statewide Contract must be in writing and fully executed by duly authorized representatives of the Agency and the Contractor.

6. **Third Party Beneficiaries.** There are no third-party beneficiaries to the Statewide Contract. The Statewide Contract is intended only to benefit the State and the Contractor.

7. **Choice of Law and Forum.** The laws of the State of Georgia shall govern and determine all matters arising out of or in connection with this Statewide Contract without regard to the choice of law provisions of State law. In the event any proceeding of a quasi-judicial or judicial nature is commenced in connection with this Statewide Contract, such proceeding shall solely be brought in a court or other forum of competent jurisdiction within Fulton County, Georgia. This

provision shall not be construed as waiving any immunity to suit or liability, including without limitation sovereign immunity, which may be available to the State.

8. **Parties' Duty to Provide Notice of Intent to Litigate and Right to Demand Mediation.** In addition to any dispute resolution procedures otherwise required under this Statewide Contract or any informal negotiations which may occur between the State and the Contractor, no civil action with respect to any dispute, claim or controversy arising out of or relating to this Statewide Contract may be commenced without first giving fourteen (14) calendar days written notice to the State of the claim and the intent to initiate a civil action. At any time prior to the commencement of a civil action, either the State or the Contractor may elect to submit the matter for mediation. Either the State or the Contractor may exercise the right to submit the matter for mediation by providing the other party with a written demand for mediation setting forth the subject of the dispute. The parties will cooperate with one another in selecting a mediator and in scheduling the mediation proceedings. Venue for the mediation will be in Atlanta, Georgia; provided, however, that any or all mediation proceedings may be conducted by teleconference with the consent of the mediator. The parties covenant that they will participate in the mediation in good faith, and that they will share equally in its costs; provided, however, that the cost to the State shall not exceed five thousand dollars ($5,000.00).

   All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator or employees of any mediation service, are inadmissible for any purpose (including but not limited to impeachment) in any litigation or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation. Inadmissibility notwithstanding, all written documents shall nevertheless be subject to the Georgia Open Records Act, O.C.G.A. Section 50-18-70 et.seq.

   No party may commence a civil action with respect to the matters submitted to mediation until after the completion of the initial mediation session, forty-five (45) calendar days after the date of filing the written request for mediation with the mediator or mediation service, or sixty (60) calendar days after the delivery of the written demand for mediation, whichever occurs first. Mediation may continue after the commencement of a civil action, if the parties so desire.

9. **Assignment and Delegation.** The Statewide Contract may not be assigned, transferred or conveyed in whole or in part without the prior written consent of the Agency. For the purpose of construing this clause, a transfer of a controlling interest in the Contractor shall be considered an assignment.

10. **Use of Third Parties.** Except as may be expressly agreed to in writing by the Agency, Contractor shall not subcontract, assign, delegate or otherwise permit anyone other than Contractor or Contractor's personnel to perform any of Contractor's obligations under this Statewide Contract or any of the work subsequently assigned under this Statewide Contract. No subcontract which Contractor enters into with respect to performance of obligations or work assigned under the Statewide Contract shall in any way relieve Contractor of any responsibility, obligation or liability under this Statewide Contract and for the acts and omissions of all subcontractors, agents, and employees. All restrictions, obligations and responsibilities of the Contractor under the Statewide Contract shall also apply to the subcontractors. Any contract with a subcontractor must also preserve the rights of the Agency. The Agency shall have the right to request the removal of a subcontractor from the Statewide Contract for good cause.

11. **Integration.** The Statewide Contract represents the entire agreement between the parties. The parties shall not rely on any representation that may have been made which is not included in the Statewide Contract.

12. **Headings or Captions.** The paragraph headings or captions used in the Statewide Contract are for identification purposes only and do not limit or construe the contents of the paragraphs.

13. **Not a Joint Venture.** Nothing in the Statewide Contract shall be construed as creating or constituting the relationship of a partnership, joint venture, (or other association of any kind or agent and principal relationship) between the parties thereto. Each party shall be deemed to be an independent contractor contracting for the Services and acting toward the mutual benefits expected to be derived herefrom. Neither Contractor nor any of Contractor's agents, servants, employees, subcontractors or contractors shall become or be deemed to become agents, servants, or employees of the State. Contractor shall therefore be responsible for compliance with all laws, rules and regulations involving its employees and any subcontractors, including but not limited to employment of labor, hours of labor, health and safety, working conditions, workers' compensation insurance, and payment of wages. No party has the authority to enter into any contract or create an obligation or liability on behalf of, in the name of, or binding upon another party to the Statewide Contract.

14. **Joint and Several Liability.** If the Contractor is a joint entity, consisting of more than one individual, partnership, corporation or other business organization, all such entities shall be jointly and severally liable for carrying out the activities and obligations of the Statewide Contract, and for any default of activities and obligations.

15. **Supersedes Former Contracts or Agreements.** Unless otherwise specified in the Statewide Contract, this Statewide Contract supersedes all prior contracts or agreements between the Agency and the Contractor for the Services provided in connection with the Statewide Contract.

16. **Waiver.** Except as specifically provided for in a waiver signed by duly authorized representatives of the Agency and the Contractor, failure by either party at any time to require performance by the other party or to claim a breach of any provision of the Statewide Contract shall not be construed as affecting any subsequent right to require performance or to claim a breach.

17. **Notice.** Any and all notices, designations, consents, offers, acceptances or any other communication provided for herein shall be given in writing by registered or certified mail, return receipt requested, by receipted hand delivery, by Federal Express, courier or other similar and reliable carrier which shall be addressed to the person who signed the Statewide Contract on behalf of the party at the address identified in the Statewide Contract Form. Each such notice shall be deemed to have been provided:

    **(i)** At the time it is actually received; or,

    **(ii)** Within one (1) day in the case of overnight hand delivery, courier or services such as Federal Express with guaranteed next day delivery; or,

    **(iii)** Within five (5) days after it is deposited in the U.S. Mail in the case of registered U.S. Mail.

From time to time, the parties may change the name and address of the person designated to receive notice. Such change of the designated person shall be in writing to the other party and as provided herein.

18. **Cumulative Rights.** The various rights, powers, options, elections and remedies of any party provided in the Statewide Contract shall be construed as cumulative and not one of them is exclusive of the others or exclusive of any rights, remedies or priorities allowed either party by law, and shall in no way affect or impair the right of any party to pursue any other equitable or legal remedy to which any party may be entitled as long as any default remains in any way unremedied, unsatisfied or undischarged.

19. **Severability.** If any provision of the Statewide Contract is determined by a court of competent jurisdiction to be invalid or unenforceable, such determination shall not affect the validity or enforceability of any other part or provision of the Statewide Contract. Further, if any provision of the Statewide Contract is determined to be unenforceable by virtue of its scope, but may be made enforceable by a limitation of the provision, the provision shall be deemed to be amended to the minimum extent necessary to render it enforceable under the applicable law. Any agreement of the Agency and the Contractor to amend, modify, eliminate, or otherwise change any part of this Statewide Contract shall not affect any other part of this Statewide Contract, and the remainder of this Statewide Contract shall continue to be of full force and effect.

20. **Time is of the Essence.** Time is of the essence with respect to the performance of the terms of the Statewide Contract. Contractor shall ensure that all personnel providing Services to the State are responsive to the State's requirements and requests in all respects.

21. **Authorization.** The persons signing this Statewide Contract represent and warrant to the other parties that:

    **(i)** It has the right, power and authority to enter into and perform its obligations under the Statewide Contract; and

    **(ii)** It has taken all requisite action (corporate, statutory or otherwise) to approve execution, delivery and performance of the Statewide Contract and the Statewide Contract constitutes a legal, valid and binding obligation upon itself in accordance with its terms.

22. **Successors in Interest.** All the terms, provisions, and conditions of the Statewide Contract shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns and legal representatives.

23. **Record Retention and Access.** The Contractor shall maintain books, records and documents which sufficiently and properly document and calculate all charges billed to the State throughout the term of the Statewide Contract for a period of at least five (5) years following the date of final payment or completion of any required audit, whichever is later. The Contractor should maintain separate accounts and records for the Agency and the User Agencies. Records to be maintained include both financial records and service records. The Contractor shall permit the Auditor of the State of Georgia or any authorized representative of the State, and where federal funds are involved, the Comptroller General of the United States, or any other authorized representative of the United States government, to access and examine, audit, excerpt and transcribe any directly pertinent books, documents, papers, electronic or optically stored and created records or other records of the Contractor relating to orders, invoices or payments or any other documentation or materials pertaining to the Statewide Contract, wherever such records may be located during normal business hours.

The Contractor shall not impose a charge for audit or examination of the Contractor's books and records. If an audit discloses incorrect billings or improprieties, the State reserves the right to charge the Contractor for the cost of the audit and appropriate reimbursement. Evidence of criminal conduct will be turned over to the proper authorities.

24. **Solicitation.** The Contractor warrants that no person or selling agency (except bona fide employees or selling agents maintained for the purpose of securing business) has been employed or retained to solicit and secure the Statewide Contract upon an agreement or understanding for commission, percentage, brokerage or contingency.

25. **Public Records.** The laws of the State of Georgia, including the Georgia Open Records Act, as provided in O.C.G.A. Section 50-18-70 et seq., require procurement records and other records to be made public unless otherwise provided by law.

26. **Clean Air and Water Certification.** Contractor certifies that none of the facilities it uses to provide the Services are on the Environmental Protection Agency (EPA) List of Violating Facilities. Contractor will immediately notify the Agency of the receipt of any communication indicating that any of Contractor's facilities are under consideration to be listed on the EPA List of Violating Facilities.

27. **Debarred, Suspended, and Ineligible Status.** Contractor certifies that the Contractor and/or any of its subcontractors have not been debarred, suspended, or declared ineligible by any agency of the State of Georgia or as defined in the Federal Acquisition Regulation (FAR) 48 C.F.R. Ch.1 Subpart 9.4. Contractor will immediately notify the Agency if Contractor is debarred by the State or placed on the Consolidated List of Debarred, Suspended, and Ineligible Contractors by a federal entity.

28. **Use of Name or Intellectual Property**. Contractor agrees it will not use the name or any intellectual property, including but not limited to, State trademarks or logos in any manner, including commercial advertising or as a business reference, without the expressed prior written consent of the State.

29. **Taxes.** User Agencies are exempt from Federal Excise Taxes, and no payment will be made for any taxes levied on Contractor's employee's wages. User Agencies are exempt from State and Local Sales and Use Taxes on the services. Tax Exemption Certificates will be furnished upon request. Contractor or an authorized subcontractor has provided the Agency with a sworn verification regarding the filing of unemployment taxes or persons assigned by Contractor to perform services required in this Statewide Contract, which verification is incorporated herein by reference.

30. **Certification Regarding Sales and Use Tax.** By executing the Statewide Contract the Contractor certifies it is either (a) registered with the State Department of Revenue, collects, and remits State sales and use taxes as required by Georgia law, including Chapter 8 of Title 48 of the O.C.G.A.; or (b) not a "retailer" as defined in O.C.G.A. Section 48-8-2. The Contractor also acknowledges that the State may declare the Statewide Contract void if the above certification is false. The Contractor also understands that fraudulent certification may result in the Agency or its representative filing for damages for breach of contract.

31. **Delay or Impossibility of Performance.** Neither party shall be in default under the Statewide Contract if performance is delayed or made impossible by an act of God. In each such case, the delay or impossibility must be beyond the control and without the fault or negligence of the Contractor. If delay results from a subcontractor's conduct, negligence or failure to perform,

the Contractor shall not be excused from compliance with the terms and obligations of the Statewide Contract.

32. **Limitation of Contractor's Liability to the State.** Except as otherwise provided in this Statewide Contract, Contractor's liability to the State for any claim of damages arising out of this Statewide Contract shall be limited to direct damages and shall not exceed the total amount paid to Contractor for the performance under this Statewide Contract.

No limitation of Contractor's liability shall apply to Contractor's liability for loss or damage to State equipment or other property while such equipment or other property is in the sole care, custody, and control of Contractor's personnel. Contractor hereby expressly agrees to assume all risk of loss or damage to any such State equipment or other property in the care, custody, and control of Contractor's personnel. Contractor further agrees that equipment transported by Contractor personnel in a vehicle belonging to Contractor (including any vehicle rented or leased by Contractor or Contractor's personnel) shall be deemed to be in the sole care, custody, and control of Contractor's personnel while being transported. Nothing in this section shall limit or affect Contractor's liability arising from claims brought by any third party.

33. **Obligations Beyond Contract Term.** The Statewide Contract shall remain in full force and effect to the end of the specified term or until terminated or canceled pursuant to the Statewide Contract. All obligations of the Contractor incurred or existing under the Statewide Contract as of the date of expiration, termination or cancellation will survive the termination, expiration or conclusion of the Statewide Contract.

34. **Counterparts.** The Agency and the Contractor agree that the Statewide Contract has been or may be executed in several counterparts, each of which shall be deemed an original and all such counterparts shall together constitute one and the same instrument.

35. **Further Assurances and Corrective Instruments.** The Agency and the Contractor agree that they will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for carrying out the expressed intention of the Statewide Contract.

36. **Transition Cooperation and Cooperation with other Contractors.** Contractor agrees that upon termination of this Statewide Contract for any reason, it shall provide sufficient efforts and cooperation to ensure an orderly and efficient transition of services to the State or another contractor. The Contractor shall provide full disclosure to the State and the third-party contractor about the equipment, software, or services required to perform the Services for the State. The Contractor shall transfer licenses or assign agreements for any software or third-party services used to provide the Services to the State or to another contractor.

Further, in the event that the State has entered into or enters into agreements with other contractors for additional work related to services rendered under the Statewide Contract, Contractor agrees to cooperate fully with such other contractors. Contractor shall not commit any act, which will interfere with the performance of work by any other contractor.