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

YISRAEL M. KEMP, Plaintiff, v. GEORGIA STATE UNIVERSITY ADMISSIONS, et al., Defendants.	CIVIL ACTION NO. 1:07-CV-0212-BBM-RGV

ORDER FOR SERVICE OF REPORT, RECOMMENDATION, AND ORDER

Attached is the Report and Recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b), and this Court's Local Rule 72. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the Report and Recommendation within ten (10) days of the receipt of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for

review by the district court. If no objections are filed, the Report and Recommendation may be adopted as the opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983).

The Clerk is directed to submit the Report and Recommendation with objections, if any, to the district court after expiration of the above time period.

IT IS SO ORDERED, this 16th day of June, 2008.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE

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MAGISTRATE JUDGE'S FINAL REPORT, RECOMMENDATION, AND ORDER

Yisrael M. Kemp ("plaintiff"), proceeding pro se, filed the instant complaint under 42 U.S.C. § 1983 ("§ 1983") and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"), against the Georgia State University Admissions Office and the Board of Regents of the University System of Georgia (collectively, "defendants"), alleging that defendants discriminated against him on the basis of his race and gender as a result of his attempt to enroll at Georgia State University ("GSU"). [Doc. 1].[1] Presently pending are defendants' Motion for Summary Judgment, [Doc. 61], plaintiff's Motion for Summary Judgment, [Doc. 63],

[1] On January 29, 2007, plaintiff filed an "Amendment to Title VI Complaint," adding an exhibit to his original complaint but no additional claims or parties. [Doc. 7].

defendants' Motion to Strike, [Doc. 65], and plaintiff's Amended Motion for Summary Judgment, [Doc. 69]. On February 1, 2008, defendants filed a response to plaintiff's summary judgment motions, [Doc. 72], but plaintiff has failed to file any response to defendants' motions to strike or for summary judgment despite the Clerk's notice to plaintiff to respond, [see Doc. 62].[2] For the reasons stated herein,

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[2] On January 8, 2008, defendants filed a motion to strike plaintiff's motion for summary judgment, arguing that plaintiff's motion fails to comply with this Court's Local Rule 56.1 regarding the filing of a motion for summary judgment. [See Doc. 65]. In lieu of filing a response to defendants' motion to strike, plaintiff filed an amended motion for summary judgment on January 16, 2008, attempting to comply with Local Rule 56.1 and to add parties and a new claim under 42 U.S.C. § 1981. [Doc. 69]. However, neither of plaintiff's motions for summary judgment, [Docs. 63 & 69], complies with this Court's Local Rules. [See Docs. 33, 54, & 60]. See also Brandon v. Lockheed Martin Aeronautical Sys., 393 F. Supp. 2d 1341, 1348 (N.D. Ga. 2005) (holding pro se litigant to the procedural requirements of Local Rule 56.1). In addition, any attempt to add claims and parties at this stage of the litigation is untimely and not in compliance with this Court's scheduling order, [Doc. 24], or Federal Rule of Civil Procedure 15(a). See Hyland v. Sec'y for the Dep't of Corr., No. 06-14455, 2007 WL 2445972, at *3 n.1 (11th Cir. Aug. 29, 2007). Plaintiff's motions for summary judgment contain arguments that should have been set forth in plaintiff's response to defendants' motion for summary judgment. As a result, defendants' motion to strike, [Doc. 65], is hereby **GRANTED** in part with respect to plaintiff's motions for summary judgment, [Docs. 63 & 69], and **DENIED** in part to the extent that the Court will consider plaintiff's arguments set forth in his motions for summary judgment as plaintiff's response to defendants' motion for summary judgment. See Wilshin v. Allstate Ins. Co., 212 F. Supp. 2d 1360, 1364-65 (M.D. Ga. 2002) (granting in part and denying in part defendant's motion to strike plaintiff's motion for summary judgment, as the court considered plaintiff's motion as a response to defendant's motion for summary judgment). The Clerk is therefore **DIRECTED** to terminate any submission of plaintiff's summary judgment motions, [Docs. 63 & 69], to the undersigned.

the undersigned Magistrate Judge **RECOMMENDS** that defendants' Motion for Summary Judgment, [Doc. 61], be **GRANTED**.

I. FACTUAL BACKGROUND

In connection with their motion and as required by Local Rule 56.1(B), defendants submitted a Statement of Material Facts as to which there Exists No Genuine Issue to be Tried. [Doc. 61-3]. Plaintiff submitted a response admitting the facts and citations asserted in ¶¶ 1-15, 17, 19-22, 29-30, 32-38, 40, 44-46, 52, 54-55, 58-63, 65, 69-70, 72, and 78-79 of defendants' statement. [Doc. 67]. Plaintiff denied the facts asserted in ¶¶ 16, 18, 23-28, 31, 39, 41-43, 47-51, 53, 56-57, 64, 66-68, 71, 73-77, and 80 of defendants' statement. [Id.]. However, with regard to all of plaintiff's denials, plaintiff either gave no reason for his denial, gave narratives that do not actually refute the fact, failed to cite specific evidence, or cited evidence that does not support the denial. Because these responses do not comport with the requirements of Local Rule 56.1(B)(2)(a)(2), the Court deems these facts and citations admitted as well.[3]

[3] Additionally, plaintiff's summary judgment motions, now considered a response to defendants' motion, include plaintiff's own statement of facts. [See Doc. 63 & Doc. 69 at 1-2, 16-20]. However, these "statements of facts" likewise fail to comply with Local Rule 56.1(B)(1)(d) and, therefore, will not be considered by this Court. See Brandon, 393 F. Supp. 2d at 1348.

A. GSU and its Admissions Requirements and Policies

GSU is a member school of the University System of Georgia. [Doc. 61-3 ¶ 1; Doc. 61-5 (Peters Aff.) ¶ 5]. As a member school, GSU must establish admission requirements that meet the minimum requirements established by the Board of Regents of the University System of Georgia ("the Board"), however, it may also establish admission requirements that exceed those set by the Board. [Doc. 61-3 ¶¶ 1-2; Doc. 61-5 ¶ 5]. GSU also develops its educational policies in compliance with applicable federal and state laws as well as the Board's policies. [Doc. 61-3 ¶ 3; Doc. 61-5 ¶ 6]. For example, it is GSU's policy to provide equal educational opportunities and to make admission decisions without regard to sex, color, age, religion, national origin, sexual orientation, or disability. [Doc. 61-3 ¶ 3; Doc. 61-5 ¶ 6; Doc. 61-6 (GSU's undergraduate catalog) at 13].

GSU bases its admission decisions on an applicant's previous record of satisfactory academic performance, test scores, personal qualities and circumstances, character, and good conduct, making admission into GSU a selective process. [Doc. 61-3 ¶ 4; Doc. 61-5 ¶ 7; Doc. 61-6 at 13]. Even applicants who meet GSU's minimum admission requirements will not necessarily be admitted. [Doc. 61-3 ¶ 4; Doc. 61-5 ¶ 7; Doc. 61-6 at 13]. In addition, applicants who are ineligible for re-enrollment at any prior educational institution or who have been convicted of a violation of a

federal, state, or municipal law, other than minor traffic violations, will be considered for admission to GSU only after their cases are reviewed by the Dean of Students, which includes an interview with the Office of the Dean of Students and obtaining any additional background checks that the Office of the Dean of Students deems necessary. [Doc. 61-3 ¶¶ 5-6; Doc. 61-5 ¶ 8; Doc. 61-6 at 13]. This policy was instituted to insure that the applicant meets GSU's satisfactory academic performance, good character, and good conduct requirements. [Doc. 61-3 ¶ 6; Doc. 61-5 ¶ 8; Doc. 61-6 at 13]. During this additional review process, the Office of the Dean of Students does not keep the Office of Admissions informed of the applicant's status, but will advise the Office of Admissions of its decision once the review process is complete. [Doc. 61-3 ¶ 66; Doc. 61-5 ¶ 27].

An applicant seeking to enroll at GSU begins the process by submitting an application that will be fully processed when all information requested on the application is provided and the application fee is paid. [Doc. 61-3 ¶ 7; Doc. 61-5 ¶ 9; Doc. 61-6 at 14]. GSU has several admission categories under which an applicant may be classified and admitted. [Doc. 61-3 ¶ 8; Doc. 61-5 ¶ 10]. For example, Freshman applicants include those applicants who have never enrolled in a regionally-accredited college or university. [Doc. 61-3 ¶ 9; Doc. 61-5 ¶ 11; Doc. 61-6 at 14-15]. GSU's minimum admission requirements for Freshman applicants include

graduation and receipt of a college preparatory diploma from an accredited high school, completion of the college preparatory curriculum established by the Board, a minimum 2.8 high school grade-point average ("GPA"), and minimum scores on college entrance exams such as the ACT or SAT. [Doc. 61-3 ¶ 9; Doc. 61-5 ¶ 11; Doc. 61-6 at 14-15].

Transfer applicants are those applicants who have previously attended a regionally accredited college or university. [Doc. 61-3 ¶ 10; Doc. 61-5 ¶ 12; Doc. 61-6 at 15]. Minimum admission requirements for Transfer applicants include a minimum cumulative 2.5 GPA in college-level courses, eligibility to re-enroll at the last educational institution attended, and completion of the college preparatory curriculum established by the Board. [Doc. 61-3 ¶ 10; Doc. 61-5 ¶ 12; Doc. 61-6 at 15-16]. Additionally, Transfer applicants are required to either arrange for all transcripts from attendance at other colleges or universities to be sent directly to GSU or to provide GSU the transcripts in a sealed envelope directly from the previously attended institution. [Doc. 61-3 ¶ 10; Doc. 61-5 ¶ 12; Doc. 61-6 at 15-16].

Applicants are considered Non-Traditional if they have been out of high school for at least five years, hold a high school diploma from an accredited high school, have not attended college within the past five years, and have earned fewer than 30 transferable semester, or 45 quarter, credit hours. [Doc. 61-3 ¶ 11; Doc. 61-5

¶ 13; Doc. 61-6 at 19]. In order to be considered for admission, Non-Traditional applicants must take the COMPASS assessment test and earn certain minimum scores in each category, including a score of 70 in reading, 60 in writing, and 37 in mathematics. [Doc. 61-3 ¶ 12; Doc. 61-5 ¶ 13; Doc. 61-6 at 19]. Applicants who meet these conditions are considered Non-Traditional Freshman. [Doc. 61-3 ¶ 13; Doc. 61-5 ¶ 13]. Non-Traditional Freshman applicants who have earned more than 29 hours of college-level coursework, however, must meet Transfer student requirements. [Doc. 61-3 ¶ 13; Doc. 61-5 ¶ 13].

If an applicant has earned 30 or more transferable semester credit hours but has not been enrolled in any college-level classes for five or more years, he or she will be considered a Non-Traditional Transfer applicant. [Doc. 61-3 ¶ 14; Doc. 61-5 ¶ 14; Doc. 61-7 (Board's policy manual)]. In addition, Non-Traditional Transfer applicants must have completed the college preparatory curriculum established by the Board. [Doc. 61-3 ¶ 15; Doc. 61-5 ¶ 14; Doc. 61-7]. Applicants in this category who do not meet the GPA requirements for Transfer applicants may be admitted to GSU by the Director of Admissions as Limited Admission Transfer students. [Doc. 61-3 ¶ 15; Doc. 61-5 ¶ 14; Doc. 61-7]. The intent behind the Non-Traditional Transfer category is to authorize GSU to admit applicants who have experienced academic difficulty in the past, but who have demonstrated the ability, maturity, and

commitment to be academically successful. [Doc. 61-3 ¶ 16; Doc. 61-5 ¶ 15; Doc. 61-7].

In order to be considered for admission for a specific semester at GSU, applicants must submit or postmark their applications and application fees by the established priority or regular deadline dates for that term. [Doc. 61-3 ¶ 17; Doc. 61-5 ¶ 16; Doc. 61-6 at 14, 16, 19]. Applicants who submit applications by the applicable priority deadline date and are accepted for admission are permitted to register early. [Doc. 61-3 ¶ 17; Doc. 61-5 ¶ 16; Doc. 61-6 at 14, 16, 19]. Applicants in need of university housing, scholarships, and financial aid are encouraged to apply by the priority deadline date. [Doc. 61-3 ¶ 17; Doc. 61-5 ¶ 16; Doc. 61-6 at 14, 16, 19]. For GSU applicants seeking enrollment for the 2006 Summer semester, February 1, 2006, was the priority deadline date for all applicants. [Doc. 61-3 ¶ 18; Doc. 61-5 ¶ 16; Doc. 61-6 at 14]. The regular deadline date was March 1, 2006, for Freshman and Non-Traditional applicants and June 1, 2006, for Transfer applicants. [Doc. 61-3 ¶ 18; Doc. 61-5 ¶ 16; Doc. 61-6 at 5, 14, 16, 19].

B. Plaintiff's Application for Enrollment at GSU and its Review

Plaintiff, who is an African-American male, graduated from Miami Killian High School in Miami, Florida in 1976. [Doc. 61-3 ¶ 19; Doc. 61-8 (Pl.'s GSU Application)]. Thereafter, plaintiff attended St. Leo College in 1979, Atlanta Junior

College during the summers of 1982 through 1986, and International Theological Seminary in 1986. [Doc. 61-3 ¶ 20; Doc. 68 (Pl.'s Dep.) at 9-12]. Plaintiff also attended Morris Brown College from 1982 through 1986, majoring in philosophy and religion. [Doc. 61-3 ¶ 21; Doc. 68 at 10-13]. Although plaintiff finished his coursework at Morris Brown College, he was not awarded a degree in 1986 because he was incarcerated at the time of his graduation ceremony. [Doc. 61-3 ¶ 21; Doc. 68 at 14-16].

On February 14, 2006, plaintiff submitted an application for admission to GSU's 2006 summer session and paid the required application fee. [Doc. 61-3 ¶ 22; Doc. 61-8].[4] When completing the application, plaintiff chose the Non-Traditional category as the applicant category he wanted to be considered in as for admission. [Doc. 61-3 ¶¶ 29, 31; Doc. 61-5 ¶ 22; Doc. 68 at 49]. As a result of choosing this category, plaintiff was required to meet the minimum admission requirements for a Non-Traditional Freshman, which he did not meet because, among other things, he had earned more than 30 transferable semester credit hours and scored below average on the COMPASS test. [Doc. 61-3 ¶¶ 31-32; Doc. 61-5 ¶ 22].

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[4] Plaintiff challenges GSU's admissions policies in place when he applied for admission for the 2006 Summer session. The educational and admissions policies in place at GSU for the 2005-2006 and 2006-2007 school years are the same. [Doc. 61-3 ¶¶ 2, 8; Doc. 61-5 ¶ 5].

On February 16, 2006, plaintiff submitted to GSU an official transcript from Morris Brown College. [Doc. 61-3 ¶ 33; Doc. 61-5 ¶ 19; Doc. 61-9 (Morris Brown Transcript); Doc. 68 at 45]. According to this transcript, plaintiff attended Morris Brown from 1982 through 1986, earning 119 credit hours with a cumulative GPA of 2.19. [Doc. 61-3 ¶ 34; Doc. 61-5 ¶ 19; Doc. 61-9]. Although plaintiff last attended Morris Brown in 1986, the transcript showed that he was awarded a Bachelor of Science degree in "organizational management" nineteen years later in May 2005. [Doc. 61-3 ¶ 36; Doc. 61-5 ¶ 20; Doc. 61-9]. While Morris Brown was accredited during plaintiff's enrollment, its accreditation was revoked in 2002, and it was therefore not accredited at the time it awarded plaintiff his degree. [Doc. 61-3 ¶ 37; Doc. 61-5 ¶ 20].

The transcript further showed that plaintiff also earned 39 credit hours of college-level coursework from an unspecified college, thereby earning a total of 145 credit hours of college-level coursework. [Doc. 61-3 ¶ 34; Doc. 61-5 ¶ 19; Doc. 61-9]. However, in his response to the application question requesting a list of every college at which he has been enrolled, plaintiff responded that he had only attended Morris Brown College from 1982 through 1986, earning 124 semester hours. [Doc. 61-3 ¶ 23; Doc. 61-5 ¶ 18; Doc. 61-8; Doc. 68 at 43-48]. Plaintiff failed to disclose his

attendance at St. Leo College, Atlanta Junior College, or the International Theological Seminary. [Doc. 61-3 ¶ 24; Doc. 61-8; Doc. 68 at 43-48].[5]

Plaintiff's application was processed by Ms. Judith Carson ("Carson"), who was new to her position with GSU. [Doc. 61-3 ¶ 38; Doc. 61-5 ¶ 23]. Although plaintiff had checked the Non-Traditional entrance category, he had supplied his Morris Brown transcript, which showed he had more than 30 semester hours of college-level coursework. [Doc. 61-3 ¶ 39; Doc. 61-5 ¶ 22; Doc. 61-8; Doc. 61-9]. Therefore, plaintiff was designated as a Transfer applicant. [Doc. 61-3 ¶ 39; Doc. 61-5 ¶ 22].

On March 3, 2006, GSU's admissions staff sent plaintiff correspondence summarizing the information they had on file and showing his applicant status as Transfer. [Doc. 61-3 ¶ 40; Doc. 61-5 ¶ 24; Doc. 61-10 (3/3/06 correspondence); Doc. 68 at 60-61]. Plaintiff was requested to verify the information. [Doc. 61-3 ¶ 40; Doc.

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[5] Plaintiff's application was also incomplete in several other categories. [Doc. 61-5 ¶ 21]. Specifically, although plaintiff indicated that he had been convicted of a federal, state, or municipal law, he provided only a brief statement regarding a Georgia criminal conviction for robbery for which he served time in prison from 1986 through 1988 and failed to include a complete explanation regarding the circumstances surrounding that conviction. [Doc. 61-3 ¶¶ 25-26; Doc. 61-5 ¶ 21; Doc. 61-8; Doc. 61-15 (Pl.'s criminal history statement); Doc. 68 at 38-40]. Furthermore, plaintiff did not provide any information regarding his other Georgia convictions or his numerous convictions in Florida. [Doc. 61-3 ¶ 27; Doc. 61-8; Doc. 68 at 29-30, 40-43]. Finally, plaintiff, who did not graduate from a Georgia high school, did not provide the requested narrative explaining why he came to Georgia and his plans for the future. [Doc. 61-3 ¶ 28; Doc. 61-5 ¶ 21; Doc. 61-8].

61-5 ¶ 24; Doc. 61-10; Doc. 68 at 60-61]. Plaintiff did not contact GSU to advise that he believed GSU had made any errors with regard to his information or applicant status. [Doc. 61-3 ¶ 41; Doc. 61-5 ¶ 24; Doc. 68 at 60-61].

On April 4, 2006, GSU advised plaintiff that he did not meet its requirements for Transfer admission because his GPA was below the minimum cumulative GPA of 2.5. [Doc. 61-3 ¶ 42; Doc. 61-5 ¶ 25; Doc. 61-11 (4/4/06 correspondence); Doc. 68 at 63]. Plaintiff immediately appealed the decision. [Doc. 61-3 ¶ 43; Doc. 61-16 (Pl.'s 4/4/06 Appeal); Doc. 68 at 65]. In his appeal, plaintiff complained that the GSU admission system "continues to be racilly [sic] discriminatory toward black student admission." [Doc. 61-3 ¶ 44; Doc. 61-16]. Plaintiff further stated, "MY BELOW AVERAGE compass score and below GPA should reflect my race affirmative action and reflect my male gender which your admission program need for me to be enroll." [Doc. 61-3 ¶ 45; Doc. 61-16]. In addition, on the same day, plaintiff submitted an "Appeal Amenment [sic]," requesting that he be considered for admission as a Non-Traditional Transfer applicant. [Doc. 61-3 ¶ 46; Doc. 61-17 (Pl.'s 4/4/06 Appeal Amendment)]. Plaintiff admitted that he made this request because he was confused about the different admission categories for Non-Traditional applicants. [Doc. 61-3 ¶ 47; Doc. 68 at 86-87]. Plaintiff, however, did not claim that he was intentionally discriminated against on the basis of his race or gender in either

of his appeals. [Doc. 61-3 ¶ 48; Doc. 61-16; Doc. 61-17]. Plaintiff also went to GSU and spoke with Carson, complaining that GSU's race-neutral policy "wasn't working in his favor" and that he was not given the "benefit of the doubt." [Doc. 61-3 ¶ 49; Doc. 68 at 66-69].

Upon receipt of plaintiff's appeal, GSU considered plaintiff for admission as a Non-Traditional Transfer applicant and determined that he was in fact academically acceptable for admission under that category. [Doc. 61-3 ¶ 50; Doc. 61-5 ¶ 26]. However, due to plaintiff's prior criminal convictions, he was required to complete an interview and review process with the Dean of Students. [Doc. 61-3 ¶ 51; Doc. 61-5 ¶ 26]. Plaintiff was advised of this decision by letter dated May 5, 2006. [Doc. 61-3 ¶ 51; Doc. 61-5 ¶ 26; Doc. 61-12 (5/5/06 correspondence)].

On May 3, 2006, plaintiff executed a release authorizing GSU to obtain information regarding his criminal background. [Doc. 61-3 ¶ 52; Doc. 61-18 (Pl.'s Release); Doc. 68 at 42-43]. On the same day, plaintiff also submitted to GSU a handwritten statement explaining that he had a "few felony" convictions in Florida on drug and theft-related charges, but he failed to provide any details regarding those convictions. [Doc. 61-3 ¶ 53; Doc. 61-19 (Pl.'s 5/5/03 statement); Doc. 68 at 38-40]. Thereafter, on May 8, 2006, plaintiff provided GSU a print-out from the Florida Department of Corrections website that listed his criminal convictions and

incarcerations. [Doc. 61-3 ¶ 54; Doc. 61-20 (Fla. D.O.C. print-out); Doc. 68 at 40-42, 96]. This print-out revealed that plaintiff had been convicted of ten theft and drug-related charges, the most recent having occurred in July of 2000. [Doc. 61-3 ¶ 55; Doc. 61-20].

On May 9, 2006, plaintiff met with Lanette Brown ("Brown"), GSU's Judicial Affairs Officer in the Office of the Dean of Students, and they discussed plaintiff's criminal background and past history of drug use. [Doc. 61-3 ¶ 56; Doc. 61-21 (Admission Disciplinary Review); Doc. 68 at 95, 98-101]. During this meeting, plaintiff advised Brown about his 1986 Georgia conviction for robbery and his theft convictions in Florida. [Doc. 61-3 ¶ 57; Doc. 61-21; Doc. 68 at 95]. As a result, Brown informed plaintiff that he needed to obtain a criminal background check. [Doc. 61-3 ¶ 57; Doc. 61-21]. On this same day, plaintiff also submitted an "Appeal Amendment of Denial Admission" to GSU in which he again complained of the race-neutral admission policy, claiming that the policy resulted in the denial of his admission to GSU. [Doc. 61-3 ¶ 58; Doc. 61-22 (Pl.'s 5/9/06 Appeal Amendment); Doc. 68 at 90-91]. Plaintiff, however, had not been denied admission to GSU at the time. [Doc. 61-3 ¶ 59; Doc. 61-12].

On May 12, 2006, GSU obtained plaintiff's Georgia criminal history report which showed previously undisclosed convictions for burglary and trespass. [Doc.

61-3 ¶ 60; Doc. 61-23 (GSU Police Dep't Criminal History Report)]. Thereafter, on May 16, 2006, Brown was informed that plaintiff's criminal record outside of Georgia was only available through the Federal Bureau of Investigations ("FBI"). [Doc. 61-3 ¶ 61; Doc. 61-24 (5/16/06 e-mail to Brown)]. By this time, GSU's May session classes for the Summer semester had begun, having started on May 15, 2006. [Doc. 61-3 ¶ 62; Doc. 61-5 ¶ 28; Doc. 61-6 at 6].

On May 19, 2006, Brown sent a certified letter to plaintiff advising him that as part of the Dean of Students' review, he would be required to submit two letters of reference and a National Fingerprint record from the FBI.[6] [Doc. 61-3 ¶ 63; Doc. 61-25 (5/19/06 correspondence from Brown); Doc. 68 at 95-97]. In the letter, Brown also provided plaintiff the address, telephone number, and e-mail address of the local FBI office in order to facilitate his compliance with this request. [Doc. 61-3 ¶ 64; Doc. 61-25; Doc. 68 at 97]. Also on May 19, plaintiff met with Brown in person to discuss the status of the review. [Doc. 61-3 ¶ 65; Doc. 68 at 95-97]. At this meeting, Brown provided plaintiff a copy of the May 19 certified letter. [Doc. 61-3 ¶ 65; Doc. 68 at 95-97].

Because the Dean of Students' review had not been completed, the Office of Admissions could not process plaintiff's application prior to the start of the Summer

[6] Plaintiff signed for the letter on May 31, 2006. [Doc. 61-3 ¶ 63; Doc. 61-25].

semester classes. [Doc. 61-3 ¶ 67; Doc. 61-5 ¶ 29]. Consequently, on May 19, 2006, the Office of Admissions sent plaintiff a form letter advising him that it was unable to complete the processing of his application at that time and that it was therefore being withdrawn for the 2006 Summer semester. [Doc. 61-3 ¶ 67; Doc. 61-5 ¶ 29; Doc. 61-13 (5/19/06 correspondence to plaintiff)]. The Office of Admissions' withdrawal of plaintiff's application, however, had no effect on the ongoing review by the Dean of Students which was required to be satisfactorily completed before plaintiff could be admitted to any term at GSU. [Doc. 61-3 ¶ 68; Doc. 61-5 ¶ 30]. In fact, the Dean of Students has still been unable to complete the process due to plaintiff's failure to submit the requested letters of reference and a National Fingerprint record from the FBI as well as his failure to even contact the FBI regarding the record. [Doc. 61-3 ¶ 69; Doc. 61-5 ¶ 31; Doc. 68 at 99-101].

On June 5, 2006, plaintiff submitted an "Appeal of admission" to the Board again complaining that the "[r]ace-neutral policy did hinder my Africa America male status to be accepted in [GSU's] admission Program in April 2006." [Doc. 61-3 ¶ 70; Doc. 61-26 (Pl.'s 6/5/06 Appeal of Admission); Doc. 68 at 103]. GSU responded to plaintiff's appeal on July 24, 2006, and advised the Board that plaintiff had been admitted to GSU, pending a review by the Dean of Students of plaintiff's criminal history. [Doc. 61-3 ¶ 71; Doc. 61-27 (7/24/06 correspondence)].

Specifically, GSU advised the Board that plaintiff's criminal history was more extensive than plaintiff originally disclosed and that it determined complete information regarding plaintiff's criminal history, including criminal acts committed outside of Georgia, was necessary before plaintiff could be cleared for admission. [Doc. 61-3 ¶ 72; Doc. 61-27]. Thus, on August 9, 2006, the Board declined to grant plaintiff's application for review. [Doc. 61-3 ¶ 74; Doc. 61-28 (8/9/06 correspondence); Doc. 68 at 141]. From the date of plaintiff's appeal to the filing of the motion for summary judgment, GSU had still not made a final decision regarding plaintiff's admission because plaintiff failed to provide the information required to complete the review process. [Doc. 61-3 ¶ 73; Doc. 61-5 ¶ 31; Doc. 61-27].

C. **Plaintiff's Complaint**

On January 24, 2007, plaintiff filed the instant complaint under § 1983 and Title VI, alleging that defendants discriminated against him on the basis of his race and gender when he was denied admission to GSU. [Doc. 1]. Plaintiff's claims are based on his belief that (1) the State of Georgia has a history of practicing segregation, (2) mistakes were made processing his application, (3) GSU knew his race and gender at the time it processed his application, and (4) the reasons provided to him for the actions taken with respect to his application are not believable. [Doc. 61-3 ¶ 79; Doc. 68 at 70-72, 74-75, 80-81, 143-44].

Plaintiff acknowledges that he is unaware of any similarly situated students outside of his protected class who were treated differently than him. [Doc. 61-3 ¶ 76; Doc. 68 at 79, 151]. In fact, other than parties in reported court decisions, plaintiff admitted that he is not even aware of any other African-Americans who claim to have been discriminated against by GSU's race-neutral admissions policy. [Doc. 61-3 ¶ 77; Doc. 68 at 78-79]. Likewise, plaintiff is unaware of any males who have been denied admission to GSU. [Doc. 61-3 ¶ 78; Doc. 68 at 150-51].

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The movant bears the initial burden of asserting the basis of his motion, and the burden is a light one. Id. at 323. The movant is not required to negate his opponent's claim. Rather, the movant may discharge this burden merely by

"'showing'– that is, pointing out to the district court– that there is an absence of evidence to support the nonmoving party's case." Id. at 325. When this burden is met, the non-moving party is then required to "go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial." Id. at 324 (quoting Fed. R. Civ. P. 56(e)) (internal quotations omitted).

While the evidence and factual inferences are to be viewed in the light most favorable to the non-moving party, see Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987), the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party must come forward with specific facts showing there is a genuine issue for trial. An issue is not genuine if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); accord Young v. Gen. Foods Corp., 840 F.2d 825, 828 (11th Cir. 1988). Similarly, substantive law will identify which facts are material. See Anderson, 477 U.S. at 248. Thus, to survive a motion for summary judgment, the non-moving party must come forward with specific evidence of every element essential to its case, so as to create a genuine issue for trial. See Celotex, 477 U.S. at 323; Rollins, 833 F.2d at 1528.

III. DISCUSSION

Defendants make three arguments in support of their Motion for Summary Judgment. [See Doc. 61-2 at 13-14]. First, defendants contend that plaintiff's claims asserted against the Georgia State University Admissions Office must be dismissed because it is not an entity capable of being sued. [Id. at 15-16]. Second, defendants argue that plaintiff's § 1983 equal protection claims against the defendants should be dismissed because they are not "persons" within the meaning of § 1983. [Id. at 16-17]. Finally, defendants assert that plaintiff cannot establish a claim under Title VI and therefore summary judgment is appropriate. [Id. at 17-24].

A. Plaintiff's claims against the Georgia State University Admissions Office

Plaintiff names as a defendant in this case the Georgia State University Admissions Office. [Docs. 1 & 7]. Defendants argue that the Georgia State University Admissions Office is not an entity capable of being sued and should therefore be dismissed as a party in this case. [Doc. 61-2 at 15-16]. For the following reasons, the Court agrees.

"'In every suit there must be a legal entity as the real plaintiff and the real defendant.'" Lovelace v. DeKalb Cent. Prob., 144 Fed. App. 793, 795 (11th Cir. 2005) (unpublished) (quoting Ga. Insurers Insolvency Pool v. Elbert County, 368 S.E.2d 500, 502 (Ga. 1988)). Federal Rule of Civil Procedure 17(b) provides that capacity of

suit is determined by the law of the state in which the court is located. See FED. R. CIV. P. 17(b); Lawal v. Fowler, 196 Fed. App. 765, 768 (11th Cir. 2006) (unpublished); Lovelace, 144 Fed. App. at 795. Georgia law recognizes natural persons, artificial persons (corporations), and "'such quasi-artificial persons as the law recognizes as being capable to sue.'" Lawal, 196 Fed. App. at 768 (quoting Ga. Insurers Insolvency Pool, 368 S.E.2d at 502). As a division of GSU, the Georgia State University Admissions Office is none of these and thus should be dismissed. See Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't, 510 F.3d 681, 694 (7th Cir. 2007) (noting that Athletics Department was not a legal entity apart from the University but merely a division of the University and therefore not capable of being sued); Manns v. Univ. of Ark. Med. Ctr., No. 4:07CV00758-WRW, 2008 WL 442295, at *1 (E.D. Ark. Feb. 13, 2008) (dismissing University of Arkansas Medical Center because it is a part of the University of Arkansas and not a separate institution or corporate body capable of suing or being sued); Stanley v. Bayer, A.G., No. 05-541, 2005 WL 1846962, at *2 (W.D. La. July 28, 2005) (dismissing division of a corporation because it was not a separate legal entity capable of being sued); Jarzynka v. St. Thomas Univ. Sch. of Law, 310 F. Supp. 2d 1256, 1267 n.3 (S.D. Fla. 2004) (noting the St. Thomas law school is not a separate legal entity capable of being sued but a division

of the University).[7] Accordingly, the undersigned **RECOMMENDS** that summary judgment be **GRANTED** as to the Georgia State University Admissions Office and that it be **DISMISSED** as a defendant in this case. The Court addresses the remaining claims as against the Board only.

B. Plaintiff's § 1983 claim against the Board

Plaintiff attempts to advance an equal protection claim against the Board through the vehicle of 42 U.S.C. § 1983. [Doc. 1]. Section 1983 provides that "[e]very person" who, acting under color of state law, violates another's federally protected rights "shall be liable to the party injured." See 42 U.S.C. § 1983. Defendants argue that plaintiff's equal protection claim is due to be dismissed because the Board is not a "person" within the meaning of § 1983. [Doc. 61-2 at 16-17]. For the following reasons, the Court agrees with the defendants.

"'[A] state is not a person within the meaning of § 1983.'" Gunn v. Jarriel, No. CV 306-039, 2007 WL 2317384, at *5 n.5 (S.D. Ga. Aug. 10, 2007) (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989)) (alteration in original). In Will, the Supreme Court held that entities with Eleventh Amendment immunity, including states and state agencies, are not "persons" subject to liability under § 1983. 491 U.S.

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[7] Plaintiff asserts no argument to the contrary other than his conclusory statement that GSU is an entity capable of being sued. [See Doc. 63 at 20; Doc. 69 at 21].

at 58, 64; see also Howlett v. Rose, 496 U.S. 356 (1990) (Will "established that the State and arms of the State . . . are not subject to suit under § 1983 in either federal court or state court."). "Under Eleventh Amendment analysis, courts have consistently deemed the Board of Regents an arm of the state of Georgia." See Marzec v. Toulson, Civil Action No. CV 103-185, 2007 WL 1035136, at *3 (S.D. Ga. Mar. 30, 2007) (collecting cases). See also Harden v. Adams, 760 F.2d 1158, 1163-64 (11th Cir. 1985) (finding state universities are agencies or instrumentalities of the state); Fouche v. Jekyll Island-State Park Auth., 713 F.2d 1518, 1522 (11th Cir. 1983) (discussing cases finding the Board of Regents a part of the state of Georgia); Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1385 (S.D. Ga. 2002) ("The Board of Regents is an agency of the State of Georgia."). Thus, the Board is not a "person" under § 1983; and, therefore, cannot be sued for money damages.[8] See Carr v. Bd. of Regents of the Univ. Sys. of Ga., 249 Fed. App. 146, 148 (11th Cir. 2007) (unpublished) (affirming summary judgment on plaintiff's § 1983 claim for money damages because the Board, as a state entity, was not a "person" under the

[8] Plaintiff failed to provide any substantive response to defendants' argument but instead seeks to add additional parties and a new claim under 42 U.S.C. § 1981. [See Doc. 63 at 20, 22; Doc. 69 at 21-26]. As noted, plaintiff's attempt to add claims and parties at this stage of the litigation is untimely and not in compliance with this Court's scheduling order, [Doc. 24], or Federal Rule of Civil Procedure 15(a). Hyland 2007 WL 2445972, at *3 n.1.

statute).[9] Accordingly, the undersigned hereby **RECOMMENDS** that defendants' summary judgment motion be **GRANTED** as to plaintiff's § 1983 claim against the Board.[10]

C. **Plaintiff's Title VI claims against the Board**

a. *Intentional Discrimination*

As previously stated, plaintiff alleges discrimination on the basis of his race and gender in violation of Title VI when GSU allegedly denied him admission for the 2006 Summer semester. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation

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[9] Generally, the Eleventh Amendment bars plaintiffs from bringing any cause of action against either a state or state officials in their official capacities. Williams v. Bd. of Regents of the Univ. of Ga., 477 F.3d 1282, 1301 (11th Cir. 2007). As previously stated, the Board is a state entity for Eleventh Amendment purposes. Id. Thus, no cause of action will lie against the Board unless Congress explicitly abrogated state immunity in the statute creating the cause of action or the Board waived its immunity. Id. No waiver has been effected for claims under 42 U.S.C. § 1983, see Quern v. Jordan, 440 U.S. 332, 345 (1979), and in this case, the Board has not waived its Eleventh Amendment immunity. Thus, the Eleventh Amendment also bars plaintiff's § 1983 claim against the Board. Williams, 477 F.3d at 1302. See also Rooks v. Altamaha Technical Coll., No. CV206-72, 2007 WL 2331830, at * 2-3 (S.D. Ga. Aug. 13, 2007); Gunn, 2007 WL 2317384, at *4-5.

[10] Were the Georgia State University Admissions Office a legal entity capable of being sued, plaintiff's § 1983 claim asserted against it would likewise be dismissed because it also would be considered an arm of the state of Georgia and therefore not a "person" within the meaning of § 1983.

in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.[11]

"To state a claim under § 601 of Title VI, 'a plaintiff must establish discriminatory intent.'" Carr, 249 Fed. App. at 148 (quoting Burton v. City of Belle Glade, 178 F.3d 1175, 1202 (11th Cir. 1999)). Additionally, "[t]he Supreme Court has said that 'the reach of Title VI's protection extends no further than the Fourteenth Amendment.'" Id. (quoting United States v. Fordice, 505 U.S. 717, 732 n.7 (1992)). See also Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001). Therefore, "because Title VI provides no more protection than the Fourteenth Amendment's Equal Protection Clause, [the Eleventh Circuit has] said that [its] Title VI analysis 'duplicate[s] exactly [its] equal protection analysis.'" Carr, 249 Fed. App. at 149 (quoting Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1405 n.11 (11th Cir. 1993)). See also Johnson v. Bd. of Regents of the Univ. Sys. of Ga., 106 F. Supp. 2d 1362, 1366 (S.D. Ga. 2000).

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. "The Clause 'directs that all persons similarly circumstanced shall be treated alike,' [b]ut . . . '[t]he Constitution does not

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[11] Defendants do not dispute that GSU receives federal funds.

require things which are different in fact or opinion to be treated in law as though they were the same.'" Carr, 249 Fed. App. at 149 (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)) (quotations omitted). Thus, "[i]n order to establish a violation of equal protection, a plaintiff must demonstrate that the challenged action was motivated by an intent to discriminate," which "may be established by evidence of such factors as substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from the norms generally followed by the decision-maker, and discriminatory statements in the legislative or administrative history of the decision." Id. (citations omitted). In short, to state a Title VI claim, under the Equal Protection analysis, plaintiff must allege that "through state action, 'similarly situated persons have been treated disparately,' . . . and put forth evidence that [defendants'] actions were motivated by race."[12] Draper v. Reynolds, 369 F.3d

[12] Some courts analyze Title VI claims under the Title VII framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See Brewer v. Bd. of Trustees of the Univ. of Ill., 479 F.3d 908, 921 (7th Cir. 2007) (finding Title VI claims are governed by the same McDonnell Douglas burden shifting framework applied to claims brought under Title VII); Middlebrooks v. Univ. of Md., 166 F.3d 1209, at *4 (4th Cir. 1999) (unpublished) (same); Chance v. Reed, Civil No. 3:06CV00970(AWT), 2008 WL 731981, at *8 (D. Conn. Mar. 19, 2008) (same); Gant v. S. Methodist Univ. Sch. of Law, No. CIVA305CV1455K, 2006 WL 2691301, *2-3 (N.D. Tex. Sept. 19, 2006) (same); Buhendwa v. Univ. of Colorado at Boulder, No. Civ. A03CV00485REBOES, 2005 WL 2141581, at *2 (D. Colo. Aug. 22, 2005); Bayon v. The State Univ. of New York at Buffalo, No. 98-CV-0578E(SR), 2004 WL 625133, at *2 (W.D.N.Y. Feb. 6, 2004) (same). However, in light of Eleventh Circuit authority to the contrary, this Court declines to apply the McDonnell Douglas framework and finds that it is inapplicable to the Title VI claim presented here. See Carr, 249 Fed.

1270, 1278 n.14 (11th Cir. 2004) (citations omitted). See also Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1202-03 (11th Cir. 2007) (comparators must be similarly situated in all relevant aspects).

In the present case, plaintiff has failed to allege that the Board treated him differently from a similarly situated person of a different race or gender. In fact, plaintiff even acknowledged that he is not aware of any other students outside of his protected class who were treated differently, much less students similarly situated to him in all relevant aspects, including his academic record and criminal background. Moreover, plaintiff was unaware of any other African-Americans or males who claim to have been discriminated against by GSU's race-neutral admissions policy, have been denied admission to GSU, or have had their appeal denied. [Doc. 68 at 78-79, 150-51].

Plaintiff has failed to show that any of the actions taken in this case were motivated by a specific discriminatory intent. In this regard, plaintiff proffers the changing of his status from Non-Traditional to Transfer status on his application, the failure to accord his application priority, the fact that Admissions knew his race

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App. at 148-49; Godby v. Montgomery County Bd. of Educ., 996 F. Supp. 1390, 1414 n.17 (M.D. Ala. 1998). But even were the McDonnell Douglas framework applied in this case, the outcome stated herein would remain the same because, assuming plaintiff could make out a *prima facie* case, the defendants have adequately set forth legitimate, non-discriminatory reasons for their actions which plaintiff has failed to refute.

and gender from his application, the requirements to obtain two letters of recommendation and a FBI background check, withdrawal of his application for the Summer semester, and denial to review his appeal as conclusory evidence of discriminatory intent. [Doc. 63]. The undisputed facts, however, show defendants took all actions for legitimate non-discriminatory reasons. [See Doc. 61-3 ¶¶ 38-43, 46, 50-51, 55-61, 63, 65, 67-74]. While plaintiff's application status was changed, GSU, immediately upon being notified by plaintiff that he wished to be considered as a Non-Traditional Transfer applicant, considered plaintiff under that status and cleared him for admission, pending an interview with the Dean of Students and a criminal background check. [Doc. 61-5 ¶ 26]. Additionally, plaintiff's application was not accorded priority status because he failed to file it by the February 1, 2006, priority deadline date. [Id. ¶ 16; Doc. 61-8]. More important, to date, plaintiff still has not been denied admission to GSU because GSU has been unable to complete its review of plaintiff's application due to his failure to provide the letters of reference and the National Fingerprint record from the FBI. GSU, therefore, has not even made a final decision with respect to plaintiff's application, and his request for review was denied by the Board because of this fact. Plaintiff has failed to present any evidence to the contrary or to show that the actions taken were due to anything other than his individual circumstances. Carr, 249 Fed. App. at 150. Thus, plaintiff

has failed to establish a genuine issue of material fact that the Board treated similarly situated applicants outside of his protected class differently in violation of Title VI or that the Board intentionally discriminated against him on the basis of his race or gender. Id. (affirming summary judgment for plaintiff's failure to present a genuine issue of material fact that the Board treated similarly situated students of different races differently in violation of Title VI). Thus, summary judgment in favor of the Board is appropriate.

b. ***Race-Neutral Admissions Policy***

Plaintiff also contends that GSU's race-neutral admissions policy failed to give him preferential treatment because of his race and gender and is therefore unconstitutional and in violation of Title VI. [Doc. 63 at 19; Doc. 69 at 14-15, 20]. Specifically, plaintiff appears to contend that an admissions policy that does not include racial classifications fails the strict scrutiny test applicable to educational policies that do include racial classifications. [Doc. 63 at 19; Doc. 69 at 6-7, 24-25]. For the following reasons, plaintiff's claim fails.

"Under Supreme Court jurisprudence, race-based treatment is subject to strict scrutiny under the Equal Protection clause." United States v. Allen-Brown, 243 F.3d 1293, 1298-99 (11th Cir. 2001).[13] Courts "apply strict scrutiny because

[13] As stated, the analysis under Title VI is the same as under Equal Protection. Burton, 178 F.3d at 1202.

'[c]lassifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1243 (11th Cir. 2001) (quoting Shaw v. Reno, 509 U.S. 630, 643 (1993)) (quotations omitted) (alteration in original). "Both the Supreme Court and [the Eleventh Circuit] have made clear that racial classifications, whatever the motivation for enacting them, are highly suspect and rarely withstand constitutional scrutiny." Id. "'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'" Id. at 1243-44 (quoting Miller v. Johnson, 515 U.S. 900, 904 (1995)).

"Under strict scrutiny, a racial classification *must* be held unlawful unless (1) the racial classification serves a compelling governmental interest, *and* (2) it is narrowly tailored to further that interest." Id. at 1244 (emphasis in original). "The proponent of the classification bears the burden of proving that its consideration of race is narrowly tailored to serve a compelling governmental interest." Id. The Eleventh Circuit has also held that "when government undertakes affirmative action, it must present a 'strong basis in evidence' for doing so." Id. (citations and quotations omitted).

Two interests that may qualify as compelling have emerged in the school context. First, the need to remedy past intentional discrimination against minorities

is considered a compelling governmental interest. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, --- U.S. ---, 127 S. Ct. 2738, 2752-53 (2007). Establishing student body diversity has been considered by some courts as another compelling governmental interest that may warrant racial classification under the Equal Protection Clause. See Johnson, 263 F.3d at 1249 & n.13, 1250 (finding UGA's freshman admissions policy giving preferential treatment to non-white and male applicants on basis of student diversity violated equal protection after assuming for purposes of its opinion that creation of a diverse student body is a compelling interest and noting that it is an open question that depends on circumstances of case).

Plaintiff apparently contends that both a need to remedy past discrimination and to establish a diverse student body exist in this case such that GSU's race-neutral policy violates Title VI and the Equal Protection Clause. [Doc. 63 at 3-7, 13-15, 18-21]. However, plaintiff has failed to show how GSU's race-neutral policy in any way prevents it from remedying past intentional discrimination. In fact, it appears, based on plaintiff's contention, and in the absence of a constitutionally legitimate purpose, plaintiff's proposed racial classification would accomplish nothing but "discrimination for its own sake." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978). Further, there is no evidence that GSU has not already

attained unitary status and therefore has already remedied past discrimination. See Parents Involved in Cmty. Sch., 127 S. Ct. at 2752 (finding that once the school had achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments and therefore any continued use of race must be justified on some other basis). Insofar as plaintiff contends that racial classifications are necessary to promote a diverse student body, his argument likewise fails. See Johnson, 263 F.3d at 1253 ("[R]acial diversity may be one component of a diverse student body, it is not the only component. If the goal in creating a diverse student body is to develop a university community where students are exposed to persons of different cultures, outlooks, and experiences, a white applicant in some circumstances may make a greater contribution than a non-white applicant." Thus, "an admissions policy that seeks to create a diverse student body by considering the race of applicants must do so in a sufficiently flexible way.").[14] In short, "[r]ace-

[14] Plaintiff attempts to rely on statistical information regarding demographics of students admitted to GSU in the 2006 Summer semester to bolster his argument of discrimination and the need for student diversity. [Doc. 63 at 19; Doc. 66 at 41; Doc. 69 at 25]. Plaintiff's statistical evidence, however, is problematic at best. "[S]tatistics based on groups including persons against whom a plaintiff was not compared are not appropriate," and, additionally, "a plaintiff relying on statistics must account for other potential causes of the disparity shown by the statistics." Weser v. Glen, 190 F. Supp. 2d 384, 402 (E.D.N.Y. 2002) (citations omitted). Although plaintiff's statistical evidence shows that more white applicants were admitted than African-Americans and more females than males, [Doc. 66 at 41], plaintiff has not presented any evidence indicating that this is because GSU has a custom or policy of discriminating against African-Americans or males. In fact,

conscious decision-making is fundamentally in conflict with the idea of Equal Protection, and when a state attempts to allocate valuable benefits (including admission to public universities) on the basis of race, it is the obligation of the courts to require a powerful showing before upholding the state's discrimination." Id. at 1263. Based on the evidence presented here, plaintiff's proposed racial and gender preferences, if implemented by GSU, would be unable to withstand strict scrutiny.

Finally, even if GSU had considered plaintiff's race and gender as requested by plaintiff, plaintiff fails to show how this consideration in any way would have impacted or changed GSU's actions taken with respect to his application for admission. The undisputed facts show that GSU has not denied plaintiff admission but is waiting on the requested information from plaintiff in order to completely process his application. Therefore, plaintiff's arguments are without merit and the

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plaintiff has not presented any evidence of the total number of applicants, the race and gender of all applicants, and the breakdown of race and gender for each unsuccessful applicant. See Stout v. Potter, 276 F.3d 1118, 1123 (9th Cir. 2002) (the appropriate population for statistical analysis is the applicant pool as compared to the composition of the successful applicants); Brown v. Am. Honda Motor Co., 939 F.2d 946, 952 (11th Cir. 1991) ("To say that very few blacks have been selected by [the defendant] does not say a great deal about [the defendant's] practices unless we know how many blacks have applied and failed and compare that to the success rate of equally qualified white applicants."); Miles v. M.N.C. Corp., 750 F.2d 867, 872 (11th Cir. 1985) (appropriate in demonstrating intentional discrimination to consider pool of qualified applicants with those actually successful). Therefore, plaintiff's statistical information is not probative evidence of discrimination.

undersigned hereby **RECOMMENDS** that defendants' summary judgment motion as to plaintiff's Title VI claims be **GRANTED**.

IV. CONCLUSION

For all of the foregoing reasons, the undersigned hereby **GRANTS** in part and **DENIES** in part defendants' Motion to Strike, [Doc. 65],[15] and **RECOMMENDS** that defendants' Motion for Summary Judgment, [Doc. 61], be **GRANTED**.

The Clerk is **DIRECTED** to terminate the reference to the undersigned.

IT IS SO ORDERED, RECOMMENDED, AND DIRECTED, this 16th day of June, 2008.

Russell G. Vineyard
RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE

[15] As previously noted, the Clerk is therefore **DIRECTED** to terminate any submission of plaintiff's summary judgment motions, [Docs. 63 & 69], to the undersigned.