UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 12-cv-60460-ZLOCH/HUNT

A.R., by and through her next friend, Susan Root, *et al*.,

Plaintiffs,

v.

ELIZABETH DUDEK, in her official capacity as Secretary of the Agency for Health Care Administration, *et al*.,

Defendants.
_____/

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF FLORIDA,

Defendant.

_____/

THE UNITED STATES OF AMERICA'S OPPOSITION TO THE STATE OF FLORIDA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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The United States seeks monetary damages in this matter because of the truly egregious nature of the violation it found in this state: Florida has unnecessarily placed hundreds of children with significant medical needs in nursing facilities, apart from their families and communities, for many years, and continues to place children in nursing facilities today, in violation of the integration mandate of Title II of the Americans with Disabilities Act.

Florida now moves for partial summary judgment, solely against the United States' damages remedy. Thus, for purposes of this motion, Florida does not dispute its liability under Title II of the ADA and its integration mandate, or that systemwide injunctive relief is appropriate. Florida simply argues that damages should not be awarded either because of legal rules that allegedly exclude or limit monetary relief, or because there is insufficient evidence that Florida acted with the deliberate indifference that would justify monetary relief. All of its arguments lack merit; Florida's obligation to pay damages should be determined at trial.

FACTS AND PROCEDURAL HISTORY

I. Background

Children with significant medical needs are children with chronic medical conditions, including those who require services such as medical apparatuses or technology (such as feeding tubes, tracheostomy tubes, and ventilators) or supervision relating to their medical condition. Fla. Stat. § 391.021; Fla. Admin. Code 59G-1.010(164),(165) Under the "Early and Periodic Screening, Diagnostic and Treatment" requirements of the federal Medicaid Act, all states must ensure the availability of any medically necessary services for such children to the extent that they are eligible for Medicaid. *See* 42 U.S.C. §§ 1396a(a)(43), 1396d(a), 1396d(r)(5). In Florida, these services are sometimes provided to children in community-based settings such as their parents' or guardians' homes. *See e.g*. No. 13-cv-6157, ECF No. 1 ("Compl."), ¶¶ 3, 37. Hundreds of other children, however, have been unnecessarily institutionalized in nursing facilities in order to access those services. *E.g.*, *id*. ¶¶ 1, 25, ECF No. 455-1, Attach. F. These nursing facilities are large, congregate settings in commercial, hospital-like structures, where children with disabilities are largely surrounded by other children with disabilities and by paid staff such as the facilities' nurses. Compl. ¶¶ 1, 28-30; Declaration of Travis W. England, Apr. 7. 2016 ("England Decl."), Ex. A, at 9-10, Ex. B, at 7.

This unnecessary segregation is discriminatory. Title II of the ADA prohibits public entities (including states) from discriminating against persons with disabilities, 42 U.S.C. § 12132, and authorizes the Attorney General to issue regulations implementing this statute, *id.*

§ 12134, which, in turn, place on every public entity the affirmative obligation to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," 28 C.F.R. § 35.130(d). The Supreme Court has detailed the requirements of this "integration mandate," holding that states must provide services to persons with disabilities in community-based settings if community placement is appropriate for them, if they do not oppose community placement, and if the state can reasonably accommodate the community placement. *Olmstead v. L.C.*, 527 U.S. 581, 587, 600, 602 (1999). The United States Department of Justice has the authority and standing to enforce Title II through litigation when there has been a violation. *A.R. v. Dudek*, 31 F. Supp. 3d 1363 (S.D. Fla. 2014). As Florida's present motion for partial summary judgment does not address its liability under Title II, this opposition will not further address these *Olmstead* elements, which will be proven at trial.

The United States completed its pre-suit investigation of Florida's service system for children with significant medical needs in September 2012, when it announced its finding that Florida was systematically placing children in unnecessary segregation in violation of Title II and *Olmstead*. England Decl. Exs. U & V. After attempting to obtain Florida's voluntary compliance through several months of pre-suit negotiations, the United States commenced this action in July 2013. Compl. ¶ 78.

II. Florida's Deliberate Indifference Toward Institutionalized Children

The evidence shows that Florida acted with deliberate indifference toward numerous children while administering its service system for children with significant medical needs. In discovery, the United States notified Florida that it contends that three types of factual circumstances, detailed below, evidence deliberate indifference (*E.g.*, ECF No. 455-1, Attach. F, at 181-82):

First, some parents or guardians of children with significant medical needs expressly asked Florida to move their institutionalized children home, but Florida nevertheless left their children in facilities. Florida does not dispute in this motion that facts such as these would support a finding of deliberate indifference.

Second, Florida is obligated under federal law to conduct a Pre-Admission Screening and Resident Review ("PASRR") process before any child is admitted to a nursing facility, but Florida ignored its legal obligation to screen children with significant medical needs before

allowing them to enter institutions, allowing nearly half of those it institutionalized to fall through the cracks. England Decl. Ex. F.

PASRR is a two-step process. In Level I, states are required to determine whether a child is suspected of having a mental illness and/or intellectual disability or related conditions. 42 C.F.R. § 483.128(a). If the answer is yes, then in Level II, states must, before allowing the child to be admitted to a nursing facility, assess whether the facility is the most appropriate setting for that child.[1] *Id.* §§ 483.126, 483.128(a). Earlier this year, in response to a discovery request (and an order granting a motion to compel), Florida produced two spreadsheets that together identified the admission and PASRR dates of 462 of the children who have been placed in nursing facilities in this state since 2007. England Decl. Exs. C and D. Fully 217 (47.0%) of the 462 children did not receive a Level I PASRR before they were admitted to nursing facilities, including 99 (21.4%) who never received a Level I PASRR at all. England Decl. ¶¶ 8-9 & Exs. E, F. For the 118 children (25.5%) who received untimely Level I PASRRs only after being admitted to nursing facilities, the average number of days that elapsed between their first admission and first Level I PASRR dates was an unbelievable 1,278 days, or three-and-a-half years. England Decl. ¶ 10 & Ex. G. Almost two thirds of the children who received untimely Level I PASRRs received them only after Florida learned that the Department of Justice had opened its investigation on December 20, 2011. England Decl. ¶ 11 & Ex. H.

Third, at least 75 of the children who have been placed in nursing facilities since 2007 have been in the care of Florida's own dependency system. *See* ECF No. 455-1, Attach. F, at 182-290. Therefore, Florida itself was their guardian, and thus, Florida had the authority to place them in the community, specifically in "medical foster care" homes where they could receive private duty nursing and home health services, while also receiving the benefits of living in a family setting. *See* Compl. ¶ 56. Yet, despite having this authority, Florida elected to place a substantial percentage of these children in institutions, and not in the most integrated setting appropriate to their needs.

[1] For 79.7% of the 118 children with significant medical needs who are known to have received untimely Level I PASRRs only after being admitted to nursing facilities, Florida subsequently performed untimely Level II PASRRs as well, confirming its recognition that Level II PASRRs were required for these children to determine whether they could be served in the community. See England Decl. ¶ 13 & Ex. K.

In sum, Florida's unnecessary institutionalization of children with disabilities has not merely been widespread, but has also evidenced a conscious disregard by Florida of its affirmative obligation to provide services to such children in the most integrated setting appropriate to their needs. All entities that violate the integration mandate of Title II fail to carry out that affirmative obligation. But in this case, the evidence shows that for many of the children whom it institutionalized, Florida ignored events or facts that placed it on notice that institutionalization was inappropriate or avoidable. Damages are appropriate to compensate these institutionalized and formerly institutionalized children for the harm they suffered, which, as discussed below, is substantial.

III. Harm Suffered by Institutionalized Children

The substantial harm that institutionalized children in Florida have suffered is noteworthy in two ways: it is certain, and it is difficult to quantify. Two of the United States' experts have opined as to both points: Sue A. Gant, a Ph.D. in developmental psychology and human learning and behavior analysis with over 40 years of experience in the field of programs and services for individuals with disabilities, opined about the harm caused by separation from families and loss of childhood opportunities and life experiences; and Charles A. Nelson III, a Ph.D. and professor of pediatrics and neuroscience, psychology in psychiatry, and education at Harvard University opined about the psychological, neurological, and even physical harm that children suffer by living in institutions. *See* England Decl. Exs. A & B. Both have extensive expertise in the effects of institutionalization generally, and both personally visited and observed the nursing facilities that house children with significant medical needs in Florida. *Id.*

First, harm is certain when children live in institutions during these formative years. As Dr. Gant states, "[i]nstitutionalization denies children the full opportunity to develop and maintain close emotional bonds with family and friends," "impairs their ability to interact with peers without disabilities," and "prevents them from experiencing many of the social and recreational activities — not to mention the routine experiences of daily childhood life — that contribute to healthy child development." England Decl. Ex. A at 5–6. This deprivation is inherent to institutional environments and is not dependent on "the quality of the particular institution" or on "how much the individual staff members at an institution care about the children." *Id.* at 6. That is because the care provided in nursing facilities is, by necessity, delivered through paid staff working on shift schedules, thus preventing "even the most well-

intentioned and devoted" staff from being able "to provide the level of personalized, intimate care that children routinely receive in family settings." *Id.* at 7. "Also obviously lost is the opportunity to be a fully integrated member of the community — by, for example, attending school in typical classrooms with ability-diverse peers, worshipping, and recreating with community members with and without disabilities and of all ages." *Id.*

Dr. Gant's site visits confirmed that Florida's nursing facilities share all of the hallmarks of institutions generally. *Id*. at 9-10. Children live in deep isolation for most of their days. *Id*. As she observed, they "spend most days alone in their rooms for hours, perhaps with a television left on, sometimes with the lights on even if they are sleeping or with the lights off even if they are awake, with few if any opportunities to leave the facilities or socialize or interact with people who are not facility staff." *Id.* at 9. "Their human interaction is largely limited to occasional congregate activities in the facility, and medical, therapeutic, or education-related visits" — activities that "are infrequent and only minimally stimulating" and are not "characterized by the individualized attention and dedication that children who are raised in a family-based setting receive." *Id.* at 10. In short, the facilities in which Florida houses children with significant medical needs share all of the characteristics that make nursing facilities an isolated, monotonous, solitary, and ultimately harmful environment for children who, by living there, are deprived of the day-to-day interaction with family or friends who are not shift workers.

Dr. Nelson similarly opined that institutional care harms children in their cognitive and psychological development. Longstanding scientific literature has made it "known for at least a century that children raised in institutions . . . experience developmental outcomes that are poorer compared to children raised in families . . . ." England Decl. Ex. B at 4. That "is because, as has been well-established, certain factors that contribute to healthy development, and that are embedded in most families, are missing from institutions." *Id.* These factors include "consistent, sensitive, committed caregiving, which fosters healthy attachment relationships in infancy and early childhood, and healthy interpersonal and intimate relationships later in life"; and "linguistic and cognitive stimulation, which facilitates language and cognitive (mental) development." *Id.* In other words, in institutions, paid staff cannot provide the kind of "constant and consistent presence and involvement of a primary caregiver in a child's life, which gives the child a sense of security"; nor can they develop the ability "of reading and responding to a specific child's needs," which would give the "child a sense that the caregiver cares deeply . . .

and is invested in the child's needs"; nor can they "invest in a child for the long term, under any and all circumstances, no matter what happens," which would allow the child to take confidence that his/her "caregiver will remain committed . . . as long as necessary and will be by that child's side no matter what happens"; nor can they develop "a strong sense of a child's mental and linguistic competence," which would enable "the caregiver to intellectually and linguistically challenge the child based on the child's current developmental level." *Id.* (emphases omitted).

These factors, like those that Dr. Gant identified, are "inherent . . . [to] congregate care, where multiple caregivers care for each child according to rotating shifts," which "renders even the best institutional care psychologically harmful" to children housed in such settings. *Id.* at 4–5. Moreover, like Dr. Gant, Dr. Nelson personally observed these institutional characteristics in Florida's nursing facilities. *Id.* at 8. These inherent shortcomings of institutional care cause numerous types of harm, including an inability "to develop the trust in their caregivers that is necessary for them to express their individuality"; "a reduced sense of self-worth"; "[r]eactive attachment disorder," which "refers to a pathological way of interacting with others"; "a diminution in their intellectual capacity"; "reduced cognitive and linguistic capacity"; interference with children's "ability to form healthy social relationships" and friendships; "a range of mental health conditions, particularly anxiety, depression and attention deficit hyperactivity disorder"; "irreversible alterations to brain development"; an inability "to respond appropriately to stressful situations," both physically and behaviorally; and "less favorable physical growth." *Id.* at 9–13.

Second, the precise degree of this harm is difficult to calculate for any institutionalized child, as it could require several medical, psychological, and other professionals to perform lengthy assessments, examinations, or studies on each child. England Decl. Ex. L at 45:9-47, see Ex. B at 5. Moreover, as Dr. Nelson opined, this may need to take place over a period of years to capture the totality of the harms, since they become manifest on an ongoing basis. *See* Ex. B at 5 (harms "are largely psychological and neurobiological and become manifest as developmental delays and mental health disorders, the cause of which is scientifically demonstrable via long-term assessments and study").

ARGUMENT

For purposes of this motion, Florida does not dispute the United States' contention that Florida was deliberately indifferent toward *some* of the children whom the United States has

identified — namely, those who remained institutionalized even after their parents or guardians asked for community placement, and those who were admitted to nursing facilities without any PASRR screening when they were at least three years old. Neither does Florida dispute that if it acted with deliberate indifference, it is subject to damages. State of Fla.'s Mot. for Partial Summ. J. (ECF 454) (hereinafter "Fla. Mot." at 18 ("To recover damages under Title II of the ADA, the United States must demonstrate that the State acted with 'deliberate indifference.'").

Instead, Florida's motion is limited to a series of scattershot objections to the United States' prayer for damages. Florida argues that while Title II actions generally allow damages, the United States (unlike other Title II plaintiffs) is excluded from that remedy. Florida also disputes the United States' ability to prove the extent of the harm for which it seeks damages (which, Florida argues, must be proven on a child-by-child basis). Florida then argues that it cannot be monetarily responsible for institutionalizing children without PASRR screening because its deliberate indifference to their rights did not cause their institutionalization. Next, Florida denies that it was deliberately indifferent at all to two subsets of children: those who were institutionalized without PASRR screening when they were under the age of three and those who were institutionalized while in the care of Florida's dependency system. Finally, it argues that damages are barred, in part or in whole, by the statute of limitations or because the ADA supposedly required the children to request and be refused a reasonable accommodation before Florida became subject to Title II. All of these varied objections lack merit.

I. The United States Has Authority Under Title II to Seek Damages (Fla. Mot. § II).

More than two years ago, Florida moved to dismiss this action under Fed. R. Civ. P. 12(c), arguing that the United States lacked standing to bring a lawsuit to enforce Title II. This Court soundly rejected Florida's motion in a published opinion. *A.R. v. Dudek*, 31 F. Supp. 3d. at 1371. Having lost on that issue, Florida now asserts that the United States should be excluded from recovering damages in such a suit. Florida argues that allowing the United States to recover damages would inevitably lead to unfairness and practical difficulties, by enabling persons with disabilities who were subjected to discrimination to potentially obtain a "double recovery," once from the award obtained by the United States and once through separate private lawsuits that they could subsequently bring in their own names. Florida further argues that "[a] private party would not even contemplate what the federal government seeks to do here: recover alleged damages suffered by absent nonparties for the benefit of those nonparties." Fla. Mot. at

8. Florida cites no authorities in support of this policy rationale, and indeed, none exist. To the contrary, the Supreme Court has considered and rejected a policy rationale that was essentially identical to that raised by Florida here. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 332–33 (1980) (rejecting contention that EEOC should be forced to comply with Fed. R. Civ. P. 23 class action requirements so as to prevent "double recovery" and ensure that EEOC's suit would "be binding upon all individuals with similar grievances in the class," including absent nonparties).

Whether a private party might contemplate what the United States seeks here to do is irrelevant, as the United States is not a private party. It is the government, and one of its functions is to protect the rights and interests of the American people. It is not at all uncommon for federal agencies to obtain damages on behalf of nonparties, and the theoretical specter of "double recovery" presents no obstacle to such actions. In *EEOC v. Waffle House, Inc.*, the Supreme Court expressly contemplated that the same act of workplace discrimination against an employee could prompt *both* the employee *and* the EEOC to seek damages, stating that in such a situation, it would go "without saying that the courts can and should preclude double recovery by an individual." 534 U.S. 279, 297 (2002) (quoting *Gen. Tel. Co.*, 446 U.S. at 333). Yet, the Court did not indicate that this prospect was troubling in any way, and the lower courts have had no difficulty applying this rule against double recovery without barring either the employee or the EEOC from suing. *See, e.g., EEOC v. Grays Harbor Cmty. Hosp.*, 791 F. Supp. 2d 1004, 1009 (W.D. Wash. 2011) (rule against double recovery did not require that employees be involved in settlement negotiations between defendant and EEOC); *EEOC v. DHL Express (USA), Inc.*, No. 10 C 6139, 2011 WL 1326941, at *5 (N.D. Ill. Apr. 7, 2011) ("[A] district court can adjust the relief — post-judgment — if double recovery is at issue."); *EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 536 (D. Md. 2007) ("Following the rationale in *Waffle House*, the Court will permit the EEOC to seek monetary relief for its retaliation claim, and will offset any such award by the monetary relief paid Koch under her settlement . . . ."); *Senich v. Am.-Republican, Inc.*, 215 F.R.D. 40 (D. Conn. 2003) ("Like any other case, the Court can work post-judgment to ensure that the plaintiff does not recover twice for the same damages."). Thus, the fears that Florida articulates are entirely misplaced and exaggerated. The obvious way to prevent double recovery is to require that any damages that would go to a person be offset by the amount of any damages that previously obtained via the United States. As a practical matter, this would almost certainly eliminate any real possibility of even being sued twice, let alone being required

to pay damages twice. Florida's obligation to pay damages should be determined from the evidence at trial, not a pre-trial motion seeking a legal bar based only on an unsupported and unprecedented rationale.

II. The United States Can Win General Damages Because Harms From Institutionalization Are Likely to Occur and Difficult to Prove (Fla. Mot. § I).

Institutionalization in Florida nursing facilities has *certainly harmed all of the institutionalized children*, as the record evidence shows. By living in institutions, these children are deprived of the most basic opportunities and life activities — to form close bonds with parental figures, to socialize with diverse peers, to be stimulated by the natural environment and by educational and recreational activities, and more — and they suffer psychological, developmental, and neurobiological harm as a result. They also suffer stigmatization from being needlessly segregated from their families and communities.

Florida ignores, and apparently does not dispute, the evidence of categorical harm here. It argues instead that such children should not be compensated because the United States offers "no individualized evidence of the nature and extent" of the harm each has suffered. Fla. Mot. at 3–6. But the Supreme Court and lower courts have consistently held that general (or presumed) damages are available for harms that are likely or certain to occur as a result of a violation, yet difficult to prove specifically or quantify; those who suffer such harms should be compensated despite the difficulty of demonstrating the obviously harmful effects of the violation. *E.g.*, *Carey v. Piphus*, 435 U.S. 247, 262 (1978); *Hazle v. Crofoot*, 727 F.3d 983, 993 (9th Cir. 2013); *Kerman v. City of New York*, 374 F.3d 93, 132 (2d Cir. 2004); *Wright v. Sheppard*, 919 F.2d 665, 669 (11th Cir. 1990); *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1088 (11th Cir. 1986); *see also, e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310–11 (1986).

The Supreme Court in *Olmstead* recognized that unnecessary institutionalization inevitably harms individuals in ways that are difficult to establish. In holding that "unjustified institutional isolation of persons with disabilities is a form of discrimination," the Court recognized "two evident judgments" regarding the consequences of such segregation. 527 U.S. at 600. One was that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 601. The other "evident judgment" was that unnecessary institutionalization also "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community

life." *Id.* at 600; *see also Davis v. Shah*, No. 14-543-cv, 2016 WL 1138768, at *24 (2d Cir. Mar. 24, 2016). Both of these categories of harm are closely analogous to harms from other torts or violations routinely compensated by general damages, as shown in Section A below. Section B then describes the evidence that the institutionalized children have suffered both of these categories of harms, and Section C explains how these harms are difficult to prove concretely.

A. General Damages Are Meant to Compensate Types of Harm That the Children Institutionalized in Florida Nursing Facilities Suffer.

In awarding general damages, courts have recognized that if people are likely or certain to experience harm as a result of a violation, but that harm will be difficult to prove specifically or to quantify, they should still be compensated for the harm they suffer. For example, in *H.C. by Hewett v. Jarrard*, the Eleventh Circuit held that a juvenile detainee who was subjected to a week of isolation without notice or process was entitled to damages, stating that "where juveniles have wrongfully received solitary confinement," "real injury can be *inferred from the facts*." 786 F.2d at 1088 (citation omitted) (emphasis added). In *Wright v. Sheppard*, the Eleventh Circuit again held that damages should be available to compensate "self-evident" harm that was not specifically proved. 912 F.2d at 669. The court determined that fair compensation to the plaintiff for losing two teeth from a battery "is not limited to the treating dentist's bill" because "[h]aving teeth has value" that is "self-evident"; and that plaintiff "*as a matter of law* is entitled to compensatory damages [for false imprisonment]." *Id.* (emphasis added).

Similarly, other courts have compensated victims for the "loss of time" that inevitably occurs as a result of being deprived of liberty — for example, when falsely imprisoned — but is intangible and difficult to prove or quantify. *Kerman*, 374 F.3d at 124–26, 132; *see, e.g.*, *Hazle*, 727 F.3d at 991–93 (finding plaintiff entitled to compensatory damages as a matter of law for imprisonment, constituting actual injury, in violation of his constitutional rights); *Guzman v. City of Chicago*, 689 F.3d 740, 748 (7th Cir. 2012) ("Regardless of how the jury might resolve [the factual dispute over the length of time of seizure], [plaintiff's] time was lost."); *Augustin v. Jablonsky*, 819 F. Supp. 2d 153, 160–61 (E.D.N.Y. 2011) (affirming presumed damages for, in part, "the loss of liberty inherent in the false imprisonment itself").

Likewise, stigmatization, mental suffering, and affront to dignity inevitably occur as a result of segregation and discrimination but are difficult to concretely establish or quantify, and are thus compensable with general damages. *E.g.*, *Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1138–39 (D.C. Cir. 1999) (inferring emotional injury from the facts to

affirm award of damages for racial discrimination); *Nolley v. County of Erie*, 802 F. Supp. 898, 903–04, 906 (W.D.N.Y. 1992) (awarding presumed damages for injury due to unwarranted disclosure of HIV status and segregation of inmate because of this status); *Mickens v. Winston*, 462 F. Supp. 910, 913 (E.D. Va. 1978), *aff'd*, 609 F.2d 508 (4th Cir. 1979); *see also Simmons v. Cook*, 154 F.3d 805, 809 & n.6 (8th Cir. 1998) (affirming damages for segregation of paraplegic inmates in solitary confinement, "result[ing] in an extreme denial of the minimal civilized measure of life's necessities" (internal quotation marks and citation omitted)). For example, in *Mickens*, the district court determined that an inmate who was subjected to racial segregation for two months of his jail sentence was entitled to compensatory damages without "vocaliz[ing], with any specificity, the alleged injury" because the "treatment that has been accorded to our black citizens by virtue of historical de jure segregation, convince the Court that official racial segregation is inherently injurious, especially to minorities." 462 F. Supp. at 913.

Courts also award general damages for dignitary harm, mental suffering, and other intangible harms from other kinds of legal violations. *E.g.*, *Parrish v. Johnson*, 800 F.2d 600, 611 (6th Cir. 1986) (presumed damages available for Eighth Amendment violation of waving knife at plaintiff); *In re Nassau Cnty. Strip Search Cases*, No. 99-CV-2844 (DRH), 2008 WL 850268, at *4 (E.D.N.Y. Mar. 27, 2008) (unlawful blanket strip search policy at county jail necessarily resulted in injury to putative class members' dignity); *see also, e.g.*, *Stachura*, 477 U.S. at 311 n.14 (general damages available for disenfranchisement because it causes concrete injury of whose value everyone has "personal knowledge," despite its intangibility and impossibility to quantify monetarily); *Curtis v. Loether*, 415 U.S. 189, 195 & n.10 (1974) (analogizing harm of racial discrimination to reputational harm resulting from defamation, which is commonly compensated by general damages); *Herzog v. Vill. of Winnetka*, 309 F.3d 1041, 1044 (7th Cir. 2002) (Posner, J.) (compensatory damages available for "indignities" that are the foreseeable consequences of legal violations); *Davis v. Lane Mgmt., LLC*, 524 F. Supp. 2d 1375, 1377 (S.D. Fla. 2007) ("The Court may infer [mental anguish] damages from the circumstances" where plaintiff with physical disability had to drag himself upstairs to his apartment when elevators were broken and defendant failed to provide reasonable accommodation.").

The harms resulting from unnecessary institutionalization per the Supreme Court in *Olmstead* are the same as those for which damages are due "as a matter of law" in the false imprisonment, racial discrimination, and other contexts. The "diminish[ment] of everyday life

activities," 527 U.S. at 583, resulting from unnecessary institutionalization is exactly what constitutes the "loss of time" and "loss of liberty" inherent in false imprisonment. Indeed, the Supreme Court has explicitly recognized the close parallel between imprisonment and institutionalization, stating that they are "similar restraint[s] of personal liberty" that place "limitation[s]" on the "freedom to act on [one's] own behalf." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989); *see also Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982) (equating institutionalization with a deprivation of liberty); *Jackson v. Indiana*, 406 U.S. 715, 737–38 (1972) (finding that indefinite mental health commitment of a defendant based solely on his incompetence to stand trial violates his due process rights). Likewise, in identifying the stigmatizing effect of segregation on persons with disabilities, the Court in *Olmstead* relied on earlier decisions recognizing the same stigmatization from racial and gender discrimination. *Olmstead*, 527 U.S. at 600 (citing *Allen v. Wright*, 468 U.S. 737, 755 (1984); *Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). Moreover, per the Supreme Court's test in *Carey*, and like the harms compensated in the context of false imprisonment and racial discrimination, the harms of institutionalization are "virtually certain" to occur and "extremely difficult to prove."[2] *Carey*, 435 U.S. at 262; *Kerman*, 374 F.3d at 126.

Precisely because such harms are inherently the result of the legal violations but are nevertheless difficult to establish, courts have awarded general damages to compensate these harms without specific or individualized evidentiary proof of the harms, such as medical bills or witness testimony. *E.g.*, *Wright*, 919 F.2d at 669; *Kerman*, 374 F.3d at 124, 126 (plaintiff entitled to general damages simply "upon pleading and proving merely the unlawful interference with his liberty"); *Nolley*, 802 F. Supp. at 905; *Mickens*, 462 F. Supp. at 913 (damages due for racial segregation even though plaintiff did not "vocalize, with any specificity, the alleged injury"); *Betances v. Fischer*, 304 F.R.D. 416, 431–32 (S.D.N.Y. 2015). Courts clearly differentiate general damages from "special damages," which compensate physical or emotional injury and are amenable to "specific[]" proof. *Kerman*, 374 F.3d at 124, 125–26; *see also Wright*, 919 F.2d at 669; *Guzman*, 689 F.3d at 748; *Gonsalez v. Marin*, No. 12 CV 1157, 2014

[2] The Supreme Court has recognized that the availability of general damages is not limited to specific torts or legal violations; rather, general damages are available where harms from violations can be analogized to torts compensable by general damages at common law or where harms from violations are likely to occur but difficult to prove. *Carey*, 435 U.S. at 258–59, 262; *see, e.g.*, *Stachura*, 477 U.S. at 310–11 & n.14.

WL 2514704, at *12 (E.D.N.Y. Apr. 25, 2014) (general damages for false imprisonment "need not be specifically proved and may be inferred from the circumstances of the imprisonment").

Although specific proof, including medical bills or testimony about emotional distress, may be required to compensate claims for specific damages, Fla. Mot. at 3–4, the United States is not asking for specific damages. Because violations of the integration mandate necessarily result in the harms set forth in *Olmstead*, these harms can be "presumed to flow" from the violation, and on this basis (in addition to being difficult to prove), they may be compensated by general (or presumed) damages. *See Carey*, 435 U.S. at 262–64. Other types of violations may or may not *inherently* result in actual harm; thus, even though difficult to prove, emotional distress and other forms of intangible harm will not presumed to flow from every violation.[3] *Id.* at 263. By contrast, the harms here (detailed below in Sections B and C) are an inherent result of unnecessary institutionalization, as explained by the Supreme Court in *Olmstead*.

Florida also misses the mark in arguing that the individualized differences in type and degree of harm here necessitate individualized proof of the harm. *See* Fla. Mot. at 4. But when, as here, the harm is of a type that is certain to occur yet difficult to prove, courts may "roughly approximate the harm" in an award of presumed damages. *Stachura*, 477 U.S. at 311. Indeed, courts certifying general damages classes have recognized that individualized proof of general damages is unnecessary, precisely because the calculation of compensation due is based on the inevitable harm to all who are subject to the violation, not on the individualized circumstances (*e.g.*, the *degree*) of the harm. *See, e.g.*, *Wallace v. Powell*, No. 3:09-CV-0291, 2015 WL 9268445, at *15 (M.D. Pa. Dec. 21, 2015); *Betances*, 304 F.R.D. at 430–32; *see also Lee v. City of Columbus*, No. 2:07-cv-1230, 2009 WL 2876263, at *4–6 (S.D. Ohio Sept. 4, 2009).

B. Children Institutionalized in Florida Nursing Facilities Certainly Suffer Harm.

[3] The cases Florida cites in which courts refuse to award emotional distress damages are inapposite for this reason. In *Brady v. Fort Bend County*, for example, the Fifth Circuit refused to find emotional distress or mental anguish damages where individuals testified about emotional harm they experienced due to a *refusal to hire*; this is not a violation that is demonstrably virtually certain to result in psychological or dignitary harms, and, in any event, the plaintiffs had failed to introduce any other evidence of such harm, such as expert testimony. 145 F.3d 691, 717–20 (5th Cir. 1998); *see also, e.g.*, *Akouri v. State of Fla. Dep't of Transp.*, 408 F.3d 1338, 1344-46 (11th Cir. 2005) (reversing emotional distress damages awarded for *failure to promote* plaintiff, where only evidence of harm was plaintiff's demeanor during trial testimony).

The evidence in this case shows that children segregated in Florida's nursing facilities are certain to suffer the harms described by the Court in *Olmstead* as a result of institutionalization.[4]

1. Children Institutionalized in Florida Nursing Facilities Are Deprived of Basic Life Opportunities and Experience Diminished Life Activities.

First, as the United States' experts have shown in great detail, the institutionalized children are deprived of the most basic opportunities and "life activities." *Olmstead*, 527 U.S. at 600. Dr. Gant observed 138 children living in Florida's nursing facilities and reviewed the records of all of the children on whose behalf the United States seeks damages. England Decl. Ex. A at 4–5, 9, Ex. Ex. L at 14:15–15:1. She found the children to be "overwhelmingly isolated." England Decl. Ex. A at 9, 11. Babies, for example, "have limited time during the day during which they interact with adults" and are only infrequently held. *E.g., id.* at 9, 11, 18. As described *supra* at pp. 4-5, the institutional nature of the facilities, including shift-based staffing, deprives the children of consistent, individualized care, a sense of home and family, and of sensory, intellectual, and social stimulation. Children are also deprived of opportunities to participate fully in their communities. They rarely leave the facilities (even for school) or have access to means of communication, including assistive technology or adaptive equipment. *Id.* at 16, 20–21. One teenage girl whom Dr. Gant met had not been outside the institution in eleven years, even though she had the same disabilities before her admission to the institution, and those disabilities had not prevented her then from having a rich, stimulating life where she could engage in pursuits she loved, such as therapeutic horseback riding. *Id.* at 13; *see also* England Decl. Ex. L at 79:12–81:14). One highly capable young woman had dreams of going to law school but was relegated daily to a classroom with children "as young as four, doing the same activities as the others, choosing between baby toys to play with." England Decl. Ex. A at 22. A young teenage boy told Dr. Gant that he "misses his mother, misses eating with his family, and misses the privacy he would have if he lived at home." *Id.* at 23. And a young woman told Dr. Gant that her two small children had recently "promised her that when they got older, they would never let her live in a nursing home." *Id.* at 29. These examples (among many others) illustrate the ways in which life opportunities are lost and life activities diminished by institutional living;

[4] It is not disputed that the nursing facilities at issue in this case are institutions; Florida's own expert agrees. England Decl. Ex. M, at 4.

all children, Dr. Gant opines, are harmed because institutional living is *inherently* characterized by diminished opportunities and life activities. *Id.* at 5-9, 29; England Decl. Ex. L at 46:3–12.

The value of the life opportunities and life activities, of which these children are inevitably deprived due to institutionalization, is "self-evident." *Wright*, 919 F.2d at 669; England Decl. Ex. A at 6 ("The deprivation of opportunities that comes with living in an institution — the opportunity to develop relationships with constant caregivers; to be socially, physically, and intellectually stimulated; to express choices and preferences and to have someone listen to and carry out those choices; and to receive individualized attention and expectations — is a harm in itself."); *see also Olmstead*, 527 U.S. at 600–01; *Davis*, 2016 WL 1138768, at *24; *Kerman*, 374 F.3d at 130.

In addition to being harmed by these lost life opportunities and activities, children are also inescapably harmed developmentally, psychologically, and neurobiologically by the deprivations inherent in living in an institution. Dr. Nelson, a nationally and internationally renowned expert on the impact that institutions have on children's brains and development, opined on how institutions cause these harms. England Decl. Ex. B at 1-3, 4-14, App. A. Among his other observations of and studies concerning institutions around the world and the children residing in them, Dr. Nelson has conducted a scientific study of children over fifteen years of their lives growing up in institutions and in family-based settings, demonstrating that certain characteristics of institutions (in contrast to family-based environments) deprive children of the type of care and stimulation necessary for healthy development. *See* England Decl. Ex. B at 5, Ex. N at 17:6–24. As described *supra* at pp. 5-6, Dr. Nelson opined here that the Florida's institutions exhibited the same characteristics as those he studied. England Decl. Ex. B at 10, Ex. N at 32:22–33:12. He found that as a result of being subject to the deprivations inherent in institutional living, the children living in Florida nursing facilities certainly suffer psychological, developmental, neurological, and even physical harm. England Decl. Ex. B at 1, 7–14.

2. Children Institutionalized in Florida Nursing Facilities Suffer the Harms of Segregation.

Second, unnecessary institutionalization "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead*, 527 U.S. at 601. Dr. Gant reported that the children and young adults in Florida's institutions, like those who live in institutions generally, are subject to uniformly and unjustifiably low expectations regarding their intellectual and communicative capabilities and potential, their

potential to benefit from age-appropriate recreational activities, and their ability to participate productively in their communities through education and gainful employment. *E.g.*, England Decl. Ex. A at 8, 15. These uniformly low expectations even extend to children's capability to make "basic daily choices," such as when to get out of bed, which are "largely made for them, without any attempt to determine individual preferences or modes of communicating those preferences and choices." *Id.* at 8. As a result, not only are children deprived of the basic life opportunity of effectively expressing themselves and exercising personal choice, but such expectations also constitute and perpetuate a stigma: that children with significant medical needs cannot be integrated into their communities or have personal autonomy.

For example, Dr. Gant met a young man in one of the nursing facilities who told her that he was interested in learning independent living skills such as cooking his own meals, getting a job, getting a driver's license, and playing drums, all of which he used to do before his traumatic brain injury and admission to the nursing facility. *Id.* at 14–15. When Dr. Gant asked the facility staff whether the young adults, including this individual, had access to vocational rehabilitation services, the staff "responded that most 'would not be able to work' because, for example, they 'have to change [diapers] every two hours'" — just one of many examples of citing children's physical or medical needs as justifications for dismissing their abilities to exercise personal autonomy and freedom in other aspects of their lives. *E.g.*, *id.* at 15, 16, 19, 24, 25, 27. As Dr. Gant, who has over 40 years of experience working with individuals with disabilities, opined, "There is no reason to enforce upon [this young man], or any of the other young adults or children at [the institution], such low expectations." *Id.* at 15; *see also* England Decl. Ex. L at 93:2–94:4 (testifying that the lack of opportunity and accommodation, as well as unwarranted assumptions about capability, which all come with living in an institution, are why this young man cannot "ultimately get a job, drive, or play drums again," considering that "I've seen people with similar physical disabilities that were able to do any one of those three things").[5] In other words, because he lives in an institution, not only is this young man deprived

[5] Florida has never attempted in this litigation to deny that this stigma exists for children with significant medical needs who live in institutions. To the contrary, as its counsel's deposition questions to Dr. Gant sadly demonstrate, it is Florida's deliberate litigation strategy in this case to *endorse* these negative stereotypes, to advocate for their truth, and to cite them as justifications for keeping children in institutions. Indeed, Florida has retained a testifying expert — a psychiatrist with no expertise or experience in assistive technology, adaptive equipment, or

continued on next page…

of opportunities and accommodations that would allow him to live more independently, but he is also stigmatized and labeled incapable of doing the things he misses the most. This is true for all of the children and young adults in Florida's institutions.[6]

Dr. Nelson also reported and testified that the care in institutions generally, including in Florida's institutions, is not individualized or personalized, and as a result, children's true potential to interact with their environments and with others is unduly underestimated. England Decl. Ex. N at 129:19–131:4, Ex. B at 13.[7]

These unwarranted assumptions have the dual effect of perpetuating the deprivation of life opportunities and activities described above and of perpetuating a stigma that these children,

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special education programs for people with disabilities — who opines that it would "do more harm than good" to suggest that the children living in Florida nursing facilities could attain high school, college, or professional degrees or gainful employment, and that the odds of a bright, verbal young woman fulfilling her dream of becoming a pediatrician or a social worker "are not encouraging." England Decl. Ex. O at 19, 24. This expert even reported that because most of the children at one of the facilities could not communicate verbally, he was "especially impressed with the high level of enthusiasm shown by teachers working with the severely disabled children," as if by showing enthusiasm, the teachers were behaving better than what could be expected of them when working with children with such severe disabilities. *Id.* at 21. These are precisely the stigmas about persons with disabilities that the Court in *Olmstead* recognized result from unnecessary institutionalization. 527 U.S. at 601; *Davis*, 2016 WL 113768, at *24.

[6] Infantilization is another manifestation of such stigmatization, and Dr. Gant reported that this was widespread. For example, Dr. Gant reported that at one facility, all the residents' TV monitors were playing the Disney Channel, regardless of the residents' ages (which ranged from infant to young adult) or preferences. England Decl. Ex. A at 11. Also, staff at a facility told Dr. Gant that a planned rare opportunity to leave the facility was going to be offered to children and young adults alike — it was a trip to the circus. *Id.* at 13–14.

[7] Florida claims in its brief that some children in its institutions have limited awareness of their surroundings or are in a "persistent vegetative state," apparently arguing that such children could not measurably benefit from integration or that they are not harmed by their institutionalization and segregation. Fla. Mot. at 4. But Dr. Nelson testified that children with such diagnoses are both harmed by institutionalization and benefit from more enriched environments. England Decl. Ex. N at 84:3–86:2, 116:2–117:6. And Dr. Gant noted that although the records of some children living in Florida's nursing facilities described them as having the diagnosis of a persistent vegetative state, she nevertheless observed, or read contrary records describing, that they could interact with their environments, some even crying upon hearing their family's voices England Decl. Ex. L at 47:4–51:24. At the very least, this evidence creates a triable issue of fact as to whether such children are *tangibly* harmed by institutionalization, but Florida's argument is also itself indicative of the stigmatization and assumptions under which such children already labor.

like other victims of segregation, must live with: that they are incapable or unworthy of participating in their communities. *See Olmstead*, 527 U.S. at 600–01 (citing *Allen*, 468 U.S. at 755; *Manhart*, 435 U.S. at 707 n.13); *Mickens*, 462 F. Supp. at 913.

C. Children Institutionalized in Florida Nursing Facilities Suffer Harms That, by Their Nature, Are Difficult to Establish.

The evidence likewise shows that the harms that Florida's institutionalized children have certainly suffered are, by their nature, difficult to prove or quantify.

First, the loss of life opportunities and diminishment of life activities — namely, children's separation from families and peers that results in "overwhelming" isolation; the diminished opportunity to be stimulated by play, education, and varied surroundings; and more — are harms in themselves that cannot be concretely measured. Likewise, the harms of segregation, which are harms to dignity, namely, the "perpetuat[ion of] unwarranted assumptions that persons so isolated [in institutions] are incapable or unworthy of participating in community life," create a "badge of inferiority" on which it is difficult to place a definite value. *Olmstead*, 527 U.S. at 600; *Mickens*, 462 F. Supp. at 913. Moreover, because most of the children institutionalized in Florida nursing facilities are non-verbal, they cannot themselves testify at trial to these harms. And because some of these children are in the custody of the State, they do not have families who can testify on their behalf. This renders individualized testimony impossible to present for the majority of the children.

Second, with respect to the psychological, developmental, neurological, and physical harms children also inevitably experience from living in institutions, as Drs. Gant and Nelson reported and testified, and as Florida states in its own brief, determining the exact type and degree of harm suffered by any particular child would entail "multi-disciplinary" assessments of each child. Some children will experience different harms than others, though they all experience harm. *E.g.*, England Decl. Ex. L at 44:19–47:17, Ex. B at 4–7; *see also* Ex. N at 145:7–11, 145:15–19. Many different medical, psychological, and other professionals would need to perform lengthy assessments, examinations, and/or studies on each child. *E.g.*, England Decl. Ex. N at 111:18–112:22, Ex. L at 44:19–47:17; Fla. Mot. at 5. To fully measure the total behavioral, psychological, mental health, and physical consequences for each child, which become manifest on an ongoing basis over his or her lifetime, these assessments, examinations, and studies may have to take place over the course of years. England Decl. Ex. L at 97:20–99:17, Ex. B at 5; Fla. Mot. at 5. But despite being difficult to prove, harm is "*known to result*

from institutionalization" itself, and not from the individual circumstances of each child's institutionalization. England Decl. Ex. B at 5. (emphasis added).

* * * *

For the reasons set forth above, general damages ought to be available, in lieu of individualized proof of "specific damages."

III. The United States Can Win Damages If It Shows That Florida Acted with Deliberate Indifference While Harming Children (Fla. Mot. § IV).

To obtain compensatory damages, the United States must show that Florida violated the ADA with discriminatory intent, which includes deliberate indifference to the rights of persons with disabilities. *See McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1146–47 (11th Cir. 2014) (citing *Liese v. Indian River Cty. Hosp. Dist.*. 701 F.3d 334, 342 (11th Cir. 2012)). Florida was deliberately indifferent if it "knew that harm to a federally protected right was substantially likely and failed to act on that likelihood." *Id.* at 1147 (citing *Liese*, 701 F.3d at 344 (internal alterations omitted)). In this case, the institutionalized children had the right under the ADA to be free from unnecessary segregation, including the right to receive services in the most integrated setting appropriate to their needs. Florida took no steps to protect that right, even though, as discussed below, it was required to take such steps under the federal PASRR requirements. Consistent with the standard set forth in *McCullum* and *Liese*, the United States seeks damages for those children whose ADA rights Florida violated with deliberate indifference.

Florida argues that the Court should not award damages based on one of the United States' categories of deliberate indifference (Florida's failure to conduct timely and appropriate PASRR screenings) because there is no proof that its failure to conduct such screenings *caused* the unnecessary institutionalization of any specific child in that damages category. *See* Fla. Mot. at 13–14. This misstates the relevant legal standard. Because the United States brought suit for violation of the ADA, *see* Compl. ¶¶ 80–84, it is required to prove only that Florida's violation of the ADA, not Florida's violation of the PASRR requirements, caused the harm for which the United States seeks relief. The United States will make this showing at trial by proving that Florida has unnecessarily placed hundreds of children with significant medical needs in nursing facilities in violation of the ADA's integration mandate. In order to obtain *damages*, the United States will be required to show that Florida violated the ADA with deliberate indifference. The United States will make this showing as well, in part by proving that Florida failed to conduct

PASRRs for certain children even though it knew that failure jeopardized those children's right to receive services in the most integrated setting appropriate to their needs under the ADA. A central function of PASRR is to prevent unnecessary institutionalization of people with disabilities whose needs can be met in the community with appropriate services and supports. *See* 42 C.F.R. §§ 483.128(a), 483.112(a), 483.132(a)(1) (evaluating individual's need for nursing facility services necessarily includes assessing whether "his or her needs can be met in an appropriate community setting").[8] Thus, by not conducting timely and appropriate PASRRs, which are intended, in part, to prevent unnecessary segregation, Florida knew that there was a far greater likelihood that children would end up in segregated settings in violation of the ADA's integration mandate. The United States will therefore be able to prove that Florida acted with deliberate indifference when it violated the ADA as to those children, and as a result, those children will be entitled to compensatory damages for the harm that they have suffered.[9]

It is Florida's deliberate indifference, not causation, that creates an obligation to pay damages. *McCullum* and *Liese* make this abundantly clear. In *McCullum*, the Eleventh Circuit found that defendants had not been deliberately indifferent because there was "[in]sufficient evidence . . . about *whether the [defendants] knew* it was substantially likely that the accommodations they were providing were ineffective." 768 F.3d at 1149 (emphasis added). The ADA violation — the cause of the harm — that the plaintiffs in *McCullum* alleged was the failure to provide effective accommodations. Defendants' *knowledge* of the allegedly ineffective

[8] *See also The ADA and Olmstead Enforcement: Ensuring Community Opportunities for Individuals with Disabilities: Hearing Before S. Comm. on Health, Educ., Labor & Pensions*, 111th Cong. 11–12 (2010) (statement of Cindy Mann, J.D., Dir., Ctr. for Medicaid & CHIP Svcs., Ctrs. for Medicare & Medicaid Svcs., U.S. Dep't of Health & Human Svcs.) ("Congress developed the PASRR program to prevent inappropriate admission and retention of people with mental disabilities in nursing facilities. Under Federal requirements, States must assure that individuals with mental disabilities or developmental disabilities being considered for admission to a nursing facility are evaluated through the PASRR process to determine the most integrated setting that can meet their needs . . . . PASRR is a powerful tool for diversion from institutions, and the resident review elements of PASRR are important tools to help encourage transitions to the community."); Letter from Cindy Mann, J.D., Dir., Ctr. for Medicaid & CHIP Svcs., Ctrs. for Medicare & Medicaid Svcs., U.S. Dep't of Health & Human Svcs., to State Medicaid Directors (May 20, 2010), *available at* http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SMD10008.pdf

[9] Further, the United States does not concede that there was no causation.

accommodations would not have caused the harm; rather, it would have been evidence that they had violated the ADA with the requisite discriminatory intent. *See id.* Similarly, in *Liese*, the Court found that the deliberate indifference standard was satisfied based on the defendant's knowledge that the plaintiff required an additional interpretive aid to effectively communicate with him and his deliberate refusal to provide that aid. 701 F.3d at 351.

IV. Florida Was Deliberately Indifferent Toward the Institutionalized Children in All Three Categories That the United States Has Identified (Fla. Mot. §§ V, VII).

In its motion, Florida disputes its deliberate indifference only with respect to two groups of institutionalized children: those who were *under* three years of age when they were institutionalized without timely PASRRs and those who were institutionalized while in the care of Florida's dependency system. Its arguments with respect to both are meritless.

A. Florida Was Deliberately Indifferent in Institutionalizing Children Under Three Years of Age Without Screening Them. (Fla. Mot. § V).

Florida incorrectly claims that, between February 4, 2008 and December 31, 2013, it believed that it did not need to conduct PASRR screening on children under three years of age, and thus was not deliberately indifferent for failing to do so. *See* Fla. Mot. at 17–19. The record clearly belies Florida's claim. Florida failed to conduct PASRR screenings or adhere to any other process that would have protected the right of the children in this case to be free from unnecessary institutionalization, a failure that proves that Florida violated the ADA with deliberate indifference.

First, the evidence shows that Florida clearly always recognized that PASRR *Level I*, at the very least, was required for all children, regardless of age. *See* England Decl. Ex. P at 67 (stating that "CMAT conducts Level I pre-admission screenings for Medicaid-eligible residents under the age of 21"), Ex. Q at 74 (same)).

Second, Florida contends that it discontinued PASRRs for children under the age of three in 2008 because it believed that its Early Steps assessments could substitute for PASRRs. Fla. Mot. at 17. But Florida lacked any good faith basis for that belief. When Florida disclosed all child-specific facts supporting its contention that it had not violated the ADA with deliberate indifference (an element of which was the contention that it had performed Early Steps assessments in lieu of PASRRs for children under the age of three), Florida identified 63 children who were admitted to nursing facilities while under the age of three between February 4, 2008 and December 31, 2013; yet Florida stated that it had performed a pre-institutionalization Early

Steps assessment for only one such child. *See* England Decl. ¶ 25. If Florida did not actually perform Early Steps assessments for most of these children, an inference fairly drawn from Florida's failure to disclose Early Steps assessments for those children in its responses to the United States' Eighth Set of Interrogatories, then it could not have had a good faith belief that they could substitute for PASRR.

Third, if, as Florida claims, it was under the mistaken belief that no PASRR screening was required for children under the age of three,[10] only for the period of time between February 4, 2008 and December 31, 2013, then Florida should have conducted PASRRs for children before February 4, 2008 and after December 31, 2013. This is not the case. Florida did no preadmission PASRRs for 68 percent of the children under the age of three admitted between February 4, 2008 and December 31, 2013, and no preadmission PASRRs for over 40 percent of such children admitted outside that date interval. *See* England Decl. ¶¶ 12(a)-(b) & Exs. I, J.

In sum, Florida failed to perform PASRRs not out of a misguided but good-faith effort to comply with federal law, but rather, because of its widespread disregard of its obligation, imposed by the ADA, to ensure that children were free from unnecessary segregation. This disregard shows Florida's deliberate indifference and creates an entitlement to damages for the harm the institutionalized children have suffered.

B. Florida Was Deliberately Indifferent in Institutionalizing Children in Its Own Custody. (Fla. Mot. § VII)

Florida had the power to place medically complex children in its custody in medical foster care but chose institutions instead. Dependency courts decide *whether* children should be removed from the custody of their parents and placed in Florida's hands. Once the court places a child in Florida's custody, Florida, as the legal custodian, decides *where* the child will live: with a relative, a foster family, or in an institution. Both the ADA and the dependency orders require Florida to seek integrated, family-based settings for the children in its custody. Fla. Stat. Ann. § 39.521(8) (requiring Florida to make diligent efforts to reunite the child with the parent or

[10] Florida is correct that during its September 2007 meeting with representatives from federal CMS, the representatives were unaware of any other state conducting PASRR screenings on large numbers of children under the age of three. *See* England Decl. Ex. R (Timmel Decl.) ¶¶ 5-6. The representatives were unaware of any other state that institutionalized large numbers of children under the age of three, as Florida did and continues to do; they did not say that a state that did institutionalize children under the age of three would not be required to perform PASRR screenings on those children. *See id.* ¶ 6.

another appropriate adult). Thus, Florida's choice to unnecessarily segregate children in its custody violated the ADA and subjects it to damages.

Florida claims that it did not act with deliberate indifference with regard to the children in its custody because it claims that dependency courts, not the state, choose where a child should live. This is not the case. Once Florida, through its Department of Children and Families ("DCF"), is granted custody of a child, Florida law states that DCF — not the dependency court — chooses where the child should live. Fla. Stat. Ann. § 39.521(4) ("An agency granted legal custody shall have the right to determine where and with whom the child shall live"); *In Interest of K.A.B.*, 483 So. 2d 898, 899 (Fla. Dist. Ct. App. 1986) (dependency court cannot decide child's physical placement because "it is crystal clear that it is within the discretion of the agency to decide *where* to keep a child who is in its custody" (emphasis added) (citing identical earlier version of Fla. Stat. Ann. § 39.521)); England Decl. Ex. T at 33:3–8 (testimony of DCF employee confirming that Florida chooses where children in its custody will live). The case law Florida cites confirms this. For example, Florida incorrectly claims that the court in *P.B. v. Dep't of Children & Family Servs.* affirmed the decision of a dependency court moving a child in DCF custody to a specific location. 709 So. 2d 590, 591 (Fla. Dist. Ct. App. 1998). But the court in *P.B.* merely affirmed a decision transferring *custody* of the child from the parent to Florida. Removing the child from the parent's home was merely a byproduct of the change in custody; it was Florida's decision whether to institutionalize the child or place him or her in medical foster care.

Several of the dependency orders demonstrate that it is Florida, not a court, that decides where a child in state custody will live. For example, for Child 154, Florida incorrectly claims that the court's order for continued "Out-of-Home Placement" required Child 154 to live in a nursing facility. Fla. Mot. at 26. In fact, Child 154's dependency order (which, as attached to Florida's brief, is missing half its pages) states the opposite: that the ordered "out of home placement is: Foster Care with [DCF]." ECF 455-2 at 293.[11] Nowhere does the order state that the child must live in a nursing facility, or even mention the words "nursing facility." It says only that "[i]t is in the best interests of the child to remain out of the parents' home at this time,"

[11] In an effort to make pinpoint references easier to locate, the United States will cite exhibits in this section (IV(B)) of this opposition as "ECF 455-2" and use the page numbers generated by CM/ECF rather than the original page numbers of the documents.

with no mention of *where*, other than the parents' home, the child should be placed. *Id.* Thus, the dependency order placed Child 154 in Florida's custody, and *Florida* decided to put Child 154 in an institution rather than a family-based foster care setting.

Similarly, Child 10's dependency order makes no mention of a nursing home and recommended the child "for subsequent adoption." *Id.* at 220. Child 133 and Child 154's dependency orders both expressly note that DCF may physically place the children in a home-based placement but that DCF had not yet identified one. *Id.* at 286-87, 292. Child 128's order states that the parents were homeless and "refused to . . . consent to place the child in an appropriate facility until they could secure housing," but nowhere required *Florida* to place the child in a facility following removal. *Id.* at 276. The only mention of a nursing facility in Child 321's order is a notation that the child's presence in a nursing facility made him/her unable to participate in the hearing; nowhere did it require or endorse placement in a facility and certainly not over DCF's objection.[12] *Id.* at 301.

Thus, none of the dependency orders that Florida attaches to its brief required Florida to place the children in nursing homes. In fact, all of the dependency orders required Florida to actively seek families to take custody of the children, which would give them the opportunity to live at home with those families — a directive that should have caused Florida to actively seek out community-based service settings for these children. *See, e.g.*, *id.* at 260; *see also id.* at 270–71 (listing Child 124's permanency goal as "adoption with expected achievement date December 11, 2012"). Indeed, several of the orders explicitly recommended that Florida find home-based placements for children. Child 121's order clearly contemplated that the child would live in a community-based setting, not a nursing facility, stating that the child "has the ability to form a special relationship with a parental substitute" and that "[s]teps need to be taken immediately to identify an *adoptive home* while Child 121 is an infant." *Id.* at 260 (emphasis added). For Child 14, a handwritten Additional Ruling stated: "Child has been staffed for independent living," meaning home and community-based care, not institutional settings. *Id.* at 233. Child 38's order gave custody to the child's mother and required that the child's return home be approved by the

[12] Child 92's order checks "Out of Home Placement" and "Foster Care" as the custody decision and the permanency goal of reunification with the parent, ECF 455-2 at 251; the bare notation "Sabal Palms Health Center" likely expresses where the child was located at the time, but there is no indication that the court ordered Child 92 to be, or remain, at that nursing facility. *Id.*

child's physician prior to discharge from the nursing facility. *Id*. at 239. Working with a child's doctor to safely transition the child home presented no bar to Florida providing services to Child 38 in the mother's home instead of in a nursing facility. *Id.* Child 124's order makes no mention of a nursing facility and in fact states that the mother was "coop[erative] w/ medical foster care." *Id*. at 266.

Despite Florida's claims to the contrary, it is clear that Florida chose where a child in DCF custody will live. Florida had an affirmative duty imposed on it by the ADA's integration mandate to place children in the most integrated setting appropriate to their needs, which even the DCF Orders explicitly recognized is a family-based setting. By choosing not to do so, Florida exhibited deliberate indifference toward those children's rights. It cannot deny that deliberate indifference by citing dependency orders, which, far from requiring Florida to institutionalize children, in fact encouraged Florida to seek permanent legal placements for them in family homes in the community.

V. Neither Statute of Limitations Bars Recovery of Damages (Fla. Mot. § VI).

The United States brought its claim for damages well within the potentially relevant statute of limitations. Florida contends that any damages that accrued before July 22, 2010 — three years before the complaint was filed — are barred under a federal three-year statute of limitations. Fla. Mot. at 20–23. Even, however, assuming the three-year limitations period applies, it was tolled until the United States knew or reasonably should have known the "facts material to the right of action." *See* 28 U.S.C. § 2416(c). The United States filed its complaint on July 22, 2013, well within three years of learning through its investigation that Florida was violating the ADA. Alternatively, Florida asserts that a four-year state statute of limitations excludes any damages that accrued prior to July 22, 2009. Fla. Mot. at 23–24. The United States is not subject to statutes of limitations in state law, however, as provided in controlling United States Supreme Court precedent.

A. The United States Filed Its Claim For Damages Well Within the Three-Year Statute of Limitations Under Federal Law.

Federal law provides for a three-year limitations period for claims for damages brought by the United States. *See* 28 U.S.C. § 2415(b) ("[E]very action for money damages brought by the United States . . . which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues[.]"). But the statute also explicitly sets forth a tolling period, which Florida omits from its discussion, until the government reasonably

could have known whether a claim for damages exists. *See* 28 U.S.C. § 2416(c) (excluding time where "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances").

Case law similarly recognizes that a claim belonging to the federal government only accrues once the government has a "complete and present cause of action." *United States v. Stricker*, 524 Fed. App'x 500, 506 (11th Cir. 2013) (citation omitted); *see also United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984). The United States does not have a complete and present cause of action until it reasonably knows the facts underlying the cause of action. *See Kass*, 740 F.2d at 1497 (limitations period begins to run when the government reasonably knows the "very essence of the right of action"); *see also United States v. Beck*, 758 F.2d 1553, 1558–59 (11th Cir. 1985); *United States v. Gray*, 582 F. Supp. 1559, 1560–61 (N.D. Ga. 1982).[13]

As in this case, the United States is often put on notice of the facts material to a claim when it conducts an investigation. In *Kass*, a contract action brought by the United States, the Eleventh Circuit concluded that the government's tolling period ended, *at the earliest*, once the government: (1) suspected that the defendant had overbilled Medicare; (2) requested documents from the defendant; (3) conducted a two-tier internal review of his claims; (4) referred the matter to an independent entity for peer review of the suspected wrongdoing; and (5) were notified by the peer review body that overbilling had occurred. 740 F.2d at 1498 n.5. Similarly, in *Beck*, the court found that the government could not reasonably have known the facts material to a cause of action for recoupment of overpayments on defendant's Medicare claims until four years after the government received a third party report that defendant's practices "far exceeded the norms of similar practitioners in [the] geographical area." 758 F.2d at 1558–59; *see also United States v. Tech Refrigeration,* 143 F. Supp. 2d 1006, 1010 (N.D. Ill. 2001) (finding defendants had not shown that government had relevant knowledge under False Claims Act at the time government first obtained documents pursuant to investigation, where nothing in the record showed what those documents revealed or that government had reached any conclusions at that time); *United States ex rel. Landis v. Tailwind Sports Corp.*, 51 F. Supp. 3d 9, 40 (D.D.C. 2014) ("[T]he SOL

[13] While the amount of damages here may be calculated by reference to the harm suffered by institutionalized children, this does not alter the fact that the United States seeks these damages in its capacity as an enforcement agency — a right of action which only arises after it conducts an investigation.

does not commence upon notice of allegations of impropriety[,] instead it is when the impropriety itself is known or reasonably should have been known by the relevant official[.]"); *United States v. Intrados/Int'l Mgmt. Grp.,* 265 F. Supp. 2d 1, 13–14 (D.D.C. 2002) (limitations period was tolled pursuant to section 2416(c) until completion of audit that revealed improper payment); *United States v. Ruegsegger*, 702 F. Supp. 438, 446 (S.D.N.Y. 1988) (government did not have a reliable indication that overpayments had been made until receiving report). The key inquiry, then, is not when the violation occurred, but rather when the United States learned of the violation.

Here, the United States began its investigation into Florida's statewide service system for children with significant medical needs in December 2011. *See* England Decl. Ex. U. On September 4, 2012, the United States concluded its investigation when it issued its Letter of Findings. *See* England Decl. Ex. V. Florida's position that certain damages accrued before the United States began its investigation is flawed: before the conclusion of its investigation, the facts central to its damages claim (such as Florida's failure to conduct timely and appropriate preadmission screenings or the expressed interest of guardians or families that their children to receive services in more integrated settings) were not known and reasonably could not have been known to the United States. Accordingly, the United States had a complete and present cause of action, at the earliest, on September 4, 2012. The three-year statute of limitations did not expire until September 4, 2015. The United States timely filed this lawsuit on July 23, 2013, only ten months after its investigation concluded and well within the three-year limitations period.

B. The United States Is Not Subject to the State Law Four-Year Limitations Period.

Florida's alternative argument — that the United States' damages claim is barred by a four-year state statute of limitations — is equally flawed. The United States is not subject to state statutes of limitations. *See United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("[T]he United States is not bound by state statutes of limitations . . . in enforcing its rights."). The Supreme Court has recognized that "when the U.S. becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right . . . it [does not] become subject to a statute putting a time limit upon enforcement." *United States v. California*, 507 U.S. 746, 757 (1993) (quoting *Summerlin*, 310 U.S. at 417).

To support its argument, Florida improperly relies on cases involving claims for back pay under Title VII, claiming that the state statute of limitations applies here because the United

States seeks damages to individuals and not to "the treasury." *See* Fla. Mot. at 19 n.6 (citing *EEOC v. Griffin Wheel Co.*, 511 F.2d 456, 458–59 (5th Cir. 1975), *overturned on other grounds*, *Occidental Life Ins. Co. v. EEOC,* 432 U.S. 355 (1977); *United States v. Ga. Power Co.*, 474 F.2d 906, 923 (5th Cir. 1973). These cases are not applicable here. When the United States sues to enforce its own rights, state statutes of limitations do not apply. *Summerlin*, 310 U.S. at 417 (when the United States "act[s] in its governmental capacity and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute of putting a time limit on enforcement"); *United States v. Smelser*, 87 F.2d 799, 801 (5th Cir. 1937) (when the United States is the "real party in interest," state statutes of limitations do not apply).

VI. The Integration Mandate Is An Affirmative Obligation and Does Not Require An Affirmative Request for Integration (Fla. Mot. § III).

Florida's claim that institutionalized children or their parents or guardians had to ask for integration before Florida was required to serve the children in the community is incorrect and based on case law that is inapplicable here. As Title II's integration mandate places an affirmative duty on states to serve persons with disabilities in community-based settings, the reasonable modification element of *Olmstead* does not require such persons with disabilities to request an accommodation before their states' Title II obligations are triggered. *See, e.g., Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1297–98 (M.D. Fla. 2010) (plaintiff was likely to succeed on the merits because Florida had affirmative duty "*[t]o avoid* the discrimination inherent in the unjustified isolation of disabled persons" by making "reasonable modifications to policies, practices, and procedures for services they elect to provide") (emphasis added)); *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1295 (M.D. Ala. 2012) ("pursuant to binding Supreme Court and Eleventh Circuit case law" state corrections department violated integration mandate by unnecessarily segregating prisoners with HIV, with no requirement that the prisoners had to first request an end to the segregation); *Crowe v. Miss. Div. of Medicaid*, No. 3:11-CV-00366-CWR, 2012 WL 4062798, at *1 (S.D. Miss. Sept. 14, 2012) (noting that "[t]he breadth of the Americans with Disabilities Act is difficult to overstate" and that "[i]ts pronouncements have been hailed by no less than the Supreme Court as a 'broad mandate' with a 'sweeping purpose'" in holding that Title II allows damages where state agency failed to provide home health services in the community). In fact, Florida does not cite any cases interpreting the ADA's integration

mandate stating that there is a "request and refusal" requirement. Instead, Florida cites a string of cases that are inapplicable because they all arise in other contexts.[14]

Moreover, even in cases that do *not* arise under the integration mandate and *do* have a request-and-refusal requirement before a lawsuit can be commenced, that requirement is dispensed with where the disability or the need for accommodation is obvious. *See Hunt v. Aimco Properties, L.P.*, No. 14-14085, 2016 WL 659197, at *5–6 (11th Cir. Feb. 18, 2016) (holding plaintiff alleged sufficient facts to show the housing provider was aware of the child's disability, and therefore may have discriminated because of disability)[15]; *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1197–98 (10th Cir. 2007) ("[w]hen a disabled individual's need for an accommodation is obvious, the individual's failure to expressly 'request' one is not fatal to the ADA claim"); *Chisolm v. McManimon,* 275 F.3d 315, 330 (3d Cir. 2001) (reversing district court's holding that a request for an accommodation was necessary when the public entity "had knowledge of [plaintiff's] hearing disability but failed to discuss related issues with him") (citation omitted). Thus, even if case law applying request-and-refusal was applicable here (which it is not), it would not allow Florida to escape damages here. Florida has always been aware of the institutionalized children's disabilities and the services they need; after

[14] *See Gaston v. Bellingrath Gardens & Home*, *Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999) (employment accommodation case); *Rylee v. Chapman*, 316 F. App'x 901, 906 (11th Cir. 2009) (finding no evidence of discrimination during arrest of man with a hearing impairment who told officers he read lips and did not request other accommodations); *United States v. Hialeah Hous. Auth.*, 418 F. App'x 872, 875–76 (11th Cir. 2011) (Fair Housing Act case); *Redding v. Nova Se. Univ.*, *Inc.*, No. 14-60545, 2016 WL 759325, at *13, 15 (S.D. Fla. Feb. 26, 2016) (higher education accommodation case); *Wood v. President & Trs. of Spring Hill Coll.*, 978 F.2d 1214, 1221–22 (11th Cir. 1992) (same); *Walker v. Florida*, No. 3:12-cv-212, 2014 WL 1017933, at *4 (N.D. Fla. Mar. 17, 2014) (prison accommodation case); *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1219 (11th Cir. 2008) (Fair Housing Act case that did not reach ADA claims); *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 158 n.6 (2d Cir. 2013) (plaintiff sought retroactive accommodation to allow late filing for disability retirement benefits); *Willis v. Conopco*, *Inc.*, 108 F.3d 282, 284–86 (11th Cir. 1997) (employment accommodation case); *McCarroll v. Somerby of Mobile LLC*, 595 F. App'x 897, 899 (11th Cir. 2014) (same); *Smith v. Rainey*, 747 F. Supp. 2d 1327 (M.D. Fla. 2010) (Title II dismissal unrelated to whether plaintiffs requested reasonable accommodation).

[15] *See also Sabal Palm Condos. of Pine Island Ridge Ass'n, Inc. v. Fischer*, No. 12-60691-CIV, 2014 WL 988767, at *9 (S.D. Fla. Mar. 13, 2014) (stating, in housing discrimination case, that "[i]t is only when either the requester's disability or the disability-related need for the accommodation are not obvious that the provider may request reliable qualifying-disability or nexus information").

all, Florida administers their disability services, has their medical and service records, and already provides them with services — just not integrated ones. Thus, even if the relevance of the integration mandate could be ignored, there would still be no need for specific requests for accommodation to trigger Florida's obligations here.

Finally, even if the relevance of the integration mandate *and* the obviousness of the children's disabilities in this case could *both* be ignored, the fact would remain that the families of many of the children requested community-based services anyway. Florida's own exhibits contain specific requests by children's parents or guardians for home or community services.[16]

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny the State of Florida's Motion for Partial Summary Judgment.

[16] *See* Meros Decl. Attach E at 7-10; Meros Decl. Attach. F at 182-290 (includes narrative response regarding parent requests to transition child to home-based services and specific citations to requests made on behalf of individually identified children; for example: parent stated that she would like to bring child home on Florida "Freedom of Choice Forms," *id.* at pg. 217; "After nursing facility admission, [the parent] expressed her desire to take Child 70 home. *See* FL07695812," *id.* at pg. 191.)

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by Notice of Electronic Filing on April 7, 2016 on all counsel of record identified on the Service List below.

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