UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 12-cv-60460-MIDDLEBROOKS-HUNT

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF FLORIDA,

Defendant.

THE UNITED STATES' OPPOSITION TO THE STATE OF FLORIDA'S MOTION TO DISMISS AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RULES

INTRODUCTION

This case seeks to remedy the State of Florida's discriminatory administration of its service system for children with disabilities who have long-term care needs. Because the State limits the availability of services, settings, and supports in the community within this system, more than 100 children are currently living in pediatric nursing facilities in Florida, when they could be living with their families. Due to the same barriers, hundreds of other children, who live in the community, are at serious risk of placement in these facilities to receive needed services.

The State's administration of its services for these children thus violates Title II of the Americans with Disabilities Act (ADA), which requires public entities to administer services, programs, and activities in the most integrated setting appropriate to the children's needs. The United States more than adequately pleads facts stating this claim.

The State moves to dismiss the Amended Complaint, asserting that the ADA does not "create any cause of action with an aggregate or systemwide focus," and that an ADA claim must be pleaded only on an individualized basis. D.E. 703 ("Mot.") at 1, 11-13, 17.

In short, the State would require the United States to plead a different case than it has, based on nothing more than the State's own say-so and in contrast to several decades of law interpreting the ADA. The State's proposed requirement also ignores Congress' express statutory purpose in enacting the ADA, and its broad mandate. Congress expressly determined that disability discrimination includes unnecessary segregation of people with disabilities. The ADA thus requires states to take affirmative measures to avoid discrimination, including modifying policies and practices that result in unnecessary segregation.

The United States adequately pleads all elements of its single claim—a violation of the ADA's integration mandate, alleging that the State administers its services through various policies in a way that segregates children with disabilities in nursing facilities. And the United States pleads facts demonstrating the particular ways the State's practices impact children who receive specific services from the State, such that it is on notice of whose rights are being violated.

Finally, there is no legal basis for certain elements the State contends must be pled for this cause of action. Accordingly, this Court should deny the motion because the Amended Complaint fully satisfies the pleading requirements of Federal Rule of Civil Procedure 8(a).

PROCEDURAL HISTORY

After receiving complaints of disability discrimination, the United States initiated an investigation in December 2011. It found that the State was unnecessarily segregating children with complex medical needs in nursing facilities, and placing other children at risk of unnecessary segregation. Following attempts to obtain a resolution with the State, the United States filed this lawsuit in July 2013.

After three years of discovery, the parties prepared for trial and submitted their Joint Pretrial Stipulation (D.E. 509), with exhibit and witness lists. The United States planned to call many aggrieved individuals and family members as witnesses. The United States also planned to present expert testimony, data, and other evidence showing that the State's service system commonly caused children with complex medical needs to be unnecessarily institutionalized or placed at risk of such institutionalization, and that the State could remedy this violation through reasonable modifications to its services and programs.

Shortly before trial was to begin, this Court issued a *sua sponte* order dismissing the United States' claim on the basis that Title II does not authorize the United States to bring suit. On appeal, the Eleventh Circuit reversed and remanded. *United States v. Florida*, 938 F.3d 1221 (11th Cir. 2019), *petition for cert. filed*, No. 21-1384 (Apr. 21, 2022). On remand, the United States obtained leave to file an amended complaint (D.E. 686, ¶ 2). The core claim of the Amended Complaint, which was filed on June 15, 2022 (D.E. 700), is the same as that of the original, updated based on the passage of time. The State now moves to dismiss (D.E. 703).

FACTUAL BACKGROUND

The State administers a service system for children with disabilities that uses Medicaid to fund long-term care. D.E. 700 ("Am. Compl.") ¶ 4. The State provides long-term care services for children both in nursing facilities and in the community. *Id.* Due to the manner in which the State administers its service system, more than 100 children and young adults with complex medical needs are unnecessarily institutionalized in nursing facilities in Florida, and other children with complex medical needs are at serious risk of such unnecessary institutionalization. *E.g.*, *id.* ¶¶ 2, 3, 22.

Over the course of approximately the last two decades, the State has limited the availability of many community-based services for children with complex medical needs. *Id.* ¶¶ 43, 52. State policies and practices have limited medically necessary in-home services and

supports to which Medicaid-eligible children with complex medical needs are entitled. *Id.* ¶¶ 43-44. For example, the State implemented several policies limiting children's access to in-home nursing services that Medicaid requires the State to provide to such children. *Id.* ¶¶ 46-51. In addition, the State fails to maintain the capacity of in-home nursing services needed for these children to live in the community. *Id.* ¶¶ 54-61.

Other State programs providing home and community-based services for children with complex medical needs are similarly limited by the State. *E.g.*, *id.* ¶ 65. For example, the State's Medicaid waiver program for persons with developmental disabilities (the iBudget waiver) carries a waitlist of over 14,000 individuals, and children with complex medical needs have waited for years to receive waiver services in their communities. *Id.* ¶¶ 66-68.

The State has also limited these children's access to family-based settings that provide care to children with complex medical needs. *Id.* ¶ 70. The State's Medical Foster Care program offers care in a family-based setting to children in the foster care system. *Id.* ¶ 71. But the State has not recruited enough Medical Foster Care providers to meet the need for the service. *Id.* ¶ 73. In addition, this family-based setting is only available to children who are in the custody of the State. *Id.* ¶ 72. This means that, for a parent or guardian who is unable to have their child live at home, the only available options are to place their child in a nursing facility or to renounce their parental rights and surrender custody to the State. *Id.* Such families cannot access Florida's family-based service alternative to institutional nursing facilities. *Id.*

Finally, the State's assessment and care coordination programs do not provide families of children with complex medical needs individualized information about actually available community-based services that could help their children remain in their homes or transition home from nursing facilities, or connect families to such services. Florida's assessment program also fails to provide families with the time or opportunity to consider options other than nursing facility placement. The State's care coordination and assessment programs should be actively identifying more integrated service options for the children. *Id.* ¶¶ 76-83.

The State's failures described above impact two specific groups of children with disabilities: Institutionalized Children and At-Risk Children. *Id.* ¶¶ 6-7. The Institutionalized Children are the more than 100 children and young adults with complex medical needs currently residing unnecessarily in nursing facilities. The Institutionalized Children receive State

Medicaid-funded nursing facility services, but could live in more integrated settings. The At-Risk Children are children with complex medical needs who are eligible for, but unable to access, the home and community-based services they need to remain in their homes and communities, due to the State's failures described above. *Id.* ¶¶ 4, 6-7, 22-26, 37, 54.

Nursing facilities are not the "most integrated setting appropriate" to the needs of the Institutionalized and At-Risk Children. *Id.* ¶¶ 2, 16-17. Nursing facilities are segregated, institutional settings where children live separate from their families and communities, and have minimal interaction with people without disabilities other than paid facility staff. *Id.* ¶¶ 5, 38-42. The Institutionalized Children could live at home or in other community-based settings, and many of their parents and guardians would choose community placement for them, if they could access necessary services and supports there. *Id.* ¶¶ 6, 51-52, 55, 67, 68, 80, 81, 84-87. The At-Risk Children have been deemed eligible for community-based services, and their parents and guardians want them to be able to remain at home. *E.g.*, *id.* ¶¶ 7, 87.

The State can make reasonable modifications to existing services and programs that would help the Institutionalized and At-Risk Children access needed services in their homes and communities. The State has the existing service framework to provide services in the most integrated setting appropriate. *See id.* ¶¶ 27-36, 44, 65, 71, 76-77, 87. The State merely needs to expand the availability of those services and programs in order to avoid unnecessary segregation and risk thereof. *See id.* ¶¶ 54-61, 65-69, 70-75, 80-83, 89-91.

STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level," or "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). As a general rule, on a motion to dismiss, the complaint's well-pleaded factual allegations are accepted as true, and construed in the light most favorable to the plaintiff. *See, e.g.*, *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1321-22 (11th Cir. 2012).

ARGUMENT

This case is a straightforward application of the ADA's integration mandate. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d); *Olmstead v. L.C.*, 527 U.S. 581 (1999). Accepting the United States' well-pleaded allegations as true and drawing reasonable inferences from them, the United States easily meets Rule 8(a)'s pleading standard and states a claim under Title II of the ADA.

The arguments advanced in the State's motion fail for several reasons. First, the State's motion rests on a flawed reading of the ADA. The State's position that Title II does not create a cause of action addressing policies that impact groups of people with disabilities directly contravenes a significant body of caselaw applying the integration mandate to state policies and practices that impact recipients of their services. Title II, and its integration mandate in particular, have been applied for decades to address discriminatory state policies, practices, and failures that commonly affect a group of people with disabilities, and which, if changed, would remedy the discrimination for all in the group. Indeed, Title II and its integration mandate are specifically geared to allow actions addressing discriminatory policies and practices that affect groups of people with disabilities. The State's argument that the United States must plead its claim on an individual-by-individual basis thus fails. It is unsupported, and creating such a requirement would fly in the face of the ADA's broad remedial purpose as well as an extensive body of law.

Second, the United States pleads a detailed and plausible claim under Title II of the ADA. Public entities must provide community-based services to individuals with disabilities when (1) such services are appropriate, (2) the affected persons do not oppose community-based treatment, and (3) community-based services can be reasonably accommodated. *Olmstead*, 527 U.S. at 607. Because the complaint alleges each of these elements with respect to the children impacted by the State's discrimination, the United States has pleaded a plausible claim. Finally, there is no legal basis for the State's asserted causation requirement, or that the United States must plead in an *Olmstead* case that an individual with a disability requested, and was subsequently refused, a reasonable modification.

Legal Framework

1. *The ADA's Broad Mandate Reaches Generally Applicable State Policies and Practices*

Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

This "broad mandate" of "comprehensive character" has a "sweeping purpose," which is to "eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (quotation marks and citation omitted).

Title II of the ADA prohibits disability discrimination by state and local governments. 42 U.S.C. §§ 12132, 12131(1). The statute provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Specifically addressing states' "administration of [their] services and programs," Title II was crafted explicitly to remedy the "pervasive unequal treatment [of people with disabilities] in [such] services and programs." *Tennessee v. Lane*, 541 U.S. 509, 524 (2004). The record Congress amassed was replete with examples of state and local laws, policies, and practices excluding people with disabilities (including groups of people with certain types of disabilities) from public programs and services, relegating them to lesser services and programs, and failing to provide access to public services and programs. *See, e.g.*, *id.* at 524-25 & nn.6-14. Congress, moreover, explicitly recognized that, in addition to "outright intentional exclusion[s]," "overprotective rules and policies" and "failure to make modifications to existing . . . practices" are forms of disability discrimination preventing participation in public life. 42 U.S.C. § 12101(a)(5).

Thus, Title II actions routinely challenge discriminatory policies or practices that affect a group of people with disabilities, and seek changes to those policies and practices that would provide a remedy for the entire group. *See, e.g.*, *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 506-07 (4th Cir. 2016) (state absentee ballot and absentee voting requirements discriminated against voters with disabilities); *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (state policy requiring quarantine of carnivorous animals entering the state discriminated against visually impaired travelers to the state who used guide dogs); *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001) (state constitutional provision disenfranchising individuals "under guardianship by reason of mental illness" violated Title II); *Galloway v. Superior Court*,

816 F. Supp. 12, 15 (D.D.C. 1993) (public entity's categorical exclusion of blind individuals from jury service violated the ADA).[1]

The ADA's Integration Mandate Affirmatively Requires States to Administer their Services and Programs in Integrated Settings When Appropriate

Noting that discrimination "persists in such critical areas as . . . institutionalization, health services, . . . and access to public services," Congress explicitly classified "segregation" as one such form of discrimination. 42 U.S.C. §§ 12101(a)(3), 12101(a)(5). Congress recognized in statutory findings that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *Id.* § 12101(a)(2).

Behind these findings was a widespread, "grotesque" history of state laws and policies designed to segregate people with disabilities from the places and programs that make up civil society. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 461-64 (1985) (Marshall, J., concurring in part); *see Lane*, 541 U.S. at 524-25 & nn.6-14; *id.* at 534-35 (Souter, J., concurring); *accord Helen L. v. DiDario*, 46 F.3d 325, 335 (2d Cir. 1995) ("The ADA is intended to insure that qualified individuals receive [state] services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them."). Chief examples of such state policies were those providing for the long-term institutionalization of people with disabilities. *See Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in part); *Lane*, 541 U.S. at 534 (Souter, J., concurring).

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[1] *See also, e.g.*, *Fla. State Conference of NAACP v. Lee*, 566 F. Supp. 3d 1262, 1272-74, 1296-98 (N.D. Fla. 2021) (statute alleged to impose restrictions on people with disabilities' access to voting); *Am. Council of the Blind of N.Y., Inc. v. City of New York*, 495 F. Supp. 3d 211, 231 (S.D.N.Y. 2020) (plaintiffs were denied meaningful access to "signalized street crossings, taken as a whole," where plaintiffs alleged city failed to provide non-visual crossing information at vast majority of such crossings); *Postawko v. Mo. Dep't of Corr.*, No. 2:16-cv-04219-NKL, 2017 WL 1968317, at *13 (W.D. Mo. May 11, 2017) (plaintiff challenged "treatment protocols" denying inmates with Hepatitis C access to medications); *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1295 (M.D. Ala. 2012) (policy segregating inmates with HIV); *Communities Actively Living Indep. & Free v. City of Los Angeles*, No. 09-cv-0287-CBM (RZx), 2011 WL 4595993, at *14 (C.D. Cal. Feb. 10, 2011) (holding that city's failure to provide meaningful access for people with disabilities to emergency services violated ADA); *McNally v. Prison Health Servs.*, 46 F. Supp. 2d 49, 58-59 (D. Me. 1999) (discriminatory policy regarding access to medication for inmates with HIV).

In *Olmstead v. L.C.*, the Supreme Court affirmed that Title II prohibits "undue institutionalization" as a species of discrimination by state and local governments. 527 U.S. at 598. Such discrimination is effectuated by the manner in which public entities administer their services and programs, requiring people with disabilities "to relinquish participation in community life they could enjoy given reasonable modifications." *Id.* at 601.

To remedy this form of discrimination, the integration mandate of the ADA affirmatively requires state and local governments 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). This means that where people with disabilities are qualified for state services, and can appropriately be served in integrated settings, they must be afforded the opportunity to be served there absent a fundamental alteration. *See, e.g.*, *Olmstead*, 527 U.S. at 599-603, 607; *Brown v. District of Columbia*, 928 F.3d 1070, 1078 (D.C. Cir. 2019); *Frederick L. v. Dep't of Public Welfare*, 364 F.3d 487, 492 n.4 (3d Cir. 2004); *see also, e.g.*, 28 C.F.R. pt. 35, App. B, at 703 (2021) (discussing 28 C.F.R. § 35.130(d), (e)); *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1297-98 (M.D. Fla. 2010) (plaintiff was likely to succeed on the merits of integration claim 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)); *United States v. Mississippi*, 400 F. Supp. 3d 546, 554 (S.D. Miss. 2019) (states have affirmative obligation to avoid unnecessary institutionalization), *appeal pending*, No. 21-60772 (5th Cir.); *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 1032 (D. Minn. 2016) ("[T]he alleged discrimination—undue isolation—stems from a failure to satisfy an affirmative duty.").

The State Mischaracterizes Both the ADA and the United States' Claim Integration Mandate Claims, Such As This One, Commonly Challenge Policies and Practices That Impact Large Numbers of Individuals

The ADA is explicitly intended to remedy "pervasive" discrimination, and particularly discriminatory administration of state services and programs. The way states, including Florida, "administer" services and programs is through a series of policies, practices, and funding decisions that impact large numbers of individuals receiving those services. The integration mandate prohibits states from administering services and programs in a manner that makes them

available only in segregated settings even when individuals with disabilities can be served in a more integrated setting.

Because such policies and practices apply to all who receive or are eligible for the services they govern, integration mandate cases are commonly brought seeking to modify those policies and practices, vindicating the rights of *groups* of people with disabilities. The focus of these cases is whether the policy or practice violates the ADA. Numerous courts have recognized this principle in considering integration mandate claims. For example, the Sixth Circuit reversed the dismissal of an integration claim brought by putative class plaintiffs and an associational plaintiff alleging that the methodology the defendants were using to calculate community service budgets prevented individuals with disabilities from receiving required services and supports, placing them at serious risk of institutionalization. *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 436, 458-59 (6th Cir. 2020). In deciding that the organizational plaintiff had standing to sue in its own right, the court rejected defendants' argument that the participation of individual members was necessary because each person's "budgets are different and tailored based on their specific medical situation." *Id.* at 442. It acknowledged that individual budgets were necessarily unique but clarified that "the participation of individual members is not necessary to determining whether a methodology commonly applied to all members is valid." *Id.* The court also noted that the plaintiffs appropriately sought relief in the form of modification of the budget methodology, and were not challenging each individual service recipient's budgeted amount. *Id.* at 441. Likewise, here, an individual ADA claim need not be brought for each of the Institutionalized and At-Risk Children in order to challenge the manner in which the State administers its services for these children.

The claim recognized in *Waskul* was not merely a "[l]egitimate," (*see* Mot. at 17), but an archetypal, *Olmstead* claim, brought to vindicate the rights of a large group of people. Even though each individual in the group has their own unique care needs, such claims address state "administration" of services and programs and seek modifications to them to afford the entire group the opportunity to receive services in the most integrated setting appropriate. *See, e.g.*, *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1177-78 (10th Cir. 2003) (state's cap on prescription medications recipients of community services can access may violate integration mandate where state does not limit access to medications for nursing facility residents);

Townsend v. Quasim, 328 F.3d 511, 516-20 (9th Cir. 2003) (state policy limiting community-based care to categorically needy excluded medically needy); *see also, e.g.*, *Olmstead*, 527 U.S. at 599 (noting that the ADA, in classifying unnecessary segregation as discrimination, "stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living"); *United States v. Georgia*, 461 F. Supp. 3d 1315 (N.D. Ga. 2020); (denying motion to dismiss *Olmstead* claim by federal government alleging that thousands of public school students are unnecessarily segregated and at risk of unnecessary segregation in separate and unequal educational program); *Georgia Advocacy Office v. Georgia*, 447 F. Supp. 3d 1311 (N.D. Ga. 2020) (same, in case brought by advocacy organizations); *Mississippi*, 400 F. Supp. 3d 546 (finding, after bench trial, that United States had proven discrimination by demonstrating state system unnecessarily segregated and placed at risk thousands of people with serious mental illness); *Kenneth R. v. Hassan*, 293 F.R.D. 254, 268 (D.N.H. 2013) (class certification appropriate where "the State practices plaintiffs challenge . . . all pertain to a discrete set of community-based services"); *Lane v. Kitzhaber*, 283 F.R.D. 587, 596-97 (D. Or. 2012) (class certification appropriate in *Olmstead* action challenging "a system-wide practice or policy that affects all of the putative class members"); *Long v. Benson*, No. 4:08-cv-26-RH/WCS, 2008 WL 4571904, at *2 (N.D. Fla. Oct. 14, 2008) (class certification appropriate where class sought injunctive relief that would not require the State to provide individualized relief to class members).

Integration mandate claims are certainly not unique in this respect; other types of claims that are brought to vindicate the rights of groups of people need not name those individuals or plead complete causes of action for each of them in order to state a claim. In the employment discrimination context, for example, the Equal Employment Opportunity Commission (EEOC) frequently brings suit on behalf of classes of individuals, including people whom the agency has not yet identified by the time it brings suit, because the existence and scope of an unlawful employment practice may be clear before every individual adversely affected by that practice can be identified. *See, e.g.*, *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 494 (2015) (notice to employer of EEOC's allegation of discrimination adequate where EEOC identifies the "class of employees" discriminated against); *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 321 (1980) (EEOC sought relief for a class of female employees of defendant in several states);

EEOC v. Sterling Jewelers, 801 F.3d 96, 99-100 (2d Cir. 2015), *cert. denied*, 137 S. Ct. 47 (2016) (EEOC sought relief for a "class of female employees with retail sales responsibilities nationwide").

The ADA Does Not Require the United States to Plead Its Cause of Action on an Individualized Basis

The State argues that the ADA "does not create any cause of action with an aggregate or system-wide focus," so the United States' claim must be invalid unless it identifies by name each child discriminated against, alleges facts specific to the circumstances of each such child, and seeks only relief that is specific to each such child. Mot. at 17.

Tellingly, the State cites no authority that would so diminish the reach of the ADA. There is no legal principle stating that any action that can be labeled as "sounding in tort" categorically must be litigated individual by individual, and, indeed, neither of the cases the State cites supports such a proposition. *Three Rivers Center for Independent Living v. Housing Authority of City of Pittsburgh* is a non-ADA case that holds that when a statute creates non-personal rights, those rights cannot be enforced by a private right of action. 382 F.3d 412, 430 (3d Cir. 2004). The case does not say that when a statute creates personal rights, those rights must be litigated individual by individual. *Everett v. Cobb County School District* merely holds that an action under the ADA should be analogized to a personal injury action for purposes of determining which statute of limitations applies. 138 F.3d 1407, 1409 (11th Cir. 1998).

No *Olmstead* plaintiff (including the federal government) has ever been required to name every individual in a class, or show that each element was met for each person in the class, at trial, much less at the pleading stage. This is because, in the typical *Olmstead* case, the violation lies in the manner in which a defendant administers services and programs, which simultaneously impacts all members of a given population. Such cases are amenable to litigation on a group basis because the government, a putative class, or an organizational plaintiff can seek relief that would, through a single injunction, remove one or more barriers that the state's policies have placed in the way of the population members' ability to fully enjoy their civil rights.

Olmstead itself reinforces this principle. Though the *Olmstead* plaintiffs were two individual women, the decision did not, as the State contends, limit integration mandate causes of action to those for specific, individualized relief (*see* Mot. at 18). To the contrary, it actually

encouraged the litigation of integration mandate claims on a systemwide basis. In guiding courts' evaluation of the reasonableness of modifications that would be required to serve people with disabilities in community settings, the Court contemplated that such relief would be implemented at the program, rather than merely the individual, level.[2] *See Olmstead*, 527 U.S. at 603-06 & n.15 (in assessing reasonableness of necessary modifications, courts should look to whether such modifications would affect the state's ability to continue meeting the needs of other populations of people with disabilities or would disrupt a state's existing comprehensive, effectively working plan towards deinstitutionalization); *Frederick L.*, 364 F.3d at 494-95.

The United States Adequately Pleads Its Integration Mandate Claim

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.[3] One form of "discrimination . . . by reason of disability" is unnecessary institutionalization, or a failure to administer services in the most integrated setting appropriate to the needs of qualified individuals with disabilities. *Olmstead*, 527 U.S. at 597; 28 C.F.R. § 35.130(d). The "most integrated setting" is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35, App. B, at 703 (2021).

States must serve qualified individuals with disabilities in the community when (1) doing so is appropriate, (2) the affected persons do not oppose receiving services in the community,

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[2] Indeed, the Court was concerned about *individuals'* lawsuits potentially disrupting states' ability to "administer services with an even hand," stating that if a "State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated," then specific individuals should not be able to displace others at the top of the waiting list merely by filing civil actions. *Id.* at 605, 606.

[3] There is no question that Defendant, the State of Florida, is a "public entity" within the meaning of the ADA and is thus subject to Title II. 42 U.S.C. § 12131(1); Am. Compl. ¶ 12. There is also no question that the Institutionalized and At-Risk Children have disabilities as defined by the ADA. The Institutionalized and At-Risk Children have complex medical needs. *Id.* ¶ 22. They are persons with disabilities under the ADA because they have medical conditions that substantially limit one or more major life activities, including mobility, breathing, eating, and personal care. 42 U.S.C. § 12102(1)-(2); Am. Compl. ¶¶ 23-25, 98.

and (3) serving the affected persons in the community can be reasonably accommodated. *Olmstead*, 527 U.S. at 607. A state's failure to provide services in the most integrated setting appropriate is excused only when the state can demonstrate, as an affirmative defense, that the relief sought would result in a "fundamental alteration" of the state's service system. *Id*. at 603.

The Institutionalized and At-Risk Children Can Appropriately Be Served in the Community

The Institutionalized and At-Risk Children can "appropriately" be served in the community. *Olmstead*, 527 U.S. at 602. The Institutionalized Children are capable of living in the community with appropriate services and supports. Am. Compl. ¶¶ 6, 80, 81, 84. These allegations alone are sufficient to show appropriateness at the pleading stage. *See, e.g.*, *M.J. v. District of Columbia*, 401 F. Supp. 3d 1, 13 (D.D.C. 2019) ("[P]laintiffs have alleged that they are able to live in their homes and communities, if the District provided the required treatment; these allegations are enough to meet the pleading standards."). But the Amended Complaint further alleges that the Institutionalized Children's needs are generally no different from the needs of children and young adults with complex medical needs already benefiting from services in the community. Am. Compl. ¶ 87. Indeed, some of the Institutionalized Children used to live and receive services in the community, but moved into nursing facilities because they were unable to access the services they needed to remain there. *Id.* ¶ 51. These facts further support the allegation that community-based services are appropriate for the Institutionalized Children. *See Steimel v. Wernert*, 823 F.3d 902, 915-16 (7th Cir. 2016) ("By previously allowing the plaintiffs significantly more interaction, the state's medical professionals have demonstrated that such activity is both appropriate and possible."); *Radaszewski v. Maram*, 383 F.3d 599, 612-13 (7th Cir. 2004) (explaining that the fact that the young adult at risk of institutionalization had lived at home for years supported a finding that he could "handle and benefit from" community-based services).

The At-Risk Children already receive services in their communities (*see, e.g.*, Am. Compl. ¶ 7), and this history of community living demonstrates that to continue living at home, with adequate services, would be appropriate. *See, e.g.*, *Radaszewski*, 383 F.3d at 612-13; *Townsend*, 328 F.3d at 516; *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 994 (N.D. Cal. 2010).

Parents and Guardians Do Not Oppose Community Placement

The ADA requires that community-based services be provided to qualified individuals with disabilities who do not oppose such services. *Olmstead*, 527 U.S. at 602, 607 (citing 28 C.F.R. § 35.130(e)(1), which provides that the ADA does not "require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept"). Non-opposition includes that a person would choose community placement if given adequate, individualized information about actually available community services. *See, e.g.*, *Kenneth R.*, 293 F.R.D. at 270 n.6 ("[T]he *meaningful* exercise of a preference will be possible only *if* an adequate array of community services are available to those who do not need institutionalization." (emphasis in original).); *Disability Advocates, Inc. v. Paterson,* 653 F. Supp. 2d 184, 267 (E.D.N.Y. 2009) (residents of institutions did not oppose community placement where they lacked choice and information about alternative housing options and would, "with accurate information and a meaningful choice . . . choose to live and receive services in a more integrated setting"), *vacated on other grounds sub nom. Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012); *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 332-34, 339-42 (D. Conn. 2008) (finding plaintiffs not opposed to community services where guardians expressed "interest" in, or would consider, community placement).

The Amended Complaint sufficiently alleges that many families of Institutionalized Children, families of At-Risk Children, and young adults residing in nursing facilities who were admitted as children, do not oppose receiving services in the community. It alleges that many families of Institutionalized Children tried to care for their children at home but ultimately were forced to place them in nursing facilities because they could not access needed in-home services, and the unavailability of in-home services—not opposition to community living—prevents Institutionalized Children from moving out of nursing facilities. Am. Compl. ¶¶ 51-52, 55, 67, 68. The Amended Complaint also alleges that families have not been provided with adequate, individualized information about community services, either before or after nursing facility admission, or with assistance in accessing such services. *Id.* ¶¶ 78-83. With such information and transition planning services, and with adequate community-based services in place, many families of Institutionalized Children would choose community placement for their children. *Id.* ¶¶ 85-86.

The State argues that some parents of Institutionalized Children may prefer that their child remain in a nursing facility. Mot. at 5. This inquiry is properly the subject of discovery, and the United States need not allege that *all* families of Institutionalized Children do not oppose community placement. *See* 42 U.S.C. § 12201(d); *Olmstead*, 527 U.S. at 602. The United States need only plead facts suggesting that there are children residing in nursing facilities whose families do not oppose community placement. As demonstrated above, the United States has done so.

The State also argues that the language used in the Amended Complaint—that "many parents" "would choose" community placement—is unduly speculative (Mot. at 11). But this language contemplates both that there are parents who currently affirmatively wish to have their children at home (and thus "would" choose to do so), and that there are parents who are not aware of community-based options but would choose them if they were. But even if the language of the Amended Complaint's allegations only contemplated the latter, non-opposition, as discussed above, can be established by showing that individuals *likely* would not oppose community services if provided adequate, individualized information about actually available community services. *See, e.g.*, *Disability Advocates*, 653 F. Supp. 2d at 263 (people reporting "a preference to move out of their adult home is merely 'a floor' with regard to who would truly be willing to move if given" information and support in making a "true choice"); *see also Kenneth R.*, 293 F.R.D. at 270 n.6 ("[T]he *meaningful* exercise of a preference will be possible only *if* an adequate array of community services are available…"). Taken to its logical conclusion, the State's argument would mean that a public entity could successfully argue failure to allege non-opposition by entirely avoiding giving families the option to receive services in integrated settings. This would render the integration mandate illusory. The facts as alleged plausibly support *Olmstead*'s non-opposition element.

The State Can Make Reasonable Modifications to Comply with the ADA

The final element to demonstrate a violation of the integration mandate is that the State can make reasonable modifications to its service system to accommodate placement in the community. *Olmstead*, 527 U.S. at 607. The plaintiff's burden of identifying reasonable modifications is not a "heavy one." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003) (citing *Borokowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995)). The

plaintiff need only suggest the existence of a plausible accommodation. *Id.*; *see also Frederick L.*, 364 F.3d at 492 n.4.

While the State claims to be unable to find any proposed modifications in the Amended Complaint, the United States has alleged several modifications the State can make to its existing services and programs to help children with complex medical needs move to and remain in their communities. The Amended Complaint specifically alleges the following modifications: expanding existing in-home nursing services (including by meeting the State's existing obligation under federal Medicaid law to provide most of the community-based services the Institutionalized and At-Risk Children need to live at home); expanding the capacity of the State's home and community-based services Medicaid waiver programs for which children with complex medical needs may be eligible; enhancing access to family-based settings by expanding the capacity and availability of the State's Medical Foster Care program (including, potentially, by raising the reimbursement rate for Medical Foster Care families and recruiting sufficient families to meet the demand for the service); and providing sufficiently individualized and effective care coordination services and assessments to help avoid unnecessary nursing facility placements and to help Institutionalized Children transition to the community. Am. Compl. ¶¶ 54-61, 65-69, 70-75, 80-83, 89-91.[4]

The types of modifications outlined in the Amended Complaint—namely, expanding existing State services and programs—are routinely found to be both sufficient to meet a plaintiff's burden to articulate a plausible modification, and reasonable. *See, e.g.*, *Mississippi*, 400 F. Supp. 3d at 576 (finding provision of community-based services reasonable where United States showed that the state "already ha[d] the framework for providing [the] services and [could] more fully utilize and expand that framework to make the services truly accessible"); *Murphy v. Minn. Dep't of Human Servs.*, 260 F. Supp. 3d 1084, 1107-08 (D. Minn. 2017)

[4] These proposed modifications should be familiar to the State, as the United States outlined the necessary modifications in its post-investigation Findings Letter to the State, which was the basis of voluntary compliance negotiations even before the original complaint was filed in this case. Am. Compl. ¶¶ 93-94. Indeed, though the State claims that in nine years of litigation it has not been able to figure out what relief the United States seeks, the State was enough "on notice" of the types of changes the United States sought that the State subsequently voluntarily made some of the requested changes. *Id.* ¶¶ 46-51, 95.

(plaintiffs adequately alleged reasonable modification where they specified the services needed to transition to more integrated settings and alleged that the state's program offered those services); *cf. Haddad*, 784 F. Supp. 2d at 1304-05 (providing a service already in state's service system to additional individuals is not a fundamental alteration).[5]

The State Attempts to Add Elements Not Part of an Integration Claim
The Complaint Need Not Allege Request-and-Refusal

The State argues that the United States is required to plead that each child (or their family) has affirmatively requested that the State provide an accommodation (namely, community integration), and that this request was refused (Mot. at 7-8, 12-13).

No court has required a plaintiff in an integration mandate case to allege (or ultimately prove) that an affirmative request for community integration was made and refused. This is because the integration mandate places an affirmative duty on public entities to serve persons with disabilities in integrated settings, so individuals need not request community integration in order for that obligation to be triggered. *See, e.g.*, *Haddad*, 784 F. Supp. 2d at 1297-98 (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)); *see also, e.g.*, *Mississippi*, 400 F. Supp. 3d at 554 (states have affirmative obligation to avoid unnecessary institutionalization); *Guggenberger*, 198 F. Supp. 3d at 1032 ("the alleged

[5] The State claims that the United States' allegations that the State could reasonably modify its services by increasing capacity of in-home nursing services, waiver services, and Medical Foster Care services, as well as by providing sufficiently individualized care coordination services, "suffer from their own peculiar pleading deficiencies" (Mot. at 18). But these supposed deficiencies are (1) that the Amended Complaint does not name specific children whose institutionalization or risk was caused by these aspects of the State's administration of its service system (which arguments are addressed *supra*, Sections V.A., B.), and (2) that the United States does not plead specific measures the State should take to expand access to these specific services and programs (Mot. at 18-20). With respect to (2), the State incorrectly articulates the United States' burden. As explained above, the United States need only articulate a plausible modification, such as expanding an existing service or providing a specific community service to the population in lieu of the facility-based version of that service. The State must implement every suggested modification that it cannot prove, as an affirmative defense, would fundamentally alter its service system. *See, e.g.*, *Brown*, 928 F.3d at 1077-78; *Frederick L.*, 364 F.3d at 492 n.4.

discrimination—undue isolation—stems from a failure to satisfy an affirmative duty").[6] Indeed, *Olmstead* itself requires not that an affirmative request for integration has been made, but only that the affected persons "do not oppose" community placement. *Olmstead*, 527 U.S. at 602-03, 607.

It makes little practical sense to impose the request-and-refusal requirement in integration mandate cases. The purpose of the requirement is to put the state on notice that a person is disabled and needs an accommodation; thus, an affirmative request is not required where the need for an accommodation is obvious. *See McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, No. 6:11-cv-1387-ORL-31, 2013 WL 1212860, at *4 (M.D. Fla. Mar. 25, 2013), *aff'd*, 768 F.3d 1135 (11th Cir. 2014) (citing *Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1198 (10th Cir. 2007)) (defendant's knowledge of the need for an accommodation "may derive either from an individual's request, or where the need is obvious"); *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001), *as amended on denial of reh'g* (Oct. 11, 2001) (noting that public entity is on notice that an accommodation is required where the need is obvious or where required by statute or regulation). In integration mandate cases, the public entity already has such notice because the affected persons are receiving state disability services. Here, the Institutionalized and At-Risk Children, by definition, receive disability services from the State. *E.g.*, Am. Compl. ¶¶ 4, 6-7. Thus, the State is on notice that it must deliver those services in the most integrated setting appropriate to the children's needs. *See, e.g.*, *Olmstead*, 527 U.S. at 603 n.14 (holding that "States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide"); *Messier*, 562 F. Supp. 2d at 326 (public entities have a

[6] The State acknowledged in 2016 that no integration mandate case has imposed a request-and-refusal requirement (D.E. 496 (Transcript of Summary Judgment Hearing) at 60:15-20), and that has not changed since 2016. Other states have acknowledged the reason, namely, that under *Olmstead*, "state governments have an affirmative obligation to consider, and to provide, a 'less restrictive alternative,' in the absence of an affirmative request for such assistance . . . [and] *Olmstead* held that the State violated the ADA by not affirmatively taking steps to transfer the individual to the alternative setting, in the absence of 'opposition' by the individual and in the absence of a 'fundamental alteration' defense." Brief for the States of Connecticut, Arkansas, Tennessee, Utah, and Wyoming, as Amici Curiae, p. 20-21, *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012).

"statutory duty to consider the appropriateness of community placement" regardless of whether it was affirmatively requested).[7]

The Complaint Sufficiently Alleges Causation

The State argues that the United States must allege that the State's actions and failures are a "but-for" cause of children's unnecessary institutionalization and risk of institutionalization (Mot. at 9, 13). The Amended Complaint pleads detailed facts showing how the State's limits on the availability of specific community-based services and programs cause children's unnecessary admission to nursing facilities, and place other children at serious risk of nursing facility placement. Namely, the State's policies limiting children's access to in-home nursing services required by Medicaid to be provided to Medicaid-eligible children, and failure to maintain necessary capacity of in-home nursing services, have caused children who could have lived at home with adequate services to be admitted to and remain in nursing facilities, and has placed other children at risk of nursing facility placement. Am. Compl. ¶¶ 6, 7, 43-44, 46-51, 54-61, 86. The State's iBudget waiver waitlist has caused many eligible children with complex medical needs to wait for years to receive waiver services in their communities. *Id.* ¶¶ 66-68. The State's failure to provide adequate access to Medical Foster Care means that many children with complex medical needs have been placed and remain in nursing facilities. *Id.* ¶¶ 70-75. And the State's failure to provide children and their families effective pre-admission assessments, individualized and effective care coordination, and discharge planning, has resulted in unnecessary and prolonged institutionalization. *Id.* ¶¶ 76-83. To the extent the State takes issue with the truth of these allegations, such a determination would be premature at the motion to dismiss stage.

The United States has alleged the causation Title II requires—that the discrimination be "by reason of . . . disability," 42 U.S.C. § 12132. This causation requirement is already baked

[7] In particular, the United States has alleged that some of the Institutionalized Children are in the custody of the State. *See* Am. Compl. ¶ 75. The State is especially on notice of such children's need for accommodation, and right to receive services in the most integrated setting appropriate to their needs, and it would be unclear how the State would both request integrated placement for these children and refuse it.

into the elements of an *Olmstead* action and need not be separately pleaded.[8] In *Olmstead*, the Supreme Court explicitly held that unnecessary institutionalization *is* discrimination "by reason of" disability. 527 U.S. at 598-601. The Court explained how this is so: "In order to receive needed medical services, persons with mental disabilities must, *because of those disabilities*, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without disabilities can receive the medical services they need without similar sacrifice." *Id.* at 601 (emphasis added).

There is no statutory basis for *also* requiring, as Florida would, proof that the *State's actions* are a but-for cause of the institutionalization.[9] The D.C. Circuit held as much in a recent appeal of a bench trial decision in an *Olmstead* class action. Rejecting the District Court's finding that plaintiffs, residents of nursing homes who wished to transition to their communities, had to separately show that the public entity caused their institutionalizations through specific systemic deficiencies, the Court of Appeals held: "treating individuals in institutions when they wish to and could be treated in the community *is* discrimination *because of* disability . . . Members of the class have thus already proven causation." *Brown*, 928 F.3d at 1087 (emphasis in original). Likewise, here, the United States' allegations that the Institutionalized and At-Risk Children are appropriate for community placement, their parents and guardians do not oppose it, and such placement can be reasonably accommodated, sufficiently plead discrimination "by reason of" disability.

CONCLUSION

[8] It should also be noted that "but-for" causation is the incorrect standard in this context. *M.R. v. Dreyfus*, 697 F.3d 706, 728, 729 (9th Cir. 2012); *Murphy v. Harpstead*, 421 F. Supp. 3d 695, 716 (D. Minn. 2019).

[9] All but one of the cases the State relies on are inapposite because they do not involve *Olmstead* claims. *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020) (race discrimination claim under 42 U.S.C. § 1981); *Holly v. Clairson Indus., LLC*, 492 F.3d 1247, 1249, 1263 n.17 (11th Cir. 2007) (employment action); *McNely v. Ocala Star-Banner Corp*., 99 F.3d 1068, 1069 (11th Cir. 1996) (same). *McNely*, moreover, is "no longer the law of the Eleventh Circuit" with respect to its "but-for" analysis. *Hendon v. Kamtek, Inc*., 117 F. Supp. 3d 1325, 1333 (N.D. Ala. 2015). The State cites one integration case to support its causation argument, *Thorpe v. District of Columbia*, 303 F.R.D. 120 (D.D.C. 2014). This case was later re-captioned as *Brown v. District of Columbia*, 322 F.R.D. 51 n.1 (D.D.C. 2017), *rev'd and remanded,* 928 F.3d 1070 (D.C. Cir. 2019), and, as explained *infra*, the D.C. Circuit rejected the District Court's approach to causation in the case. 928 F.3d at 1087.

For the above reasons, the United States respectfully requests that the Court deny the State's motion to dismiss. In the alternative, should the Court grant the State's motion, the United States respectfully requests leave to amend.

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