

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. _____

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF FLORIDA,

Defendant.

COMPLAINT

INTRODUCTION

1. Nearly two hundred children with disabilities in Florida are segregated unnecessarily in nursing facilities. Many young adults, who entered nursing facilities as children and grew up in these institutions, remain unnecessarily segregated from their communities.¹ As a result of limitations on community-based services and deficient assessment and transition planning processes, the Institutionalized Children have spent their formative years separated from their families and apart from their communities, often very far from home.

2. Unnecessary institutionalization denies children the full opportunity to develop and maintain 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 that contribute to child development.

3. Other children with significant medical needs who reside in the community and receive

¹ These institutionalized children and young adults are collectively referred to hereinafter as the “Institutionalized Children.”

private duty nursing or personal care services have also been harmed by policies and practices limiting community-based services.² Many have faced repeated service reductions and lengthy and unduly burdensome recertification processes that place them at serious risk of unnecessary institutionalization.

4. The United States brings this action against the State to enforce the rights of children with significant medical needs to receive services in the most integrated setting appropriate to their needs. The State discriminates against children and young adults with disabilities by administering and funding its programs and services for these individuals in a manner that has resulted in their prolonged and unnecessary institutionalization in nursing facilities or placed them at risk of such institutionalization in violation of title II of the Americans with Disabilities Act of 1990 (the “ADA”), 42 U.S.C. § 12131-12134. Such unjustified isolation and segregation of persons with disabilities violates the ADA’s mandate that public entities “administer services programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d); *see also* 42 U.S.C. § 12132; *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999).

5. The United States Department of Justice (the “Department”) provided notice to the State in September 2012 that, after a six-month investigation, it had found the State in violation of title II of the ADA based on the unjustified segregation of the Institutionalized Children and on having and enforcing policies and practices that place other children with disabilities at serious risk of institutionalization. While the State, since the issuance of the Department’s Findings Letter, altered some policies that have contributed to the segregation of children with significant medical needs, violations of the ADA remain ongoing. Nearly two hundred children remain

² These children are collectively referred to hereinafter as the “At-Risk Children.”

unnecessarily segregated in nursing facilities. The State's transition planning processes are deficient, and barriers to community placement persist. For several months, the United States has engaged in good faith negotiations with the State to resolve the violations identified in its Findings Letter. The United States has determined that compliance cannot be achieved through voluntary means.

JURISDICTION

6. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1345, because it involves claims arising under federal law. *See* 42 U.S.C. § 12133. The Court may grant the relief sought in this action pursuant to 28 U.S.C. §§ 2201-02.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because a substantial part of the acts and omissions giving rise to this action occurred in the Southern District of Florida. 28 U.S.C. § 1391(b).

PARTIES

8. Plaintiff is the United States of America and brings this action to protect the rights of the Institutionalized and At-Risk Children, who are persons with disabilities under the ADA.

9. Defendant, the State of Florida, is a "public entity" within the meaning of the ADA, 42 U.S.C. § 12131(1), and is therefore subject to title II of the ADA, 42 U.S.C. § 12131 *et seq.*, and its implementing regulations, 28 C.F.R. Part 35.

10. The State administers and funds services for children with significant medical needs through various agencies and departments.

11. Florida's Agency for Health Care Administration ("AHCA") is responsible for administering the State's Medicaid Program under Title XIX of the Social Security Act. *See* Fla. Stat. §§ 20.42, 409.902. Pursuant to the Early and Periodic Screening, Diagnostic and Treatment

(“EPSDT”) requirements of the Medicaid Act, AHCA is responsible for ensuring the availability of all medically necessary services coverable under a Medicaid State Plan for categorically Medicaid-eligible individuals under the age of twenty-one, including home health services such as private duty nursing or personal care services, therapies such as physical or occupational therapies, and other medically necessary services. *See* 42 U.S.C. §§ 1396a(a)(43), 1396d(a), 1396d(r)(5).

12. The Florida Agency for Persons with Disabilities (“APD”) administers the State’s Home and Community-Based Services (“HCBS”) waiver programs³ for individuals with developmental disabilities. *See* Fla. Stat. § 20.197.

13. The State’s Department of Health (“DOH”) and AHCA administer a number of other HCBS waiver programs for individuals with traumatic brain injuries or other specific diagnoses. *See generally* Fla. Admin. Code R. 59G-13.

14. The State’s Children’s Medical Services Program (“FLCMS”), within DOH, has lead responsibility for facilitating collaboration with AHCA and APD to arrange for long-term care services for children with certain special health care needs,⁴ including those with medically complex and/or medically fragile conditions.⁵ *See* Fla. Stat. §§ 20.43, 391.016, 391.021(2),

³ Section 1915(c) of the Medicaid Act permits states to request waiver of certain requirements of the Medicaid Act to offer a variety of community-based services and supports to individuals with disabilities. *See* 42 U.S.C. § 1396n(c).

⁴ A child with “special health care needs” is any child “younger than 21 years of age who [has] chronic and serious physical, developmental, behavioral, or emotional conditions and who require[s] health care and related services of a type or amount beyond that which is generally required by children.” Fla. Stat. § 391.021(2).

⁵ According to Florida law, “medically fragile” means a person who is “medically complex and whose medical condition is of such a nature that he is technologically dependent, requiring medical apparatus or procedures to sustain life, e.g., requires total parenteral nutrition (TPN), is ventilator dependant, or is dependent on a heightened level of medical supervision to sustain life,

391.026.

15. Florida’s Department of Children and Families (“DCF”) administers the State’s foster care system, including determining the placement of children with significant medical needs in the custody of the State. Fla. Stat. §§ 20.19, 39.811, 409.145.

16. DCF, in coordination with AHCA and FLCMS, also funds and administers Medical Foster Care, a statewide program to provide family-based care for medically complex and medically fragile children under the age of twenty-one who have been determined to be unable to safely receive care in their own homes.

STATUTORY AND REGULATORY BACKGROUND

17. Congress enacted the ADA in 1990 “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). It found 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).

18. For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities: “[N]o 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.” *Id.* § 12132.

and without such services is likely to expire without warning. Fla. Admin. Code R. 59G-1.010 (165). “‘Medically complex’ means that a person has chronic debilitating diseases or conditions of one (1) or more physiological or organ systems that generally make the person dependent upon twenty-four (24) hour-per-day medical, nursing, or health supervision or intervention.” Fla. Admin. Code R. 59G-1.010(164).

19. Title II of the ADA prohibits discrimination on the basis of disability by public entities. This encompasses the State of Florida, its agencies, and its system of services for children with disabilities, because a “public entity” includes any state or local government, as well as any department, agency, or other instrumentality of a state or local government, and it applies to all services, programs, and activities provided or made available by public entities, such as through contractual, licensing, or other arrangements. *Id.* § 12131(1); 28 C.F.R. § 35.130(b)(3)(i).

20. Congress directed the Attorney General to issue regulations implementing title II of the ADA. *Id.* § 12134. The title II regulations require public entities 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).

21. The preamble discussion of the ADA’s “integration regulation” explains that “the most integrated setting” is one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible” 28 C.F.R. § 35.130(d), App. B., at 673 (2011).

22. Regulations implementing title II of the ADA further prohibit public entities from utilizing “criteria or methods of administration” that have the effect of subjecting qualified individuals with disabilities to discrimination or “[t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the entity’s program with respect to individuals with disabilities” 28 C.F. R. § 35.130(b)(3).

23. In *Olmstead*, the Supreme Court held that title II prohibits the unjustified segregation of individuals with disabilities. 527 U.S. at 597. The Court explained that its holding “reflects two evident judgments.” *Id.* at 600. “First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.” *Id.* “Second, 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.

24. Under *Olmstead*, public entities are required to provide community-based services when (a) such services are appropriate, (b) the affected persons do not oppose community-based treatment, and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities. *Id.* at 607.

FACTUAL ALLEGATIONS

A. Nearly Two Hundred Children with Disabilities Reside in Segregated Nursing Facilities in Florida

25. Nearly two hundred Institutionalized Children reside in segregated, institutional nursing facilities.

26. The Institutionalized Children spend most of their days residing in shared rooms with other individuals with disabilities, participating in meals and activities with other individuals with disabilities, and having only limited interaction with individuals without disabilities. Many of the residents’ families live in other areas of the State, leaving the children hundreds of miles from family and loved ones.

27. Educational services for many of these children consist of classes in an activity room within the nursing facility. Others are transported from their facilities to programs in their local school districts, but because they are institutionalized, they are unable to fully enjoy the benefits of education in the community.

28. The interiors of these facilities resemble hospitals—housing children in rooms with at least one, and sometimes up to three, other individuals. Some facilities house upwards of three

hundred residents, including children, young adults, and elderly individuals.

29. Institutionalization does not provide the stimulation and variety of interactions that occur in the community—the kind of interactions that contribute to the full development of a child or young adult. Indeed, residents’ choices regarding how they spend their day appear severely limited. A March 2013 report by AHCA, for example, found during an unannounced visit to one facility that several pediatric residents were not provided “meaningful, chronological age and developmentally appropriate structured activities,” the lack of which “could result in extended periods of time without stimulation and learning opportunities.” The report noted an instance in which a teenage resident had asked staff to assist him in leaving his room in his wheelchair. The staff escorted him to an activity area where he was placed next to three infants and toddlers listening to nursery rhymes. No staff member was observed providing meaningful activities to these residents.

30. A July 2012 report by AHCA after an unannounced site visit to another facility found seventeen children collected in one activity area with only one staff member overseeing their care. A subsequent State report in December 2012 regarding the same facility found that the facility had failed to arrange for face-to-face physician visits (as required by State law) for a significant number of children for a period of several months, placing the children in ongoing and immediate jeopardy. Most of the facility’s pediatric residents were subsequently transferred to another nursing facility in early 2013, even though they would have benefitted from movement to a more integrated, community-based setting.

B. The State’s Administration of Its Service System Has Caused Unnecessary Segregation of Children in Nursing Facilities and Placed Others At Risk of Unnecessary Institutionalization

31. Numerous policies, practices, and actions by the State have led to the unnecessary segregation of the Institutionalized Children and placed many other children with significant medical needs at risk of unnecessary institutionalization. Over the course of the last decade, the State has limited the availability of many community-based services for children with significant medical needs. It has done so by: (1) enacting policies and engaging in practices that have resulted in the denial or reduction of medically necessary services; (2) failing to provide sufficient reimbursement rates for in-home nursing services; (3) failing to ensure sufficient capacity in its HCBS waiver programs; and (4) failing to ensure there is sufficient capacity in non-institutional, out-of-home settings that are able to serve children with significant medical needs. It has also failed to effectively administer programs designed to prevent inappropriate nursing facility admissions, and it has not meaningfully offered Institutionalized Children opportunities to return to the community.

i. Denial or Reduction of Medically Necessary Services

32. The State has in recent years unduly restricted the availability of many in-home services for children with significant medical needs through the application of a state regulation that requires Medicaid services to “[b]e furnished in a manner not primarily intended for the convenience of the recipient, the recipient’s caretaker, or the provider.” *See Fla. Admin. Code R. 59G-1.010(166)*. Until recently, the State’s service manuals defining private duty nursing instructed that in-home nursing services would be “reduced over time” as parents (or other members of the household, including siblings and grandparents) learned to perform skilled medical interventions on their children.

33. The State used this requirement to deny services that were prescribed by children's treating physicians and to compel parents and other family members (including siblings and grandparents) to provide care that is medically necessary and which should have been provided through services covered by the State.

34. Additionally, from 2010 until 2013, the State required children with significant medical needs to enroll in Prescribed Pediatric Extended Care ("PPEC") services (a congregate day program) instead of private duty nursing, even though the children were qualified for in-home nursing. The State offered private duty nursing as a supplemental service only.

35. A number of children were placed or remain in nursing facilities as a result of the State's limits on in-home services, or failure to provide such services. Families who have attempted to care for children with significant medical needs at home have not been provided in-home services that would have enabled them to safely care for their children at home. As a result, they have had no meaningful choice but to place their child in a nursing facility to receive necessary care. For example, one mother placed her teenage child in a nursing facility after she had requested private duty nursing services at home but was told that that the care would decrease over time and would eventually stop. Another family admitted their child to a facility after the State reduced the in-home health care it provided the child by fifty percent, from four hours per day to two. The child's family determined they would be unable to safely provide care to make up for the reduction in supports and felt they had no choice but to admit their child to a nursing facility. The mother of another child with significant medical needs attempted to arrange for in-home nursing services through the State's Medicaid program but was offered only three hours per day of care by the State. Because she was unable to safely provide care to supplement the hours offered by the State, she had no choice but to place the child in a nursing facility. Each of

these children remains in a nursing facility.

36. Families of Institutionalized Children have been told that if they bring their children home they will face gradual reductions in hours of in-home services, or that their children will not have access to the same types of therapies or other services that their children receive in nursing facilities.

37. Other children with significant medical needs have been placed at serious risk of unnecessary institutionalization as a result of these practices. For example, one child with significant medical needs currently lives at home with in-home supports provide by the State. In 2012, the State reduced the child's in-home health care by fifty percent to four hours per day. Since the reduction in services, the child's physical and emotional conditions have deteriorated. Her parents do not want to place her in a nursing facility, but fear that they may need to in order to obtain necessary services.

38. As frequently as every six months, families of children whose prescribed services have been denied must proceed through lengthy and unduly burdensome reconsideration and appeals processes to ensure their children receive the care they need. When services have been reduced without appropriate consideration of the child's needs, such processes unnecessarily impinge on caregivers' ability go to work, care for their children, and conduct other family business, such that their children are placed at serious risk of institutionalization.

39. Even after their families have appealed such reductions or denials, children do not always receive a restoration of hours in the amount that is necessary to safely keep them in the community. As a result of prolonged reductions in services, some children's physical and emotional conditions have deteriorated.

ii. Stagnant Reimbursement Rates for Home Health Services

40. Medicaid home health reimbursement rates, including rates paid for private duty nursing, remain at the same level as those paid by the State in 1987.

41. In 2007, AHCA reported to the legislature that, due to insufficient reimbursement rates, providers of home health services had indicated they would be unable to continue providing services to Medicaid beneficiaries. Another AHCA report that year stated that “many Medicaid beneficiaries state they are unable to access state plan [home health] services due to low rates.”

42. In 2008, a similar request for increased funding noted that AHCA “has documented growing numbers of home health agency providers who have stated . . . they will be incapable of continuing to provide services to Medicaid beneficiaries” due to insufficient reimbursement rates.

43. The State reduced funding for private duty nursing services by approximately six million dollars in 2010.

44. Insufficient reimbursement rates have resulted in shortages of nursing services in certain parts of the State and, upon information and belief, have contributed to the unnecessary institutionalization of children with significant medical needs.

45. While it has reduced or limited the availability of community-based services, the State has increased funding for nursing facility care for children with significant medical needs.

46. Since January 2004, the daily supplemental rate paid to facilities serving medically fragile children has increased by more than 28%. Using State and federal dollars, AHCA pays an enhanced rate of up to approximately \$550 per day to nursing facilities for each of the Institutionalized Children.

47. The State's reductions and limitations to in-home care coincide with a rise in the number of children placed in nursing facilities. A 2004 State report, for example, indicated that approximately 136 nursing facility beds were designated to serve children. In September 2012, there were more than two hundred children in nursing facilities, and a substantial number of adults who entered nursing facilities as children and remain institutionalized. Indeed, in 2011, at the request of one nursing facility serving children, the State removed a regulatory ceiling that had previously limited the number of children served at a nursing facility to sixty.

iii. Insufficient Capacity in HCBS Waiver Programs

48. Most of the Institutionalized Children and At-Risk Children are eligible for services in Florida's HCBS waiver programs, including the waiver for persons with developmental disabilities. Services available through these programs include environmental accessibility adaptations to homes or apartments (*i.e.*, home modifications), respite care, and funding to support individuals who live in community-based settings other than their family home. Most of these programs have lengthy waiting lists. Since July 2005, for example, the number of individuals on the waiting list for services under the State's HCBS waiver program for individuals with developmental disabilities has grown from 14,629 to nearly 22,000 in September 2012, and more than half of the individuals on the list have waited for five years or more. Only individuals deemed to be in "crisis" are given priority for admission to the waiver from the waiting list, but even these individuals are not always able to enroll in the waiver program due to lack of funding.

49. Children who would benefit from receipt of waiver services have entered nursing facilities instead, due to the lengthy waiting list for services. For example, the family of one child with significant medical needs moved to Florida from another state in 2010. Although the

child received community-based services through an HCBS waiver program in the family's former state, the child was unable to enroll in Florida's waiver program because of the significant waiting list for services. The child's family spent thousands of dollars attempting to care for the child in the community, but in 2011 they felt they had no choice but to place the child in a nursing facility to access necessary services. Another child has been on the waiting list for the State's HCBS waiver program since at least 2006, when the child was admitted to a nursing facility. In May 2013, the child's family received a notice that they remained on the waiting list and that there were no funds to enable the child to enroll in the waiver program.

50. In 2013, for the first time in eight years, the State provided additional funding for this waiver program. Although the State has provided additional funding for the 2013-14 fiscal year, according to State reports, the additional funding will only permit fewer than five percent of people on the waiting list to enroll in the program.

51. Despite the growth in demand for services, the number of individuals actually enrolled in these programs has decreased by several thousand in the last several years.

52. In addition to facing lengthy waiting lists, families of children who would benefit from services available under the State's HCBS waiver programs have not been sufficiently informed of their availability.

53. Children have remained in nursing facilities for years while waiting to be enrolled in waiver programs. As recently as May 2013, families of Institutionalized Children have received notices that they remain on a waiting list for services through the State's HCBS waiver program for individuals with developmental disabilities, and that there is insufficient funding to enroll them in the waiver. Some of these children have been waiting for five years or more.

iv. Lack of Sufficient Community-Based Alternatives

54. The State has also failed to offer out-of-home, non-institutional settings in which to provide care for children with significant medical needs.

55. There are currently very few providers of care to children with significant medical needs in out-of-home non-institutional settings.

56. The State's Medical Foster Care program offers care in a family-based setting. The purpose of the Medical Foster Care program is "[t]o enhance the quality of life for medically complex and medically fragile foster children, allowing them to develop to their fullest potential . . . [and to] provide a family-based, individualized, therapeutic milieu of licensed medical foster homes to reduce the high cost of long-term institutionalization of medically complex and medically fragile foster children." See DOH, DCF, & AHCA, *Medical Foster Care Statewide Operational Plan*, at 1-1 (2009). Medical Foster Care is not available, however, unless a parent or guardian has lost custody of their child to DCF.

57. In the past, as many as 20% of children in nursing facilities were in the State's custody. Currently, approximately 10% of the Institutionalized Children are in the State's custody and are eligible for Medical Foster Care services. They have nonetheless been institutionalized for years in nursing facilities because of the State's administration of its Medical Foster Care program. For example, the State placed one child with significant medical needs in a nursing facility in 1997 when the child was one year old. The child remained in a facility until the age of sixteen, when in the fall of 2012 the State undertook to place the child in the community. Although the child would have benefitted from placement in the community, the child remained institutionalized for more than a decade and a half.

v. *Deficient Admission and Transition Planning Processes*

58. For individuals under the age of twenty-one, admission to a nursing facility and Medicaid reimbursement for services provided in a nursing facility requires the recommendation of a Children's Multidisciplinary Assessment Team ("CMAT"). *See* Fla. Admin. Code R. 59A-4.1295(3)(b).

59. Collectively, representatives from AHCA, APD, DOH, FLCMS, and DCF participate in the CMAT, which convenes for each eligible child under the age of twenty-one identified as medically fragile or medically complex and needing certain long-term care services.

60. The federal Nursing Home Reform Act requires states to develop and implement a pre-admission screening program, known as "PASRR," for all Medicaid-certified nursing facilities. 42 U.S.C. § 1396r(e)(7); 42 C.F.R. §§ 483.100 to 483.138. State regulations task the CMAT with administering a first level screening (known as a "PASRR Level I") prior to the admission of each child to a nursing facility. *See* Fla. Admin. Code R. 59A-4.1295 (3).

61. For individuals identified through a PASRR Level I as possibly having an intellectual disability or a related condition, APD is required to conduct a second level PASRR review (a "PASRR Level II"). PASRR Level II is supposed to determine whether "the individual's total needs are such that his or her needs can be met in an appropriate community setting" and "if [nursing facility] services are recommended, . . . the specific services which are required to meet the evaluated individual's needs" *See* 42 C.F.R. §§ 483.128(i)(3), 483.132(a)(1). The PASRR Level II Review is supposed to occur before the child is admitted to a nursing facility, and within seven days of receiving a referral from a CMAT.

62. The State has failed to take appropriate measures to ensure that children who are entering nursing facilities are considered for alternative placements in a timely manner.

63. Moreover, a substantial number of the Institutionalized Children were admitted to nursing facilities without having been fully screened through the State's PASRR program. Some Institutionalized Children did not receive a full PASRR screening until years after they had entered the facility, including a number of children in the custody of the State. For example, one child was admitted to a nursing facility in early 2010, was not referred to a PASSR Level II until late 2011, and no Level II Review occurred until early 2013. Another child was admitted to a nursing facility in 2006 and, despite receiving a Level I PASSR screen that indicated a history of intellectual disability, he did not receive a Level II Review until 2013. A child in the custody of the State was placed in a nursing facility in 2006 shortly before the child's fourth birthday. A Level I PASRR assessment indicated the possibility of an intellectual disability at the time of admission, but a Level II review was not performed until six years later. Similarly, another child in the State's custody was admitted to a nursing facility in 2005 at the age of six. A Level I PASRR Assessment indicated the possibility of an intellectual disability, but a Level II Review was not performed until 2012. The State admitted another child in its custody to a nursing facility in 2007, and although a Level I PASSR screen indicated the possibility of an intellectual disability, it does not appear that a Level II review was ever performed.

64. State documents indicate that to the extent the State initiated Level II PASRR reviews for Institutionalized Children following the United States' issuance of its Findings Letter, many of these reviews found that the Institutionalized Children could be served in their family home or other community-based settings. Rather than effectively connecting children to these services, however, a substantial number of these assessments indicate that the State did no more than leave a packet of information regarding community-based services at the nursing facility, or suggest enrolling the child in a waiting list for services.

vi. *Failure to Offer Meaningful Opportunities to Move to the Community*

65. Many children who have been inappropriately admitted to a nursing facility have remained there for years because the State has not presented meaningful opportunities for them to move to the community.

66. After a child has been placed in a nursing facility, his or her continued stay is contingent upon the State's recommendation and approval through the CMAT process. The CMAT must evaluate the need for continued placement in the facility after a child has been in the facility for six months. Thereafter, the State requires the CMAT to conduct a follow-up meeting annually to re-assess the child's status. More frequent meetings are required if there is a significant change in the child's clinical status or if a meeting is requested.

67. Many of the Institutionalized Children remain in facilities for very long periods of time, even when it is apparent that their medical conditions would permit return to the community with appropriate supports. The continued stay of most of these children is the direct result of the State's failure to actively identify more integrated service options for them.

68. Because the State fails to ensure the Institutionalized Children are considered for placement in the community, many have spent much or all of their childhoods in a facility and remain there into adulthood. One young man, for example, remains in a nursing facility at the age of twenty even though a recent State assessment determined that placement in a nursing facility "is not the most appropriate placement" and that other community-based services could effectively meet his needs. Some young adults have been transferred to different wards of the facilities after their twenty-first birthdays and housed among elderly residents. Others have been transferred to other facilities, sometimes in a different part of the State.

69. Without meaningful transition planning and effective access to community-based

alternatives to institutional care, it is likely that many of the Institutionalized Children will remain in nursing facilities for most or all of their lives.

C. The Institutionalized Children, and Those In the Community At Serious Risk of Institutionalization, are Qualified to Receive Services in More Integrated Settings and They and Their Families Would Not Oppose Placement in Such Settings

70. The Institutionalized Children could be served in more integrated settings, and their families, if presented a meaningful opportunity to do so, would choose for them to grow up at home or in other settings that foster their full development and that do not segregate them from the community.

71. The State has shown that it is possible to serve children with significant medical needs in the community through services that already exist within its system. The Institutionalized Children's needs are generally no different than those of children and young adults receiving services in more integrated community-based settings. With reasonable modifications, these services permit the Institutionalized Children to be reunited with their families or live in other community-based settings.

D. Providing Services in Integrated Settings Can be Accommodated Through Reasonable Modifications to the State's Existing Services

72. The actions needed to remedy the State's ADA violations described in this Complaint could be achieved through reasonable modifications of the State's service system.

73. The types of services that already exist in the State's service system would be able, with reasonable modifications, to meet the needs of the Institutionalized and At-Risk Children. These services include private duty nursing; personal care services; home health services; respite services; crisis services; home and environmental modifications; specialized medical equipment and supplies; intensive care coordination; transportation; nutrition counseling; dietary

supplements; family training; behavioral/psychiatric services; habilitation services; and occupational, physical, speech and respiratory therapies.

74. The State is independently obligated to provide many of these services to Medicaid-eligible children pursuant to the EPSDT requirements of the Medicaid Act. 42 U.S.C. §§ 1396a(a)(43), 1396d(a)(4), 1396d(r)(1)-(5). The State is also obligated under the PASRR requirements of the Medicaid Act to ensure individuals with disabilities are adequately screened before entry to a nursing facility to determine whether and what community-based services would be appropriate, and to provide specialized services appropriate to meet their needs. *See* 42 U.S.C. § 1396r(e)(7); 42 C.F.R. §§ 483.100-38.

75. Supporting children with medical needs in the community is a cost-effective alternative to institutionalization. The State has admitted that providing nursing services to children with significant medical needs in the community is less costly than doing so in institutional settings.

UNITED STATES DEPARTMENT OF JUSTICE INVESTIGATION

76. In December 2011 the Department formally opened an investigation regarding the alleged unnecessary segregation of the Institutionalized Children and State policies and practices allegedly causing other children with disabilities to be at risk of nursing facility placement.

77. In a September 2012 Findings Letter, the Department reported that it had found the State in violation of the ADA because it planned, administered, and funded its system of services for children with disabilities in a manner that results in the unnecessary institutionalization of hundreds of children in nursing facilities. The Findings Letter identified numerous remedial measures the State could take to comply with federal law, and further advised the State that, in the event a resolution could not be reached voluntarily, the United States Attorney General may initiate a lawsuit pursuant to the ADA.

78. The United States has since November 2012 met multiple times with State officials in a good faith effort to achieve resolution of the violations identified in the Findings Letter. The Department has determined that compliance with the ADA cannot be secured by voluntary means.

VIOLATION OF TITLE II OF THE ADA, 42 U.S.C. §§ 12131 et seq.

79. The allegations of Paragraphs 1 through 78 of this Complaint are hereby realleged and incorporated by reference.

80. Defendant, the State of Florida, is a public entity subject to title II of the ADA, 42 U.S.C. § 12131(1).

81. The Institutionalized and At-Risk Children are persons with disabilities covered by title II of the ADA, and they are qualified to participate in Defendant's programs, services and activities, including home and community-based services. 42 U.S.C. §§ 12102, 12131(2).

82. Defendant violates the ADA by administering its service system for children with disabilities in a manner that fails to ensure the Institutionalized and At-Risk Children receive services in the most integrated setting appropriate to their needs and by failing to reasonably modify policies, practices and procedures to avoid such discrimination and unnecessary segregation. 42 U.S.C. § 12132.

83. Defendant's actions constitute discrimination in violation of title II of the ADA, 42 U.S.C. § 12132, and its implementing regulations at 28 C.F.R. Part 35

84. Providing services to the Institutionalized and At-Risk Children in more integrated settings can be accomplished with reasonable modifications to the Defendant's programs and services.

85. The State has acted with deliberate indifference to the injuries suffered by the

Institutionalized and At-Risk Children.

86. All conditions precedent to the filing of this Complaint have occurred or been performed.

PRAYER FOR RELIEF

WHEREFORE, the United States of America prays that the Court:

- (A) Grant judgment in favor of the United States on its Complaint and declare that the Defendant has violated title II of the ADA, 42 U.S.C. § 12131 *et seq.*
- (B) Enjoin Defendant from:
 - 1. failing to provide appropriate, integrated community-based services and supports to the Institutionalized and At-Risk Children consistent with their individual needs;
 - 2. discriminating against the Institutionalized and At-Risk Children by failing to provide services and supports in the most integrated setting appropriate to their needs;
 - 3. failing or refusing to take such steps as may be necessary to restore, as nearly as practicable, the Institutionalized Children to the position they would have been in but for the discriminatory conduct; and
 - 4. failing or refusing to take such steps as may be necessary to prevent the recurrence of any discriminatory conduct in the future and to eliminate the effects of Defendant's unlawful conduct;
- (C) Issue a declaratory judgment declaring that Defendant has violated title II of the ADA by failing to make reasonable modifications to its programs for the Institutionalized and At-Risk Children to enable them to obtain services and supports they require to live in the most integrated setting appropriate to their needs;

- (D) Award compensatory damages in an appropriate amount to the Institutionalized Children for injuries suffered as a result of the defendant's failure to ensure compliance with the requirements of title II of the ADA, 42 U.S.C. §§ 12131 *et seq.*
- (E) Order such other appropriate relief as the interests of justice may require.

Dated: July 22, 2013

Respectfully submitted,

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