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United States District Court, S.D. Florida,
Fort Lauderdale Division.

A.R., by and through her next friend, Susan Root, et al., Plaintiffs,
v.
Elizabeth DUDEK, in her official capacity as Secretary of the Agency for Health Care Administration, et al., Defendants.
United States of America, Plaintiff,
v.
State of Florida, Defendant.

CASE NO. 12-60460-CIV-ZLOCH/HUNT
|
Signed 06/09/2016

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REPORT & RECOMMENDATION ON FLORIDA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

PATRICK M. HUNT, UNITED STATES MAGISTRATE JUDGE

***1** This matter is before this Court on Florida's Motion for Partial Summary Judgment, filed March 21, 2016. ECF No. 454. The Honorable William J. Zloch previously referred this case to the undersigned for a report and recommendation concerning disposition of all dispositive motions. ECF No. 275;[1] *see also* 28 U.S.C. § 636(b); S.D. Fla. Mag. R. 1. Having carefully reviewed the Motion, the Response, the Reply, the supporting documents, the entire case file, and applicable law, having had the benefit of oral argument, and being otherwise fully advised in the premises, the undersigned hereby RECOMMENDS that Florida's Motion for Partial Summary Judgment, ECF No. 454, be GRANTED.

I. Background

This case involves the proper scope of the United States' authority to recover damages on behalf of nonparties under Title II of the Americans with Disabilities Act ("ADA") of 1990 based upon proof of a "systemic" *Olmstead* violation. Title II of the ADA prohibits discrimination by reason of disability by any public entity, including a State entity, that provides services, programs, or activities to any "qualified individual with a disability."[2] 42 U.S.C. § 12132; *see infra* note 15.

"In order to state a Title II claim, a plaintiff generally must prove (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability." *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1083 (11th Cir. 2007) (citing *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001)).

In *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), the United States Supreme Court agreed with the Eleventh Circuit Court of Appeals that "undue institutionalization qualifies as discrimination 'by reason of ... disability' " under Title II. *Id.* at 597–603; *L.C. by Zimring v. Olmstead*, 138 F.3d 893, 902 (11th Cir. 1998), *aff'd in part, vacated in part, remanded sub nom. Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). Respondents in *Olmstead*, two mentally retarded women who were voluntarily institutionalized in Georgia state-run

institutions, brought suit for injunctive relief against Georgia state officials. 527 U.S. at 593. They alleged a Title II violation after the State failed to place them in a community-based program, despite a finding by their treating physicians that such placement was appropriate. *Id.* at 593–94. The State "resisted court intervention," however, "on the ground that immediate transfers in cases of this order would 'fundamentally alter' the State's activity." *Id.* at 594.

***2** The Supreme Court held that when three conditions are satisfied, Title II's discrimination proscription "requires" the placement of persons with mental disabilities in community settings, rather than in institutions. *Id.* at 587, 607. Those conditions are met when: (1) "the State's treatment professionals have determined that community placement is appropriate"; (2) "the transfer from institutional care to a less restrictive setting is not opposed by the affected individual"; and (3) "the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Id.*

On March 13, 2012, in this case, ten qualified individuals—T.H., L.J., A.G., A.C., A.R., C.V., M.D., C.M., B.M., and T.F. (collectively "Individual Plaintiffs")—sued several State of Florida officials (collectively "Defendants"),[3] alleging that Defendants discriminated against them in violation of Title II of the ADA, *inter alia*, "by denying medically necessary services in the community as a reasonable accommodation, resulting in [Individual] Plaintiffs ... being unnecessarily institutionalized or at risk of unnecessary institutionalization in nursing facilities." ECF No. 62 at 41; ECF No. 1; Case No. 12-60461, ECF No. 1. At that time, T.H., L.J., A.G., all of whom are children with severe medical disabilities, were institutionalized in one of Florida's three nursing facilities for children. ECF No. 62 at 5–6. Like the respondents in *Olmstead*, those named Plaintiffs sought injunctive relief that would require their placement in a community-based setting.[4] *See id.* at 45–46.

But, unlike the respondents in *Olmstead*, Individual Plaintiffs also seek relief for children alleged to be "at risk" of unnecessary institutionalization in one of Florida's nursing facilities. *Id.* at 3–4. "The at-risk children are those children who have similar severe disabilities as children in nursing facilities, but are provided care from nursing providers in their homes or in Prescribed Pediatric Extended Care (PPEC) centers." ECF No. 95 at 3. For example, although A.C., A.R., C.V., M.D., C.M., B.M., and T.F live at home, they are alleged to be at risk of unnecessary institutionalization in nursing facilities in part because they have previously been diagnosed as "medically fragile"[5] or are children in need of skilled care services via Florida's Medicaid program.[6] ECF No. 62 at 6.

***3** The Individual Plaintiffs filed this case as a putative class-action lawsuit, seeking system-wide declaratory and injunctive relief.[7] ECF Nos. 1, 95; ECF No. 329 at 3. Individual Plaintiffs subsequently filed a motion, twice renewed, to certify the following class: "All current and future Medicaid recipients in Florida under the age of 21, who are (1) institutionalized in nursing facilities, or (2) medically complex or fragile and at risk of institutionalization in nursing facilities." ECF No. 95 at 1 (emphasis omitted); *see also* ECF No. 220 at 2; ECF No. 329 at 2. At the beginning of this case, the first sub-class of Plaintiffs consisted of approximately 287 institutionalized individuals. ECF No. 95 at 19. The second sub-class of "at risk" Plaintiffs consisted of many more (approximately 3051).[8] *Id.* at 21.

Defendants objected to class certification on the ground that "the factual allegations in the Complaint and Motion show [Individual] Plaintiffs are actually attacking the medical necessity decisions as they are applied to each individual." ECF No. 113 at 9. In contrast, Individual Plaintiffs argued that "Defendants' failure to provide community-based services to medically complex children is the result of their illegal policies and practices, rather than isolated errors in the course of lawful activity." ECF No. 329 at 2. The Individual Plaintiffs further stated that "[t]he State of Florida has a long history of segregating medically fragile and complex children in institutions," ECF No. 95 at 4, and that "this is a systemic issue affecting thousands of medically complex and fragile children," ECF No. 329 at 2.

Meanwhile, the United States Department of Justice ("DOJ") was formally investigating allegations of unnecessary segregation and state policies and practices that lead to children being at risk of unnecessary institutionalization in the State of Florida.[9] Case No. 13-61576, ECF No. 1 (hereinafter U.S. Compl.) at 20. In September 2012, the DOJ issued a "scathing" Letter of Findings, stating that Florida was in violation of Title II's discrimination proscription and identifying several proposed remedial measures. ECF No. 468-22; ECF No. 454 at 2; *see* 28 C.F.R. § 35.172(c). Despite several subsequent meetings between the United States and State of Florida officials, the DOJ ultimately determined that Florida's compliance with the ADA could not be achieved by voluntary means. U.S. Compl. 21.

On July 22, 2013, the United States brought its own action in this district against the State of Florida, also alleging a "systemic" violation of Title II. *Id.* According

to the United States, it brought this action "to enforce the rights of children with significant medical needs to receive services in the most integrated setting appropriate to their needs" and "to protect the rights of the Institutionalized and At-Risk Children, who are persons with disabilities under the ADA."[10] *Id.* at 2, 3. Similar to the Individual Plaintiffs' Title II claim, the United States' Complaint alleges that Florida is discriminating against "Institutionalized and At-Risk Children" throughout the State "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." *Id.* at 21 (citing 42 U.S.C. § 12132).

***4** More specifically, the United States alleged that Florida has limited the availability of many community-based services for children with significant medical needs by "enacting policies and engaging in practices that have resulted in the denial or reduction of medically necessary services," *inter alia. Id.* at 9. For example, Florida allegedly ignored its federal obligation to conduct a Pre-Admission Screening and Resident Review ("PASRR") process for some children with significant medical needs before allowing them to enter institutions, thereby allowing nearly half of those it institutionalized to "fall through the cracks."[11] *Id.* at 16–17; ECF No. 467 at 7–8.

In its Prayer for Relief, the United States also asks for system-wide declaratory and injunctive relief. U.S. Compl. 22. But, unlike the Individual Plaintiffs, the United States additionally seeks "compensatory damages in an appropriate amount to the [nearly two hundred] Institutionalized Children for injuries suffered as a result of [Florida's] failure to ensure compliance with the requirements of [T]itle II of the ADA." *Id.* at 23; *see supra* note 10. The United States believes that damages are warranted "because of the truly egregious nature of the violation it found in this state." ECF No. 467 at 6.

The United States' "systemic" Title II claim is substantially the same as the Individual Plaintiffs'. Moreover, while brought in its own name, the United States' case was effectively brought on behalf of the same individuals identified in the Individual Plaintiffs' proposed class. *Compare* ECF No. 95 at 1, *with supra* note 10. On December 6, 2013, at the request of the Individual Plaintiffs, this Court consolidated both the Individual Plaintiffs' and the United States' actions, recognizing that both actions involve common, if not identical, questions of law and fact. ECF No. 215.

The undersigned subsequently recommended that the Individual Plaintiffs' Second Renewed Motion for Class Certification be denied.[12] ECF No. 395. In doing so, the undersigned noted the parties' conflicting characterization of the claims in this lawsuit:

> It is no surprise that Plaintiffs wish to paint with a broad brush on one canvas and Defendants wish to frame this case as smaller, distinct pictures. The reality is that Plaintiffs' claims are more akin to the art of pointillism. That is, the smaller pictures (or policies) that Defendants argue are not common to all members, could indeed be common to all members when they are juxtaposed and viewed together from a distance.

Id. at 23 (footnote omitted). While this observation was made in reference to the Individual Plaintiffs' claims, it applies with equal force to the United States'.

The undersigned went on to find that the proposed class "is simply too broad and over inclusive so as to be adequately defined." *Id.* at 13. Critical to the undersigned's finding was the understanding that "[t]he Court in *Olmstead* did not condemn institutionalization, it condemned *unnecessary* institutionalization."[13] *Id.* at 12. "As such," the undersigned stated, Individual "Plaintiffs' definition is over inclusive because it includes children who are unharmed by the policies alleged to be causing institutionalization and, thus, lack standing." *Id.* But, even when limited to "unnecessary" institutionalization, the undersigned found that Individual "Plaintiffs' definition is still too broad in scope and carries an amorphous 'at risk' indicator [that] is elusive and lacks objective criteria defining the class." *Id.* The undersigned's findings recognize that objectively identifying a class of unnecessarily institutionalized children and children "at risk" of unnecessary institutionalization in Florida would involve significant "individual inquiry." *See id.* at 10.

***5** Nevertheless, in the same Report and Recommendation, the undersigned found that there is sufficient commonality among the proposed class because all members are generally subject to the same policies and procedures applicable to Florida's administration of services to disabled children in Florida. *Id.* at 26. The undersigned stated, while the Individual Plaintiffs' claim

of systemic failure relies on an "amalgam of individualized policies," at least one of them (the convenience-of-the-caretaker standard) is generally applicable to the entire class. *Id.* However, the undersigned ultimately concluded that class certification was still unnecessary because if the Individual Plaintiffs prevail on their "systemic" claims for declaratory and injunctive relief, the resulting system-wide changes to Florida's administration of services to disabled children in Florida would certainly inure to the benefit of the proposed class. *Id.* at 15. Again, these observations are equally applicable to the United States' request for systemic relief as well.

On February 29, 2016, the Honorable William J. Zloch, United States District Court Judge, formally adopted the undersigned's reasoning and conclusions and declined to certify that class. ECF No. 448. The parties did not attempt to appeal that order. *See* Fed. R. Civ. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.").

At issue now—approximately four years into the consolidated lawsuit, and at the close of discovery—is the State of Florida's Motion for Partial Summary Judgment.[14] ECF No. 454; *see* ECF Nos. 387, 492. Therein, Florida does not directly contest the United States' or the Individual Plaintiffs' ability to prove a systemic violation of the ADA. Nor does Florida contest their entitlement to declaratory or injunctive relief. Rather, in the words of the United States, Florida raises "a series of scattershot objections to the United States' prayer for damages." ECF No. 467 at 12. For the reasons more fully set forth below, the undersigned finds that at least one of Florida's arguments hit the target.

II. Florida's Motion for Partial Summary Judgment

Florida's Motion for Partial Summary Judgment raises seven primary arguments. ECF No. 454. First, Florida argues that it is "entitled to summary judgment, child by child, as to all children for whom the United States cannot present individualized evidence of the nature and extent of any noneconomic harm." *Id.* at 4–7.

Second, Florida argues that the United States has no authority under Title II of the ADA to recover money damages on behalf of nonparties. *Id.* at 7–10.

Third, Florida argues that it "is entitled to summary judgment separately with respect to each individual child on whose behalf the United States claims damages because the United States cannot show that the parents or legal guardians of those children actually requested reasonable accommodations to enable their children to transition to more integrated settings, or that the State refused such requests for reasonable accommodations." *Id.* at 10–14.

Fourth, Florida argues that the United States "has no individualized evidence that the omission of a PASRR caused or contributed to a single child's institutionalization." *Id.* at 14–18. Thus, "[t]o the extent the United States seeks damages on the ground that the State did not perform a timely PASRR," Florida claims, "the State is entitled to summary judgment—child by child—unless the United States produces evidence of causation." *Id.* at 15.

Fifth, Florida argues that the United States "cannot adduce facts showing that the State acted with deliberate indifference in adopting and following its former policy of not performing PASRR screenings upon children under the age of three." *Id.* at 18–20. According to Florida, "that policy was implemented with the full knowledge and acquiescence of the federal Center for Medicare and Medicaid Services in the Department of Health and Human Services ('CMS'), which oversees and enforces the PASRR requirements of the Medicaid Act." *Id.* at 18.

***6** Sixth, Florida argues, the statute of limitations bars the United States' claims for damages on behalf of individuals whose damages claims accrued before July 22, 2010, which is three years prior to the date the United States filed its Complaint. *Id.* at 20–25. As claimed by Florida, the three-year statute of limitations specifically bars "any damages claim brought on behalf of (1) any person who was admitted to a nursing facility before July 22, 2010, and for whom the United States claims damages on the ground that a PASRR screening was not performed before admission to the nursing facility; and (2) any person who was discharged from a nursing facility before July 22, 2010." *Id.* at 20.

Lastly, Florida argues that the United States "cannot establish that the State violated the integration mandate or acted with deliberate indifference with respect to any child who resided in a nursing facility at the direction of a Florida dependency court." *Id.* at 25–28. According to Florida, "[c]hildren in state custody may be placed in facilities by court order, and the State has no authority to disobey such an order." *Id.* at 25.

If Florida's second argument concerning the United States' general authority to seek compensatory damages is

correct, this Court need not address Florida's other arguments concerning the United States' entitlement to damages for specific children in this case. Therefore, for the sake of logical reasoning and judicial economy, the undersigned will address Florida's second argument first. But, prior to that, the undersigned must briefly discuss the applicable standard of review and the statutory scheme at issue.

III. Motion for Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure 56(a), "[t]he court *shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphasis added). "The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (stating that there is no "requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim"). If that burden has been met, the burden shifts to the non-moving party "to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark*, 929 F.2d at 608.

IV. Title II of the ADA

A.

The ADA is the Federal Government's keystone piece of legislation enacted to prohibit discrimination against persons with disabilities. *See Olmstead*, 527 U.S. at 589 n.1. It "was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities." *Tennessee v. Lane*, 541 U.S. 509, 516 (2004). The stated purposes of the ADA are "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities ... [and] to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities," *inter alia.* 42 U.S.C. § 12101(b).

The ADA is divided into three main parts. Under Title I of the ADA, Congress set forth prohibitions against discrimination based on disability in employment. 42 U.S.C. §§ 12111–12117. Under Title II of the ADA, Congress set forth prohibitions against discrimination based on disability in public services furnished by governmental entities. 42 U.S.C. §§ 12131–65. Under Title III of the ADA, Congress set forth prohibitions against discrimination based on disability in public accommodations provided by private entities. 42 U.S.C. §§ 12181–89.

***7** Title II of the ADA is further divided into two subparts. Part A governs public services generally. 42 U.S.C. §§ 12131–34. Part B more specifically governs public transportation services. 42 U.S.C. §§ 12141–65. Both the Individual Plaintiffs' and the United States' claims are largely based on 42 U.S.C. § 12132 of Title II, Part A, which states 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."[15]

To give teeth to the ADA's discrimination proscriptions, within each of the three titles, Congress allocated regulatory responsibility to various federal agencies and provided a specific "Enforcement" provision. For example, within Title II, Congress instructed the Attorney General to issue regulations implementing the provisions of Title II, including § 12132's discrimination proscription, which the Attorney General did.[16] 42 U.S.C. § 12134(a); 28 C.F.R. pt. 35. In *Olmstead*, the Court's holding was substantially based on two of those regulations—the "integration regulation" and the "reasonable modifications regulation."[17] *See* 527 U.S. at 597 ("The Court of Appeals essentially upheld the Attorney General's construction of the ADA.... We affirm the Court of Appeals' decision in substantial part."). The former requires 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) (2010). The latter requires public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability," unless those modifications would entail a fundamental alteration of the nature of the service, program, or activity. *Id.* § 35.130(B)(7). At least in this circuit, both regulations "have the force of law." *Olmstead*, 138 F.3d at 898.

Title II's enforcement provision incorporates the remedies,

procedures, and rights set forth in § 505 of the Rehabilitation Act. It provides in full as follows: "The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133.

The Rehabilitation Act was similarly enacted to prohibit discrimination on the basis of disability, but only by the Federal Government itself, or by any programs or activities receiving Federal financial assistance. *See* 29 U.S.C. § 794. Section 505 of the Rehabilitation Act, in turn, states that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, *et seq.*) ... shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."[18] 29 U.S.C. § 794a(a)(2).

***8** Title VI of the Civil Rights Act (governing Federally Assisted Programs) prohibits discrimination on the ground of race, color, or national origin by any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000d. Pursuant to 42 U.S.C. § 2000d-1, the Federal Government may enforce compliance with the requirements of Title VI in two alternative ways. First, the Federal Government may terminate or refuse to grant or to continue Federal financial assistance. 42 U.S.C. § 2000d-1. Second, the Federal Government may enforce compliance "by any other means authorized by law." *Id.* In either event, "no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." *Id.* Further, any action taken is subject to judicial review. *Id.* § 2000d-2.

B.

In this case, by way of a Motion for Judgment on the Pleadings, Florida previously challenged the United States' authority to sue under Title II of the ADA. Case No. 13-61576, ECF No. 28. Florida noted that, unlike in Titles I and III, which expressly authorize the Attorney General to bring suit to enforce its provisions, the Attorney General is not even mentioned in Title II's enforcement provision—it only mentions "person[s]." *Id.* at 4; *compare* 42 U.S.C. § 12133, *with* 42 U.S.C. §§ 12117(a), 12188(b).

On May 30, 2014, the Honorable Robin S. Rosenbaum denied Florida's Motion for Judgment on the Pleadings, however, concluding that the United States has standing to enforce Title II of the ADA by filing a lawsuit "when voluntary compliance is not possible."[19] Case No. 13-61576, ECF No. 40 at 12. For support, Judge Rosenbaum cited to numerous cases interpreting the Federal Government's enforcement power under both § 505 of the Rehabilitation Act and, ultimately, Title VI of the Civil Rights Act. She stated that "[v]arious courts have interpreted the phrase 'by any other means authorized by law' to mean that, if an offending entity violates the statute and compliance is not forthcoming, the funding agency may refer the matter to DOJ to enforce the statute's nondiscrimination requirements in court." *Id.* at 8–9. Judge Rosenbaum also gave great weight to the DOJ's same interpretation. *Id.* at 6–7.

V. Analysis

A.

This Court must now address whether Title II of the ADA authorizes the United States to recover money damages on behalf of nonparties in this case. In its Motion for Partial Summary Judgment, Florida argues that even if the United States has authority to bring suit in federal court, "Title II of the ADA does not confer authority on the United States to recover damages for harm allegedly suffered by individuals." ECF No. 454 at 7. Additionally, Florida states that the individuals for whom the United States seeks damages are not parties to this case and, thus, would not be bound by a judgment. *Id.* Therefore, according to Florida, if this Court permits the United States to recover damages on behalf of nonparties, "[t]he State would face the classic 'heads you win, tails I lose' scenario." *Id.* That is, if the United States were to recover damages in this case, it would expose the State to the threat of double recovery in future suits brought by the parents or legal guardians of the individuals whose claims were adjudicated in their absence. *Id.* Moreover, even if the United States loses in this case, "then *res judicata* would not protect the State" from those same suits. *Id.*

The United States did not directly respond to Florida's substantive argument, which raises an issue of first impression in the nation.[20] Instead, in its Response in Opposition to Florida's Motion for Partial Summary Judgment, the United States used one and a half pages to remind this Court that Judge Rosenbaum previously denied Florida's Motion for Judgment on the Pleadings

and to attack Florida's policy concern of "double recovery." ECF No. 467 at 12–14. More specifically, the United States stated:

> ***9** Whether a private party might contemplate what the United States seeks here to do is irrelevant, as the United States is not a private party. It is the government, and one of its functions is to protect the rights and interests of the American people. It is not at all uncommon for federal agencies to obtain damages on behalf of nonparties, and the theoretical specter of "double recovery" presents no obstacle to such actions.

Id. at 13. The United States then cited to six cases involving suits for discrimination in the private employment sector that addressed the "double recovery" issue. *Id.*

Before addressing the true substance of Florida's argument, the undersigned notes that Judge Rosenbaum's prior conclusion concerning the United States' standing to bring suit does not influence resolution of the instant issue. As explained by Florida in its Motion for Partial Summary Judgment, Florida's "motion for judgment on the pleadings and the Court's Order on that motion did not ... differentiate between the forms of relief sought in the complaint." ECF No. 454 at 8. Furthermore, the issue of whether Congress intended to create a cause of action that is enforceable by the United States is "analytically distinct" from the remedies available for a violation of the statute, if any. *See Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 595 (1983) ("Whether a litigant has a cause of action 'is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.' " (quoting *Davis v. Passman*, 442 U.S. 228, 239 (1979))). Thus, contrary to the United States' suggestion in its Response, Judge Rosenbaum's prior conclusion does not mean, or even imply, that money damages are available to the United States under Title II. This Court need not revisit her decision here.

The undersigned also notes that the parties' focus on the double recovery issue was unhelpful. The threat of double recovery, while perhaps a factor for Congress when determining whether to authorize a suit for money damages by the Federal Government, is of no real consequence in this Court's analysis of whether Congress actually intended to authorize a suit for money damages by the Federal Government. Furthermore, to the extent that Congress actually intended to authorize a suit for money damages by the Federal Government *and* private individuals, "[i]t also goes without saying that the courts can and should preclude double recovery by an individual." *Gen. Tel. Co. of the Nw. v. E.E.O.C.*, 446 U.S. 318, 333 (1980) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, n.14 (1974)).

Apart from focusing on the double recovery issue, the United States wholly failed to address its purported authorization to recover damages for nonparties in this case. The United States assumes, without explaining, that its authority to recover damages on behalf of nonparties comes from Title II of the ADA. However, the plain language of Title II's enforcement provision contains no such express authorization. *See* 42 U.S.C. § 12133. Furthermore, the United States did not present a single case interpreting Title II of the ADA as authorizing the United States to recover damages on behalf of nonparties.[21] Nor did the United States present any legislative history on the subject. Perhaps even more telling, the United States did not present a single case interpreting § 505 of the Rehabilitation Act, enacted in 1973, or any provision of Title VI of the Civil Rights Act, enacted in 1964, as authorizing the Federal Government to recover money damages on behalf of nonparties.

***10** In fact, all of the cases cited by the United States on this issue (other than this case) were brought by the EEOC, or a private individual, pursuant to a different statutory scheme. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 283 (2002) (Title I of the ADA, 42 U.S.C. § 12117(a), and Title I of the Civil Rights Act, 42 U.S.C. § 1981a); *Gen. Tel.*, 446 U.S. at 320–21 (Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(f)(1)); *E.E.O.C. v. Grays Harbor Cmty. Hosp.*, 791 F. Supp. 2d 1004, 1005 (W.D. Wash. 2011) (Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(f)(1)); *E.E.O.C. v. DHL Exp. (USA), Inc.*, 2011 WL 1326941, at *1 (Title I of the ADA, 42 U.S.C. § 12117(a), and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a); *E.E.O.C. v. LA Weight Loss*, 509 F. Supp. 2d 527, 531 (D. Md. 2007) (Title VII of the Civil Rights Act); *Senich v. Am.-Republican, Inc.*, 215 F.R.D. 40, 41 (D. Conn. 2003) (Age Discrimination in Employment Act). Those cases are therefore inapposite here. *See Olmstead*, 138 F.3d at 901 ("[N]one of the cases cited by the State involved claims under the express integration regulation of either the ADA or the § 504 coordination regulations, and therefore, those cases are inapposite here." (citing *Helen L. v. DiDario*, 46 F.3d 325, 333–34 (3d Cir. 1995))).

Without the benefit of the parties' analysis on this issue, the undersigned will now turn to the true substance of Florida's argument.

B.

In all material respects, the United States seeks noneconomic compensatory damages for the first subset of the proposed class that this Court previously declined to certify. *See Class*, *Black's Law Dictionary* (10th ed. 2014) (defining "class" as "[a] group of people, things, qualities, or activities that have common characteristics or attributes"); *Class*, *Merriam-Webster Online Dictionary*, http://www.merriamwebster.com/dictionary/class (last visited June 8, 2016) (defining "class" as "a group of persons or things having characteristics in common"); *E.E.O.C. v. D. H. Holmes Co.*, 556 F.2d 787, 793 (5th Cir. 1977) ("But we do pause at the prayer for back pay. Such relief is sought on behalf of all 'those persons adversely affected.' We can only assume this to mean that relief, if granted, is to run in favor of a class of beneficiaries defined somehow by their relationship to the wrongs alleged. If this complaint and prayer do not amount to a 'class action,' we are at a loss to know what does."). Specifically, the United States seeks damages for all "Institutionalized Children [who suffered] injuries ... as a result of [Florida's] failure to ensure compliance with the requirements of [T]itle II of the ADA." U.S. Compl. 23. Today, according to the United States, this class encompasses 153 individuals.[22] ECF No. 496 at 58, 93.

Generally, "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (stating that a class-action lawsuit "is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only' " (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979))). Here, the United States has not alleged an injury to itself. Therefore, considering this is not a class-action lawsuit, the United States must have express statutory authority to sue in its own name for the redress of other individuals' injuries. *See, e.g.*, *Gen. Tel.*, 446 U.S. at 323 ("Given the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the remedies available, the EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals."); *cf. In re Elec. Books Antitrust Litig.*, 14 F. Supp. 3d 525, 531 (S.D.N.Y. 2014) ("Congress has specifically authorized the filing of an antitrust lawsuit by a State as *parens patriae* to recover damages for injury to its citizens." (citing 15 U.S.C. § 15c)); *see also Warth*, 422 U.S. at 501 ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

***11** Here, this Court need not definitively resolve whether Title II expressly authorizes the United States to obtain money damages on behalf of nonparties harmed by unnecessary institutionalization, however, because even if Title II does authorize such recovery, this Court should still dismiss the United States' claim for damages in this case. Even when the United States is expressly authorized to recover damages on behalf of nonparties, to be entitled to damages in any specific case, the United States—just like any other plaintiff—must establish causation and an injury in fact. *See McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1145 (11th Cir. 2014) ("At the summary judgment stage, a plaintiff must come forward with evidence showing the following in order to have Article III standing: (1) an injury in fact that is concrete, particularized, and either actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that a favorable judicial decision will redress the injury." (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992))).

In *General Telephone*, for example, where the Court approved of the EEOC's suit for damages (back pay) on behalf of individuals aggrieved by their employer's pervasive discriminatory practices, the EEOC was expected to specifically establish at trial which individuals were adversely affected by the employer's practices and the amount of their damages. *See Gen. Tel.*, 446 U.S. at 324 ("Of course, Title VII defendants do not welcome the prospect of backpay liability; but the law provides for such liability and the EEOC's authority to sue for it. Moreover, the EEOC here requested relief only on behalf of 'those persons adversely affected' and 'in an amount to be proved at trial.' There is no claim or suggestion of unjustified, windfall backpay awards." (citation omitted)).[23]

Here, Florida has repeatedly asserted that the United States' claim for damages would result in unjustified, windfall damages awards because the United States refuses to provide individualized evidence of harm. *See* ECF No. 496 at 7. Additionally, Florida has consistently raised both federalism and due process concerns. According to Florida, throughout this lawsuit, the United States has done nothing more than present "little vignettes, or samples of facts without context," and then attempt to extrapolate those facts as applied to the entire class. ECF

No. 454 at 3.

This Court has informed the United States that its "characterization of its declaratory and injunctive relief claims as 'systematic' neither alters the individualized nature of its damage claims nor deprives Florida of the right to challenge the facts underlying those damage claims." ECF No. 436 at 6. During oral argument, the United States clarified that it still intends to rely solely on its "systemic" claim to establish its entitlement to damages at trial. ECF No. 496 at 13–14, 93, 100. According to the United States, it will then use any damages it recovers "to compensate the individuals who have been harmed as a result of the legal violation."[24] *Id.* at 93. Nonetheless, the United States maintains that it is "not litigating individual claims of, or on behalf of, individual children." ECF No. 467-1 at 1. The undersigned finds this position to be a fatal defect to the United States' claims for money damages.

Like the EEOC in *General Telephone*, to be entitled to recover damages for nonparties, assuming it has the authority to sue for damages, the United States would need to prove an ADA violation as to each child for whom it seeks damages. In this context, in which the United States has alleged a violation of Title II, as interpreted in *Olmstead*, the United States must actually prove *unnecessary* institutionalization with respect to each child for whom its seeks damages. *Olmstead*, 138 F.3d at 902. At the very least, the United States must allege and prove that Florida's administration of services or policies actually and proximately caused specific *undue* institutionalization of *each* child for whom it seeks damages. Otherwise, the United States' damages claims are not actionable under Title II, at least as interpreted in *Olmstead*. *See id.*

***12** Absent more, a "systemic" Title II claim is insufficient to establish an *Olmstead* violation as to an entire class because an *Olmstead* violation is highly individualized. *See* ECF No. 468-15 at 5 (Declaration of Richard L. Elliott). To establish an *Olmstead* violation, the claimant must show not only that community-based treatment is "appropriate" for the disabled individual, a highly individualized determination in and of itself, but also that the individual does not oppose treatment, which will also vary individual by individual. *See Olmstead*, 527 U.S. at 607; *Sossamon v. Texas*, 563 U.S. 277, 278 (2011) (stating that "the word 'appropriate' is "inherently context-dependent"). Only if those two conditions are met does this Court also consider the State's services or programs in general, and that is only if the public entity raises a cost-based or fundamental-alteration defense, as did Georgia State officials in *Olmstead*. Furthermore, the *Olmstead* Court specifically cautioned that its holding should *not* be construed as imposing a "standard of care" for whatever medical services a State renders, or as requiring a State to "provide a certain level of benefits to individuals with disabilities."[25] 527 U.S. at 603 n.14.

In this case, even if the United States has authority to recover damages on behalf of nonparty individuals under Title II of the ADA in general, it does not follow that proof of a State's systemic violation resulting in undue institutionalization to *some* children would allow the United States to recover damages for *all* children currently or formerly institutionalized within the State. *Cf. Warth*, 422 U.S. at 515–16 ("[I]n the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof."). This is true because not every institutionalized child has necessarily suffered injury as a result of Florida's systemic violation, if any. Stated differently, just because a State poorly administers its services to children with disabilities does not necessarily mean that every institutionalized child with a disability in the State was unnecessarily institutionalized.

In its Complaint, the United States alleged that all of the "Institutionalized Children [in Florida's nursing homes] 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." U.S. Compl. 19, ¶ 70. Additionally, the United States alleged that the actions needed to remedy the State's violations "could be achieved through reasonable modifications of the State's service system." *Id.* ¶ 72. If true, this is clearly actionable after *Olmstead*.[26]

But, while these general allegations may have been sufficient to get past the motion to dismiss stage, without more, they are insufficient to get past the summary judgment phase. At this stage in the litigation, Florida has sufficiently shown that even if Florida's administration of services and polices result in "undue institutionalization" for some children, there are others for whom community-based treatment is altogether inappropriate. ECF No. 454. And, there are still others who have opposed, or would oppose, more integrated settings.[27] *Id.* For all of those children, there is no *Olmstead* violation and, thus, no actionable injury caused by Florida's administration of services to children with disabilities.

C.

***13** Many of Florida's remaining arguments further illustrate the problems associated with the United States' claim for money damages based upon proof of a "systemic" *Olmstead* violation. For example, Florida's argument that the United States cannot present evidence that reasonable accommodations were requested and refused, regardless of whether there is such a requirement under the law, recognizes that community-based treatment is not appropriate for every child it serves and that some individuals or their families may oppose community-based treatment, even if appropriate. Florida's argument that the United States cannot present evidence of a causal connection between the omission of a timely PASRR screening and the institutionalization of any individual child recognizes that a State's allegedly inadequate policies do not inevitably lead to unnecessary institutionalization in every instance.

Florida also raises a statute of limitations issue with respect to the United States' claim for damages, and the United States agrees that the applicable limitations period is three years. ECF No. 496 at 87–88; 28 U.S.C. § 2415(b); *see Smith v. City of Philadelphia*, 345 F. Supp. 2d 482, 485 (E.D. Pa. 2004) ("Claims under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act of 1973, 29 U.S.C. § 749, are governed by the state statute of limitations for personal injury claims."). However, because the United States sues in its own name, and because the United States argues it "discovered" the systemic violation within three years of filing suit, the United States would have this Court believe that its claims for damages are unlimited in time. *See* ECF No. 496 at 89–90, 93. For obvious reasons, this cannot be the case.

One of the purposes of the limitations period is "to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983). Thus, if an individual could have made an *Olmstead* claim against Florida, but that cause of action expired prior to the date the United States discovered a violation, the United States should not now be permitted to revive that claim in its own name by raising a systemic violation, which may or may not have caused the individual's past unnecessary institutionalization. *See E.E.O.C. v. Griffin Wheel Co.*, 511 F.2d 456, 459 (5th Cir.) ("These personal claims are entitled to no superior status because they are here allowed to be asserted in the Attorney General's suit as well as in the private class action."), *decision clarified on denial of reh'g*, 521 F.2d 223 (5th Cir. 1975), *disapproved of on other grounds by Occidental Life Ins. Co. of California v. E.E.O.C.*, 432 U.S. 355 (1977). Moreover, because the United States has not presented evidence of an *Olmstead* violation as to each individual for whom it seeks damages, it is impossible for this Court to determine which of those claims are timely.

Florida's first argument perhaps best illustrates the inherent problems with permitting the United States' generalized claim for damages to go forward. Again, Florida's first argument is that it is "entitled to summary judgment, child by child, as to all children for whom the United States cannot present individualized evidence of the nature and extent of any noneconomic harm." ECF No. 454 at 4. According to Florida, while the United States was able to conduct an "in-depth, multi-disciplinary assessment to determine the degree of harm experienced by a child, no such assessment was performed" for this case. *Id.* The United States did not disagree.

In response, the United States argued that it is entitled to "general (or presumed) damages"—"in lieu of individualized proof of 'specific damages' "—because harm from institutionalization in Florida nursing homes, like harm from false imprisonment or racially-motivated segregation, is certain to occur and difficult to quantify. ECF No. 467 at 14, 24. In the words of the United States, all 153 children have "suffered two types of *broad* harm, ... the loss of life opportunities and the stigmatization due to segregation." ECF No. 496 at 30–32 (emphasis added). Moreover, according to the United States, the *only* distinguishing factor among children in Florida's nursing homes, at least in terms of assessing the harm caused by undue institutionalization, is the child's length of stay. *Id.* at 39.

***14** The United States' argument for general damages might have weight if it could prove an *Olmstead* violation for each individual that it seeks damages for. While the doctrine of general damages may permit certain tort claims to go forward without evidence of actual loss, *Carey v. Piphus*, 435 U.S. 247, 262 (1978) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974)), it does not exempt plaintiffs from establishing the underlying tort. To be entitled to general damages, the plaintiff must always establish the underlying tort such that the resulting harm may be inferred from the circumstances. *See Kerman v. City of New York*, 374 F.3d 93, 125 (2d Cir. 2004). Here, without proof of an *Olmstead* violation as to each child, there is no tort from which the harm is presumed to flow, and even general damages for specific individuals would be inappropriate.

Furthermore, even if the United States could establish entitlement to general damages for 153 individuals upon proof of a single, systemic violation of the ADA, it does not follow that each child has experienced the same two types of "broad" harm to an equal degree. On the one

hand, the United States' position that the only distinguishing factor is length of stay assumes that all disabled children in Florida's institutions are "fungible," or indistinct. ECF No. 496 at 39–40. On the other hand, the United States concedes, as it must, that those children may have "different manifestations of those harms and they may have suffered different types of harms, or different degree[s] of harm. And of course, every individual is different in that regard."[28] ECF No. 496 at 30. One of the United States' own experts, Dr. Sue Gant, also stated that length of time is only one variable among many variables in considering the harm suffered as a result of unnecessary institutionalization. ECF No. 468-12 at 45–46.

The undersigned agrees with Florida that "endless variations distinguish the cases of the medically complex children who reside in the three nursing facilities in Florida that admit children." ECF No. 454 at 5. As explained by Florida:

> These children suffer from a broad spectrum of medical conditions of different severities requiring vastly different care. Adler Decl. ¶ 3. Many suffer from severe intellectual or developmental disabilities in combination with extraordinarily challenging illnesses and medical conditions. *Id.* Some have little or no awareness of their surroundings. *Id.* The noneconomic harms suffered, for example, by a child in a persistent vegetative state, with no appreciation of the child's surroundings, will differ markedly from the harms suffered by a teenager who, despite catastrophic physical injuries, is cognitively intact. The kind, scope, and duration of necessary services varies according to each child's unique condition and individual needs and capabilities. *Id.*
>
> The same diversities are apparent in the families of children with complex medical needs. *Id.* ¶ 4. Some have loving and committed parents who made the impossibly difficult decision to place their children in nursing facilities, but who continue to love their children and visit them regularly. *Id.* Other children have been abused, neglected, or abandoned, and entered the nursing facilities with profound cognitive deficits, physical disabilities, and behavioral abnormalities. *Id.* The capacity (if any) to experience emotional distress or pain and suffering, or to develop mentally or improve physically, differs from child to child, as do the deprivations that each child might experience in different alternative settings, including the family home. *Id.* Thus, even assuming a violation, the emotional distress or pain and suffering proximately caused by any violation is individualized. It is not ascertainable either by formula or by conjecture.

***15** *Id.* at 5–6.

Despite awareness of these inherent differences, and despite having had the opportunity and means, the United States failed to search for and uncover evidence as to the harm, if any, suffered by each of the institutionalized children for whom it seeks damages. The United States cannot even offer "an approximation" of the value of harm at trial. ECF No. 496 at 36. "Although it is not necessary that damages be ascertained precisely, the amount of damages must be capable of some reasonable determination." *See Campbell v. Talladega Cty. Bd. of Ed.*, 518 F. Supp. 47, 57 (N.D. Ala. 1981). Here, the United States' systemic claim, as pleaded and argued, is not capable of any reasonable determination in terms of the harm experienced by each child.

VI. Conclusion

The issues raised in Florida's Motion for Partial Summary Judgment, and the United States' responses thereto, again reveal a fundamental disconnect between the parties' understanding of the claims in this case. However, at this stage in the litigation, this Court must determine the true scope of the parties' claims—not as the parties paint the picture, but as the law allows them to go forward. *See Catrett*, 477 U.S. at 323–24 ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses ...."); *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986) ("The purpose of summary judgment is to separate real, genuine issues from those which are formal or pretended."); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("As to materiality, the substantive law will identify which facts are material.").

The undersigned finds that to the extent the United States seeks damages for individuals who suffered injuries as a result of Florida's "systemic" violation of Title II, which is based upon Florida's administration of services generally, U.S. Compl. 23, the United States is attacking individual medical-necessity decisions as they are applied to each individual. The undersigned also finds that Florida has sufficiently shown that there are no genuine issues of material fact that should be decided at trial as to some of the individuals for whom the United States seeks damages because not all children in Florida's institutions are unnecessarily institutionalized. *See supra* Part V.B. The burden then shifted to the United States to demonstrate that it has evidence of an *Olmstead* violation, thus raising

an issue of material fact, as to each individual for whom it seeks damages. *Clark*, 929 F.2d at 608. In other words, to go forward with its claim for damages at this stage of the litigation, the United States was required to indicate which individuals it has evidence of an *Olmstead* violation for, and to present that evidence to the Court. Instead, the United States maintained that it is "not litigating individual claims of, or on behalf of, individual children." ECF No. 467-1 at 1.

The undersigned concludes that the United States' "systemic" Title II claim, as pleaded and argued, is insufficient to sustain its prayer for money damages.[29] While the United States' claim of a "systemic" violation of the ADA by Florida, if statutorily authorized and proven, is particularly appropriate for redress through its claims for declaratory and injunctive relief,[30] it is particularly inappropriate for redress through its claim for money damages.[31] The United States' claim of systemic failure by Florida relies on an amalgam of policies that are generally applicable to all institutionalized children. But, as previously explained, the Court in *Olmstead* did not condemn all institutionalization, and an *Olmstead* violation is highly individualized. *See supra* Part V.B. Since filing the Complaint, the United States has failed to explain how it intends to differentiate between "Institutionalized Children" who were unnecessarily institutionalized, i.e., "harmed," by Florida's policies of general applicability and those who were not. Rather, it claims it does not have to. *See supra* Part V.C. As a result, the United States did not specifically identify evidence in response to Florida's summary judgment materials that could establish an *Olmstead* violation for the 153 individuals for whom it seeks damages.[32] The United States has therefore failed to demonstrate an issue of material fact as to its claim for damages, and summary judgment is appropriate as to that claim. *Clark*, 929 F.2d at 608.

***16** This is not to say that the United States does not possess evidence of an *Olmstead* violation as to *some* individuals, however. After formally investigating for a year and then filing this lawsuit approximately three years ago, the parties have engaged in substantial discovery related to Florida's policies and procedures governing its services to children with disabilities in this State. According to Florida, the United States has taken nineteen depositions in this case and has had "ready access to children in [Florida's] nursing facilities." ECF No. 454 at 7. Additionally, the United States has asked for, and received, millions of pages of records pertaining to individual children who have been or are currently in one of Florida's nursing homes.[33] *Id.* According to the United States, Dr. Gant personally "observed 138 children living in Florida's nursing facilities and reviewed the records of all of the children on whose behalf the United States seeks damages." ECF No. 467 at 19.

Nevertheless, because the United States relies solely on its "systemic" claim to establish entitlement to damages, at no point in this lawsuit has the United States argued that it can or would present evidence of an *Olmstead* violation for each child on whose behalf it seeks damages, if required. This is true despite Florida's expressed willingness to fight this case "child by child," *see* ECF No. 454, and this Court's prior statement that the United States' "characterization of its declaratory and injunctive relief claims as 'systematic' neither alters the individualized nature of its damage claims nor deprives Florida of the right to challenge the facts underlying those damage claims," ECF No. 436 at 6. To date, the United States has wholly failed to present individualized evidence that demonstrates an issue of material fact as to whether the 153 individuals for whom the United States seeks damages were unnecessarily institutionalized, as defined in *Olmstead*. *See supra* note 32. Accordingly, after careful consideration, the undersigned ultimately concludes that the proper and just course of action is to dismiss the United States' damages claim in its entirety.

VII. Recommendation

For the foregoing reasons, the undersigned recommends that Florida's Motion for Partial Summary Judgment be granted and that the United States' claim for damages be dismissed.

Unless otherwise modified by the Honorable William J. Zloch, United States District Judge, the parties will have fourteen days after service of a copy of this Report and Recommendation within which to file written objections, if any. *See* 28 U.S.C. § 636(b)(1) (providing procedure for review of magistrate judge's proposed findings and recommendations). Failure to timely file objections shall bar the parties from a de novo determination by Judge Zloch of any issue covered in the Report and from challenging, on appeal, the factual findings accepted or adopted by this Court, except on grounds of plain error or manifest injustice. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985) (holding that "a court of appeals may exercise its supervisory powers to establish a rule that the failure to file objections to the magistrate's report waives the right to appeal the district court's judgment"); *Dupree v. Warden*, 715 F.3d 1295, 1300 (11th Cir. 2013) ("[U]nder our current rule, a party's failure to object to factual findings and legal conclusions in a magistrate judge's report and recommendation in civil cases has limited

consequences. Despite a party's failure to object, we seem to consistently review unobjected-to factual findings for plain error, and we review the unobjected-to legal conclusions de novo."); *Smith v. Potter*, 310 Fed.Appx. 307, 309 (11th Cir. 2009) ("This court has held that the failure of a party to object to the magistrate judge's report precludes review of findings of fact except on grounds of plain error or manifest injustice, but does not limit review of legal conclusions." (citing *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993))).

DONE and SUBMITTED at Fort Lauderdale, Florida this 9th day of June, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 3221140

Footnotes

[1] Unless otherwise noted, all ECF citations refer to filings in Case No. 12-60460, and all pin cites refer to the ECF page number in the top, right-hand corner of the document, not the page number identified by the parties or the Court.

[2] "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

[3] The Complaint names as Defendants: Elizabeth Dudek, in her official capacity as Secretary for the Agency for Health Care Administration ("AHCA"); Harry Frank Farmer, Jr., in his official capacity as the State Surgeon General and Secretary of the Florida Department of Health ("FDOH"); Kristina Wiggins, in her official capacity as Deputy Secretary of the FDOH and Director of Children's Medical Services; and eQHealth Solutions Inc., who is contracted with AHCA to provide services for Florida's Comprehensive Medicaid Utilization Management Program. ECF No. 62 at 7.

[4] Since the case was filed, T.H., L.J., and A.G. were all transitioned to community-based settings. ECF No. 237 at 13. However, L.J. subsequently died. ECF No. 245.

[5] A "medically fragile" person is 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 parental nutrition (TPN), is ventilator dependent, or is dependent on a heightened level of medical supervision to sustain life, and without such services is likely to expire without warning." Rule 59G-1.010(165), Fla. Admin. Code.

[6] For the criteria governing classification as a child in need of skilled care services via Florida's Medicaid program, see Florida Administrative Code Rule 59G-4.290(3).

[7] Class certification may be appropriate when "the party opposing the class has acted or refused to act on grounds

that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

[8] When the second renewed motion for class certification was filed, April 3, 2015, there were 179 medically complex child Medicaid recipients currently institutionalized in nursing facilities in Florida and 3716 alleged to be at risk of unnecessary institutionalization. ECF No. 329 at 4.

[9] The investigation began in December 2011. ECF No. 468-21.

[10] The United States defined "Institutionalized Children" as "[n]early two hundred children with disabilities in Florida [who] are segregated unnecessarily in nursing facilities" and "[m]any young adults, who entered nursing facilities as children and grew up in these institutions, [who] remain unnecessarily segregated from their communities." U.S. Compl. 1 & n.1. The United States defined "At-Risk Children" as "[o]ther children with significant medical needs who reside in the community and receive private duty nursing or personal care services [and who] have also been harmed by policies and practices limiting community-based services." *Id.* at 1–2, 2 n.2.

[11] The PASRR process is intended "to screen out children who have either intellectual disability or mental illness, but not requiring a medical level of care that could place them in a nursing home setting." ECF No. 496 at 81.

[12] "Due to the parties' drastically diverging theories in this case," the first motion was denied with leave to refile following discovery "bearing on the class-certification issue." ECF No. 203 at 6. The renewed motion was also denied without prejudice with leave to refile, pending the Court's ruling on Florida's then-pending Motion to Dismiss, which was later denied. ECF No. 263 at 4 (citing ECF No. 237); ECF No. 310.

[13] *See Olmstead*, 527 U.S. at 601–02 ("We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings."); *id.* at 604 ("[T]he ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk."); *id.* at 610 (Kennedy, J., concurring) ("It would be unreasonable, it would be a tragic event, then, were the [ADA] to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision.").

[14] Neither the Individual Plaintiffs nor the United States filed a motion for (partial) summary judgment.

[15] The ADA defines the term "public entity" to include State and local governments, as well as their agencies and instrumentalities. 42 U.S.C. § 12131(1).

[16] In Title I, Congress instructed the Equal Employment Opportunity Commission ("EEOC") to issue regulations

implementing its provisions concerning discrimination in employment. 42 U.S.C. § 12116. Under Title III, Congress instructed the Secretary of Transportation and the Attorney General to issue regulations implementing its provisions concerning discrimination in public accommodations provided by private entities. *Id.* §§ 12186(a)(1), (b).

17 In *Olmstead*, the petitioner did not challenge, and the Court did not address, the validity of the Attorney General's regulatory formulations. 527 U.S. at 592.

18 Section 505 also authorizes the court to award attorney's fees to a prevailing party, "other than the United States," in any action or proceeding to enforce or charge a violation of the Rehabilitation Act. 29 U.S.C. § 794a(b).

19 On the same date, the case was reassigned from Judge Rosenbaum to District Court Judge William J. Zloch and the undersigned Magistrate Judge. ECF No. 251.

20 The United States informed this Court that it has never sought or received damages for individual victims in any type of *Olmstead* enforcement action. ECF No. 496 at 15, 18–19, 21.

21 Since the ADA's enactment in 1990, the United States has sought to recover damages under Title II in only three other cases. ECF No. 454 at 10. Two of those actions were immediately settled, and the third resulted in an order requiring the City of Baltimore to amend a zoning law. *Id.* Thus, none reached this issue.

22 Many children have died since the filing of this lawsuit. ECF No. 496 at 58.

23 Title I of the ADA incorporates the "powers, remedies, and procedures" set forth in Title VII of the Civil Rights Act. 42 U.S.C. § 12117(a). As a result, it is clear that "the EEOC, the Attorney General, and persons alleging discrimination on the basis of disability in violation of Title I may enforce its provisions" by filing suit in federal court. *Olmstead*, 527 U.S. at 591 n.5 (citing 42 U.S.C. § 12117(a)).

24 The United States has not specifically explained how it intends to distribute the money damages.

25 In *Olmstead*, the Court stated that "the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting." 527 U.S. at 602.

26 There is no dispute that the Institutionalized Children are "qualified individuals with disabilities" within the meaning

of Title II. *See supra* note 2.

[27] During oral argument, the United States informed this Court that one of its experts called many families that have children who are currently institutionalized in nursing facilities in Florida. ECF No. 496 at 73. At least one of those families opposed their child receiving services in more integrated settings. *Id.*

[28] In its corporate deposition, the DOJ similarly stated that "it goes without saying that the circumstances of each of the children ... are very individualized." ECF No. 455-1 at 260.

[29] Again, the undersigned assumes, without deciding, that the United States has authority to recover damages on behalf of nonparties under Title II of the ADA.

[30] *See Lewis v. Casey*, 518 U.S. 343, 359 (1996); *cf.* 42 U.S.C. § 1997a(a) (authorizing the Attorney General to obtain "equitable relief" only whenever "the Attorney General has reasonable cause to believe that any State ... is subjecting persons residing in or confined to an institution ... to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities").

[31] The undersigned notes that—consistent with its central enforcement role within the ADA—the United States may fulfill its stated purposes in bringing this action without seeking damages. *See* U.S. Compl. 2, 3. As the undersigned previously explained, if any plaintiffs prevail on their claims for systemic declaratory and injunctive relief, the resulting system-wide changes will inure to the benefit of the institutionalized children for whom the United States seeks damages. ECF No. 395 at 15. At the very least, this Court's judgment would provide individuals who are not named in this lawsuit, but who desire other specific relief, such as damages, with powerful ammunition to prove their own *Olmstead* violation. *See United States v. Georgia*, 546 U.S. 151, 159 (2006) (concluding that Title II creates a private cause of action for damages against the States, but only for conduct that actually violates the Fourteenth Amendment); *Lane*, 541 U.S. at 517 ("Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, ... which authorizes private citizens to bring suits for money damages."); *see also* 42 U.S.C. § 2000d-7 (expressly abrogating State sovereign immunity and providing that "remedies (including remedies both at law and in equity) are available" for violations of § 504 of the Rehabilitation Act and Title VI of the Civil Rights Act, among other acts); 28 C.F.R. § 35.172(d) ("At any time, the complainant may file a private suit pursuant to section 203 of the Act, 42 U.S.C. 12133, whether or not the designated agency finds a violation.").

[32] Specifically, the United States' evidence presented in support of its summary judgment materials consists of: (1) expert reports that provide opinions regarding the necessity of institutionalization in Florida as well as the "broad" harm experienced by children who are unnecessarily institutionalized in Florida, ECF Nos. 468-1, 468-2, 468-13, 468-15; (2) spreadsheets containing thousands of dates of admission and dates that PASRR(s) were performed, or should have been performed, for children in Florida's institutions, ECF Nos. 468-3, 468-4, 468-5, 468-6, 468-7, 468-8, 468-9, 468-10, 468-11; (3) the depositions of two expert witnesses who observed some children in Florida's institutions, ECF Nos. 468-12 (Dr. Gant), 468-14 (Dr. Nelson); (4) two versions of Florida's Statewide Operational

Plan, ECF Nos. 486-16 (Nov. 2010), 468-17 (Mar. 2007); (5) the declaration of Daniel Timmel concerning his alleged statement as to whether other states conducted PASRR evaluations for children under three, ECF No. 468-18; (6) two miscellaneous deposition transcript excerpts, ECF Nos. 468-19, 468-20; and (7) two letters from the United States to Florida's Attorney General concerning its pre-suit investigation, ECF Nos. 468-21, 468-22. The undersigned has reviewed all of those materials (in addition to Florida's materials) and did not find any evidence that *specifically* establishes that 153 individuals were unnecessarily institutionalized in violation of Title II, as interpreted in *Olmstead*. That is, apart from select examples and gross generalizations, the United States presented no evidence that would suggest that community placement was appropriate and unopposed with respect to each child for whom it seeks damages. In any event, considering the United States has consistently maintained that its damages claims are *not* individualized, this Court should not be expected to comb through the evidence presented in support of the parties' summary judgment materials in an attempt to determine for which individuals the United States may have evidence of an *Olmstead* violation, if any. It is enough to say that the United States did not meet its burden.

[33] For example, in response to one of the United States' many motions to compel, Florida "produced thousands of PASRR-related documents, including hundreds of completed PASRR screening forms, among the 10.7 million pages of documents that the State has produced to the United States at a cost of more than $2 million." ECF No. 444 at 2.

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