UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
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Plaintiff,	)	CIVIL ACTION NO:
	)	4:09-CV-00033-JLH
	)	
v.	)	
	)	
STATE OF ARKANSAS et al.;	)	
	)	
Defendants.	)	
	)	
	)	
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MEMORANDUM OF LAW IN SUPPORT OF UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, Plaintiff, the United States of America, by its attorneys, hereby moves for an order granting partial summary judgment in favor of the United States. For the reasons set forth below, the United States requests that the Court grant the United States' Motion for Partial Summary Judgment in accordance with Federal Rule of Civil Procedure 56 and find in favor of the United States on Count II of the Complaint, regarding its claim that Defendants fail to serve residents in the most integrated setting appropriate to their needs in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 – 12213. Specifically, the United States seeks summary judgment on its claim that Defendants fail to provide reasonable assessments as to whether Conway Human Development Center (CHDC) residents can live in a more

integrated setting, as required by the ADA. As a result, as Defendants' own expert and independent professionals have found, many CHDC residents can live with appropriate supports in a more integrated setting but have not been properly identified as such by CHDC. Additionally, CHDC residents and, where applicable, their guardians have been deprived of the benefit of an objective, reasonable assessment upon which to make an informed choice about placement.

The United States also requests that the Court enter summary judgment in favor of the United States regarding its claim that the State violates the Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1400 et seq., and its implementing regulations, 34 C.F.R. pt. 300, by depriving CHDC students of access to public school resources and the State's challenging academic content and achievement standards and by failing to educate students in the least restrictive environment, thus failing to provide CHDC students with a free appropriate public education (FAPE).

I. SUMMARY OF RELEVANT FACTS

The more than 500 residents of CHDC are segregated in every major respect from the community beyond the facility's grounds. Fewer than 20 of these individuals leave the grounds for day programs. United States' Statement of Undisputed Facts ("Undisputed Facts") ¶ 9. Most CHDC residents attend church and recreational activities on grounds. Id. And while there are trips into the community, most are for eating out, movies, or shopping, and do not provide opportunities for interacting with non-disabled peers in any meaningful way. Id.

The CHDC complex is a "self-contained community" that offers the people with disabilities living there few opportunities to live alongside of, or experience life with, people without disabilities. Undisputed Facts ¶ 9. The living units at CHDC are communal, and offer very little, if any, privacy. Some units have as many as ten beds in one room. Id. Food is delivered to each unit from a central kitchen and typically plated by the unit staff. Id. There is a public address system in each residence that announces certain times of day. Id.

There is substantial evidence that hundreds of CHDC residents are appropriate for a more integrated setting. Undisputed Facts ¶ 49. Yet CHDC treatment teams have identified only five individuals -- less than one percent of its total population -- as appropriate for community placement. Id. ¶ 32.

In fact, CHDC residents are systematically denied an objective, reasonable assessment of whether CHDC is "the most integrated setting appropriate to the[ir] needs," 28 C.F.R. § 35.130(d), or whether they might be able to "handle or benefit from" a community setting. See Olmstead v. L.C., 527 U.S. 581, 601 (1999). Treatment teams at CHDC lack the requisite knowledge or experience to provide such an assessment. Undisputed Facts ¶¶ 52-53, 58-61.

Further, when CHDC treatment teams meet to address continued placement at CHDC, this process is overwhelmingly limited to obtaining the guardian's affirmation of continued institutionalization at CHDC. Undisputed Facts ¶¶ 50-51.

Not surprisingly, most CHDC residents are admitted as children and stay for a lifetime, never having the opportunity to live in a more integrated setting in

which they could interact with non-disabled individuals in meaningful, life-enriching ways, as required under the ADA. Undisputed Facts ¶ 4. In fact, residents at CHDC are more likely to die at the facility than to be discharged to a more integrated setting – and they die at the strikingly young age of 46.4 years. See Undisputed Facts ¶ 5.

Moreover, none of the approximately 50 school-aged children at CHDC attend a single class with their non-disabled peers, despite that most of them came from public schools where they interacted on a daily basis with their non-disabled peers in classes, extra-curricular activities, or at lunchtime. See Undisputed Facts ¶¶ 72, 74. Nor do CHDC students receive IDEA-required statewide and districtwide assessments. As a result, they lack the opportunity to access and benefit from Statewide academic content and achievement standards. See Undisputed Facts ¶ 73 (Defendant's expert Bruce Gale testifying that CHDC students do not participate in either general or alternative Statewide assessments); id. (Defendant's expert Derek Nye testifying that CHDC students are not receiving regular assessments, assessments with accommodations, or alternative assessments).

CHDC students' complete educational segregation from their non-disabled peers is perpetuated by Defendants' failure to ensure that all required IEP team members participate in CHDC student IEP meetings. See Undisputed Facts ¶¶ 68-69 (Defendant's response to request for admissions denying that Defendants "have an obligation to 'secure' the attendance of a public agency representative at each individualized education plan meeting"). In fact, the only regular participants at

CHDC IEP meetings are CHDC staff. Defendants' failure to ensure that a local educational agency (LEA) representative and a regular education teacher attend CHDC IEP meetings results in continued denial of access by CHDC students to public school resources and regular interaction with non-disabled students.

II. LEGAL STANDARD

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

To establish a genuine issue of fact sufficient to warrant trial, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. Ltd v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party must set forth "specific facts showing there is a genuine issue for trial." Anderson, 477 U.S. at 248 (quoting Fed. R. Civ. P. 56(c)(2)). "Although the moving party has the burden of demonstrating the absence of genuine issues of material fact, the 'nonmoving party may not rest upon mere denials or allegations.'" Burchett v. Target Corp., 340 F.3d 510, 516 (8th Cir. 2003) (quoting Rose-Maston v. NME Hosps, Inc., 133 F.3d 1104, 1107 (8th Cir.1998)). The court is "not required to speculate on which portion of the record the nonmoving

party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." White v. McDonnell Douglas Corp., 904 F.2d 456, 458 (8th Cir. 1990) (quoting InterRoyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989), cert. denied, 494 U.S. 1091 (1990)).

III. ARGUMENT

A. The Court Should Grant Partial Summary Judgment Regarding the United States' Claim that Defendants Violate the ADA by Failing to Serve CHDC Residents in the Most Integrated Setting Appropriate to Their Needs.

It has been twenty years since Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and to assure "equality of opportunity, full participation, independent living, and economic self-sufficiency for [individuals with disabilities]." 42 U.S.C. § 12101(a)(7) and (b)(1). In the opening provisions of the Act, Congress emphasized 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. at § 12101(a)(2).

Title II of the ADA prohibits discrimination in access to public services by requiring that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Pursuant to Congress' instructions, the

United States Department of Justice issued regulations to implement Title II. These implementing regulations include an "integration mandate," see 28 C.F.R. § 35.130(d) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."). The most integrated setting is defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 CFR pt. 35 App. A, p. 450 (1998).[1]

In Olmstead v. L.C., 527 U.S. 581 (1999), the Supreme Court held that unjustified segregation of persons with disabilities in institutions like CHDC constitutes the type of discrimination prohibited under Title II of the ADA. In doing so, the Court emphasized that when Congress enacted the ADA, it explicitly recognized "unjustified 'segregation' of persons with disabilities as a form of discrimination." Id. at 600. The Court reasoned that this recognition reflected two judgments by Congress:

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[1] As the Supreme Court recognized in Olmstead, "[b]ecause the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II . . . its views warrant respect." Olmstead, 527 U.S. at 597-98. The Court emphasized that "the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Id. (internal quotations omitted); see Messier, 562 F. Supp. 2d 321 (D. Conn. 2008). In Olmstead, the Court relied on the Department of Justice's position, as set forth in numerous briefs in other segregation cases, that "undue institutionalization qualifies as discrimination 'by reason of . . . disability'" under the ADA. Id. at 598 (quoting 42 U.S.C. § 12132). As set forth below, it is the Department of Justice's "well-reasoned view[]" based on a "body of experience and informed judgment" about the ADA and its implementing regulations that the Defendants' current community placement practices violate both.

> 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 . . . . 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 600-01 (internal quotations omitted).

In construing the integration mandate, the Court held that a violation is established if the institutionalized individual is "qualified" for community placement—that is, if he or she can "handle or benefit from community settings" and does not oppose community placement. Olmstead, 527 U.S. at 601-603.[2] In Olmstead, the plaintiffs were two institutionalized individuals who wanted to move to the community and whose treating professionals had already determined that community placement was appropriate. Id. at 602-03. On these facts, the Court noted the need for a reasonable assessment to determine "whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program." Id. at 602. Indeed, without a reasonable assessment of whether a resident can "handle or benefit from community settings," it is impossible for a public entity, such as CHDC, to aver that it is "administer[ing] services, programs, and activities in the most integrated setting appropriate to the needs of qualified

[2] The state, however, may interpose a defense that community placement would "entail a 'fundamenta[l] alter[ation]' of [its] services and programs." Id. at 603 (plurality opinion).

individuals with disabilities," as required under the ADA. See 28 C.F.R. § 35.130(d).[3]

A reasonable assessment should not be based on what is currently available in the community, nor can it simply be a "rubberstamping" of the guardians' wishes. See Messier v. Southbury Training School 562 F. Supp. 2d 294, 338-39 (D. Conn. 2008) (rejecting the notion that an assessment of individuals' appropriateness for community placements is required only in those cases "in which a class member, a parent, or a guardian has explicitly asked for community placement" and finding that "[s]uch an attitude is inconsistent with the integration mandate of the ADA.").

[3] Without reasonable assessments, the Defendants cannot aver that they are complying with the constitutional requirements dictated by the District Court in the Porter v. Knickrehm litigation. In Porter the District Court found that the Defendant's post-admission procedures violated the constitutional due process rights of HDC residents "because they contain no requirement that the State discharge HDC residents who no longer require HDC services." Undisputed Facts ¶ 19. The Defendants submitted new rules which were approved by court and affirmed by the Eighth Circuit. Porter v. Knickrehm, 457 F.3d 794, 797 (8th Cir. 2005). The approved HDC admission and discharge rules stated in part that "Even without a request for discharge, an HDC Superintendent **must** discharge an individual upon a determination by HDC professionals that the individual is no longer eligible for admission or retention (i.e., that he or she is no longer in need of and able to benefit from active treatment provided at another HDC, and is able to access appropriate and adequate services in another setting)." (emphasis added) Undisputed Facts ¶ 20. However, the current DDS policy 1086, "Human Developmental Center Admission and Discharge Rules," does not match the rules that were submitted to and approved by the District Court. Undisputed Facts ¶ 21. Instead the current DDS policy states when consideration of discharge **may** be given and omits the specific language from the District Court mandating discharge when services are no longer required. When CHDC fails to provide objective, reasonable assessments of residents, the constitutional due process rights recognized by the court in Porter are also violated.

Rather, it must contain an objective, individualized determination of what the individual would need to live in a more integrated setting, based on that individual's skills, interests, and methods of communication. Undisputed Facts ¶ 50. Further, for an assessment to be reasonable, it must reflect an accurate understanding of what supports and services can be provided in a more integrated setting. Id.

Subsequent cases have also made clear that "Olmstead does not allow States to avoid the integration mandate by failing to require professionals to make recommendations regarding the service needs of institutionalized individuals with mental disabilities." Frederick L. v. Dep. of Pub. Welfare, 157 F. Supp. 2d 509, 540 (E.D. Pa. 2001). See also Disability Advocates, Inc. v. Paterson, 653 F. Supp. 2d 184, 259 (E.D.N.Y. 2009); Long v. Benson, No. 08-cv-26 (RH/WCS), 2008 WL 4571905, at *2 (N.D. Fla. Oct. 14, 2008) (noting that the State "cannot deny the right [to an integrated setting] simply by refusing to acknowledge that the individual could receive appropriate care in the community"). Such perverse results would render the integration mandate virtually meaningless.

Moreover, the individual and, where applicable, his or her guardian, must be provided the option of a particular alternative to continued institutionalization. For example, in Messier, the court criticized the State for failing to conduct community placement assessments of any resident whose guardians responded to a survey indicating that they wanted their ward to remain in the facility. 562 F. Supp. 2d at 333-34. The court explained that "neither the survey nor the cover letter gave much

sense of what placement options were available. This might have encouraged respondents to 'play it safe' by indicating that they preferred their wards to remain at STS, the option with which they were most familiar." Id. at 333. The court also noted that "efforts to educate guardians about community placement are often successful in changing their attitudes." Id. The court went on to say that "[a]n opportunity to discuss the possibility of community placement with guardians could make a substantial difference in the number of referrals for placement." Id. at 338. Ultimately, the court found that, "[b]y concluding from the results of the Family Survey that there is no demand for community placements, the defendants may have prevented guardians and families from making informed choices." Id. at 338.

1. CHDC Residents Do Not Receive Objective, Reasonable Assessments of Whether They Are Appropriate for a More Integrated Setting.

In violation of the ADA and its implementing regulations, interdisciplinary teams at CHDC, as a matter of practice, fail to provide an assessment as to whether CHDC residents can live in a more integrated setting. 42 U.S.C. §§ 12101-12213; 28 C.F.R. § 35.130(d); Olmstead, 527 U.S. at 602. Instead, almost without exception, teams defer to the decision of the parents and/or guardians and simply adopt that decision as the team's recommendation. And they do so without giving full information or even requiring affirmative opposition to community placement.

In Olmstead, the Supreme Court presumed that a public entity providing services for individuals with disabilities was obligated to provide a reasonable assessment as to whether the individual was receiving those services in the most

integrated setting. 527 U.S. at 602. Subsequent decisions have underscored that a state's assessments must be reasonable. See Disability Advocates, Inc., 653 F. Supp. 2d at 259; Frederick L.,157 F. Supp. 2d at 540. It is not reasonable for an assessment of whether an individual can handle or benefit from a more integrated setting to be determined by a guardian's placement preferences, as occurs at CHDC, because no actual assessment or recommendation is being provided. See Messier, 562 F. Supp.2d at 338. Thus, CHDC is not providing a reasonable assessment of whether residents can live in a more integrated setting. Therefore, as a matter of law, it cannot establish that it is in compliance with the ADA and its implementing regulations by relying on its treatment team process. See 42 U.S.C. §§ 12101-12213; 28 C.F.R. § 35.130(d); Olmstead, 527 U.S. at 602.

The importance of an objective, reasonable assessment of whether an individual with disabilities can handle and benefit from community settings must be understood in the context of Olmstead's determination that unnecessary institutionalization is a form of discrimination. 527 U.S. at 600, 602. The Supreme Court in Olmstead acknowledges that institutionalizing individuals who can handle and benefit from a community setting "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." Id. at 600 (citing Allen v. Wright, 468 U.S. 737, 755 (1984) ("There can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action.")) (additional citations omitted). The Court further determined that, "confinement in an institution

severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, education advancement and cultural enrichment." Id. at 601. In the context of CHDC, a "self-contained community" where children and adults currently are likely to spend a lifetime, the importance of an open, honest, independent process for determining if an individual can handle or benefit from community placement cannot be overemphasized. See Undisputed Facts ¶ 9.

The fact that CHDC does not provide objective, reasonable assessments of whether individuals are appropriate for a more integrated setting is beyond reasonable dispute. CHDC interdisciplinary teams ("IDTs"), as a matter of practice, simply adopt the guardians' stated wishes, without exercising any independent judgment or even giving the guardians the benefit of an objective, reasonable assessment of whether the individual could handle or benefit from a more integrated setting, or providing an assessment about particular alternatives to continued institutionalization. CHDC's supervisory social worker -- the person CHDC identified as most knowledgeable about community placement -- admits that when an individual's treatment plan sets forth conditions that must be met before an individual will be "considered for a lesser restrictive environment," this means that "the individual or the guardian has not specifically requested alternate placement." Undisputed Facts ¶ 38. Program coordinator Donna Clendenin likewise testified that she and the teams she works with consider community placement for a resident only if the guardian agrees to it. Undisputed Facts ¶ 47.

Statements by CHDC's other program coordinators (Sarah Murphy and Judy Weaver), CHDC team leaders (Rebecca Brewer, Larry Brewer, and Doug Hart), as well as CHDC's superintendent all support the fact that objective, reasonable assessments are not provided to CHDC residents or, where applicable, their guardians. Undisputed Facts ¶¶ 34, 40-41.

Defendants' own experts failed to find any examples of teams *ever* recommending community placement where the guardian was opposed to community placement. For example, defense expert Dr. Kastner testified that he found no examples of IDTs recommending community placement when a parent or guardian did not agree. Undisputed Facts ¶ 42. Defense expert Dr. Walsh similarly testified that he had not found any examples of teams disagreeing with parents. Undisputed Facts ¶ 43.

Defense expert Gale emphasized the importance of CHDC's failure to conduct an independent assessment of the feasibility of particular less restrictive placements for youth when parents do not raise the issue. See Undisputed Facts ¶ 44 (At his deposition, Dr. Gale stated, "I think that it is incumbent upon CHDC to be constantly doing that work for the families. And if I am to criticize CHDC in an area regarding this, that is one where I feel that, in a good natured way, if the parent isn't saying they want their child elsewhere, CHDC is saying okay. And I frankly don't think that that's enough.").

Defense expert Gale also agrees that facilities must do what CHDC does not – "raise potential alternative placements, even if the parents do not request it" and "disagree with the family if, in their clinical opinion, they feel that a less restrictive environment can benefit a particular child." See Undisputed Facts ¶ 44. Dr. Kastner also agreed in his deposition that the decision of treating professionals regarding the appropriateness of community placement and the support or objection by a parent or guardian are "two separate determinations." Undisputed Facts ¶ 45. Furthermore, Ms. Robin Sims, consultant for the Defendants, noted in her deposition that the professional team has an "obligation" to give their input "as to whether they feel that individual is eligible or should be recommended to move into a community setting." Undisputed Facts ¶ 46.

CHDC's failure to do what Defendants' experts acknowledge they should do – and what is required by law – is confirmed by the former president of the CHDC parents' association, whose step-daughter is a longtime resident at CHDC. He testified that the parents make the recommendation regarding placement, which then gets consensus from the team. Undisputed Facts ¶ 48.

The results of this failure to provide an assessment of CHDC residents' capacity to live in a more integrated setting are tangible. By not providing CHDC residents and, where applicable, their guardians with an objective, reasonable assessment regarding particular alternatives to continued institutionalization, CHDC denies them the opportunity to meaningfully consider a more integrated placement. Undisputed Facts ¶ 50-52. Under these circumstances, there is no basis

upon which an individual can exercise his or her "option of declining to accept a *particular* accommodation," as required under the ADA. 28 C.F.R. pt. 35, App. A, p. 450 (1998) (emphasis added).

CHDC's failure to provide objective, reasonable assessments of whether individuals can handle or benefit from a more integrated setting also prevents Defendants from systematically identifying the number and type of individuals who could be successful in the community and planning state resources accordingly. This, too, violates the ADA's integration mandate. See Olmstead, 527 U.S. at 606. See also Messier, 562 F. Supp.2d at 330 (finding the State's method of considering placement in the community only when a particular placement becomes available violates the ADA because a State "cannot systematically develop resources appropriate to [the institution's] residents' placement needs."). See Undisputed Facts ¶ 62 (United States' expert Robert Gettings determined that "it is impossible to develop a credible plan for transitioning institutionalized persons to the community without first determining the number and characteristics of individuals who potentially might be impacted."); Undisputed Facts ¶ 45 (United States' expert Robert Gettings noted that "[p]roviders indicated they could provide options for CHDC residents, if they knew the parameters of the need. In other words, CHDC will not promote community placement until an option exists. And the provider cannot develop options until it has information about what residents need and some commitment to fund the development of those options.").

2. Treatment Teams at CHDC Do Not Have Sufficient Knowledge or Training about Community Integration to Make a Reasonable Recommendation Regarding the Most Integrated Setting Appropriate for CHDC Residents

CHDC interdisciplinary teams comprise individuals who, by their own admissions, do not have sufficient knowledge or training regarding community services, options, and benefits and thus cannot make an objective, reasonable assessment regarding an individual's capacity to handle or benefit from a community setting. Olmstead, 527 U.S. at 600, 602. This deficiency poses an independent basis as to why CHDC residents are not receiving any assessment whether they are qualified to live in a more integrated setting and this, as a matter of law, is a violation of the ADA and its implementing regulations. 42 U.S.C. §§ 12101-12213; 28 C.F.R. § 35.130(d); Olmstead, 527 U.S. at 602.

CHDC staff admittedly do not know what services can be provided in the community, are not familiar with living options available in the community, and cannot identify the benefits to living in the community. For example, Angela Green is the CHDC supervisory social worker and the CHDC staff member identified by the Defendants as knowing the most about community placement. Undisputed Facts ¶ 58. She is also the CHDC staff member who handles most discharge/transition planning issues at CHDC. Undisputed Facts ¶ 25. She and the individuals she supervises are responsible for advocating for appropriate services and recognition of individuals' rights and facilitating alternative placements when recommended by the team. Undisputed Facts ¶ 12. When asked if she expected a resident's treatment plan to identify why CHDC is the most

integrated setting for that resident, Ms. Green stated "I'm not sure that is a required thing within our policies." Undisputed Facts ¶ 31 (noting that Ms. Green is unsure as to whether CHDC policies require that the treatment team provide an assessment as to why CHDC is the most appropriate placement for each resident and that DDS Assistant Director Shelley Lee's understanding is that DDS has no policy regarding the IDT's discussion of community placement).

Ms. Green further testified that she is "not familiar with all the services that [community] providers are able to give." Undisputed Facts ¶ 58. When asked what the benefits are of community living, Ms. Green responded that "the benefit is living in the setting of your choice." Id. She was unable to identify any other benefits of community placement. Id. If Ms. Green does not know what options are available in the community or what the benefit is for a resident in moving to the community, she cannot provide input to those she supervises, nor to CHDC residents and their families, as to whether an individual could handle or benefit from a more integrated setting.

CHDC program coordinators demonstrate similarly significant gaps in knowledge regarding community services. This is particularly problematic because program coordinators write the IPPs and are responsible for designing, determining and coordinating the programs and services that ensure active treatment to residents. Undisputed Facts ¶ 7. In addition, the program coordinator facilitates the annual review meeting process, ensures that discussion and review at the meeting includes all facets of the individuals living, working and social/leisure

environments, and works with individual residents regarding plans to transition residents to other settings. Undisputed Facts ¶ 26. Yet, CHDC program coordinator Judy Weaver testified that she does "not know exactly what all is available out there" regarding community options and that it is the social worker's responsibility to know about community placement. Undisputed Facts ¶ 59. CHDC program coordinator Sarah Murphy testified that she has not visited any community placements in the Conway area, and has visited only one placement outside of the Conway area. Id.

CHDC's five team leaders also lack the knowledge and understanding of community placement options necessary to ensure that CHDC residents receive an objective, reasonable assessment of their appropriateness for such settings. CHDC team leaders are responsible for supervising professional staff, training new employees, and approving or disapproving residents' individual treatment plans. Undisputed Facts ¶ 6. They are expected to have "knowledge of programs and services for the mentally retarded and developmentally disabled." Id. Nevertheless, team leader Doug Hart testified that he does not know if there are fewer services in the community than at CHDC. Undisputed Facts ¶ 60. Mr. Hart is likewise unaware of any training that CHDC staff receive regarding community integration, and neither he nor team leader Rebecca Brewer received any training regarding community integration. Undisputed Facts ¶ 60. Team leader Jamie Coleman told United States expert consultant Toni Richardson that she had not read the

literature on community placement and had not been trained on community placement. Undisputed Facts ¶ 61.

Team leader Rebecca Brewer testified as to her erroneous belief that the services available at CHDC cannot be duplicated in the community. Undisputed Facts ¶ 60. But most, if not all, of the services CHDC residents require can be met in the community. Undisputed Facts ¶ 53. For example, the need to develop or improve daily living skills is often listed in CHDC plans as a barrier to community placement despite the fact that "community programs teach those same skills." Undisputed Facts ¶ 53. Similarly, individual's health issues require careful planning, appropriate supports and good training but need not be a bar to a resident living in a more integrated setting. Id. See also Undisputed Facts ¶ 55 (defense expert Dr. Walsh testified that, with appropriate supports, any individual with developmental disabilities can reside in the community); Undisputed Facts ¶ 56 (defense expert Dr. Kastner testified that there are individuals with developmental disabilities who have issues with aggression or self-injurious behavior, are non-mobile, and live in the community, and that neither behavior issues nor behavior plans are a bar to placement in the community).

As set forth above, CHDC is a self-contained community where the residents spend the bulk of their time at the facility, segregated from their non-disabled peers. Undisputed Facts ¶ 9. As noted, the Supreme Court determined that institutional settings such as CHDC, "severely diminishes [residents'] everyday life," Olmstead, 527 U.S. at 601, and the integration mandate instructs that

individuals receive services in a setting that maximizes interaction with non-disabled persons, 28 CFR pt. 35, App. A, p. 450 (1998). Yet, CHDC supervisory staff consider CHDC, a facility without non-disabled residents and with minimal opportunities for interaction with non-residents, to be an integrated setting.

Thus, supervisory social worker Angela Green states that CHDC is an integrated setting, because "[i]t is a place that can meet individual's needs, it allows them to have training, social interaction, allows them to go, do." Undisputed Facts ¶ 13. Program coordinator Sarah Murphy stated that CHDC is an integrated setting because it is "individualized," and program coordinator Judy Weaver stated that CHDC is integrated because it is an "appropriate" place for CHDC residents. Undisputed Facts ¶ 14. Program coordinator Donna Clendenin testified that CHDC is integrated because it is diverse, Undisputed Facts ¶ 16, and team leader Doug Hart was unable to define the term "integrated setting." Undisputed Facts ¶ 16. Cf. Messier, 562 F. Supp. 2d at 326 (discussing that the facility at issue "is not an integrated setting. It is a segregated institution in which all residents are mentally disabled. Furthermore, [the facility] is a relatively isolated campus in a rural setting. With the exception of day programs, residents of [the facility] have limited opportunities to interact with people from outside the institution or with non-disabled people."). If the staff members responsible for overseeing the assessments of residents' capacity for community life do not know what is available in the community, and have a preconceived and inaccurate notion that CHDC residents are already in an integrated setting, they cannot provide the objective, reasonable

assessment required by the ADA and the Supreme Court's ruling in Olmstead. 527 U.S. at 602.

The testimony of two of the Defendant's proposed experts, Robin Sims and Derek Nye, that CHDC is *not* an integrated setting, underscores the inadequacy of CHDC staff"s understanding of what an integrated setting truly is. Undisputed Facts ¶ 10 (testimony of defense expert Robin Sims that "[a]n integrated setting is generally one if you're talking like in school situations where disabled and non-disabled individuals are educated together. There are no non-disabled people being served in a developmental center. So the question is really -- you know, it's kind of a silly question."); Undisputed Facts ¶ 11 (testimony of defense expert Derek Nye that CHDC is not an integrated setting because students at CHDC do not get to interact with their non-disabled peers).

Further evidence that CHDC staff lack sufficient knowledge to make objective, reasonable assessments as to whether an individual can handle or benefit from community placement is apparent in CHDC treatment records, which identify as barriers to community placement tooth brushing, matching clothing, and other routine skills, notwithstanding that community providers routinely address such needs. Undisputed Facts ¶ 53. The use of such inappropriate barriers to community placement is typical of CHDC residents' program plans. Undisputed Facts ¶ 53 (Report of Toni Richardson). As a result, individual program plans are too similar to reflect true individualized planning. Id.; see CHDC Policy II-D-1; CON-US-109079; Undisputed Facts ¶ 22 (describing the policy for the "Individual

Program to be "goal directed and must define the direction in which a person wants their life to go. It will specify long-range goals, behavioral objectives, and service objectives"); Undisputed Facts ¶ 54 (testimony of defense expert Kevin Walsh that CHDC IPPs are "similar").

CHDC cannot provide objective, reasonable assessments of its residents because key staff members have an insufficient or seriously flawed understanding of the community's services and benefits, erroneously believe that CHDC is already an integrated setting, and create plans for residents that raise inappropriate barriers to community placement. Without an objective, reasonable assessment, CHDC is not determining if individuals can handle or benefit from a more integrated setting and, as a matter of law, is in violation of the ADA and its implementing regulations. 42 U.S.C. §§ 12101-12213; 28 C.F.R. § 35.130(d); Olmstead, 527 U.S. at 602.

3. Hundreds of Individuals Currently Residing at CHDC Could Handle or Benefit From a More Integrated Setting.

There is overwhelming evidence that hundreds of CHDC residents can "handle or benefit from community settings." See Olmstead, 527 U.S. 601-602. First, a professional reviewer, Ms. Toni Richardson, [4] has concluded that more than

[4] For over 25 years, Ms. Richardson has served on behalf of individuals with developmental disabilities in a variety of capacities, from direct care staff member to the Commissioner of the then-Department of Mental Retardation for the State of Connecticut. Undisputed Facts ¶ 8. Ms. Richardson is currently a community placement consultant to a number of jurisdictions, as well as a community

half of the residents of CHDC could live in a more integrated setting with appropriate supports.[5] Undisputed Facts ¶ 49.

In addition, several of Defendants' own experts acknowledge that there are individuals at CHDC who could handle or benefit from a more integrated setting. For example, defense expert Dr. Gale testified that he can identify at least seven CHDC students who could be in less restrictive environments either now or eventually. See Undisputed Facts ¶ 57 ("In essence, there are seven students who are in the range of mild intellectual disabilities who also have significantly interfering social, emotional challenges. And my belief is that it is more of these social, emotional challenges that are keeping them at CHDC than the fact that they

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placement "evaluator" pursuant to the terms of the settlement agreement in People First v. Clover Bottom Developmental Center, et al. Id.

[5] As discussed, Defendants have not made any reasonable assessment to which the Court could defer. In any event, it is appropriate to consider other evidence of residents' appropriateness for community placement. See Disability Advocates, Inc. v. Paterson, 653 F. Supp. 2d 184, 258-59 (E.D.N.Y. 2009) (holding that Olmstead does not "create a requirement that a plaintiff alleging discrimination under the ADA must present evidence that he or she has been assessed by a 'treatment provider' and found eligible to be served in a more integrated setting."); Joseph S. v. Hogan, 561 F. Supp. 2d 280, 291 (E.D.N.Y. 2008) ("the language from Olmstead concerning determinations by 'the State's treatment professionals' appears to be based on the particular facts of the case and not central to the Court's holding") (internal citation omitted); Frederick L. v. Dep't of Public Welfare, 157 F. Supp. 2d 509, 541 (E.D. Pa. 2001) ("[The court] do[es] not read Olmstead to require a formal 'recommendation' for community placement."). Thus, the focal point of this analysis should be the integration mandate, which says nothing about treating professionals, but does require services to be administered "in the most integrated setting appropriate to the needs of the individual," 28 C.F.R. § 35.130(d).

could not profit from being in a more typically developing environment around typically developing peers").

Other defense expert testimony supports the independent professional assessment that hundreds of individuals currently residing at CHDC could handle or benefit from a more integrated setting. Defense expert Dr. Walsh testified that, with appropriate supports, any individual with developmental disabilities can reside in the community. Undisputed Facts ¶ 55. Defense expert Dr. Kastner conceded that there are individuals with developmental disabilities who have issues with aggression or self-injurious behavior, are non-mobile, and live in the community. Undisputed Facts ¶ 56. Dr. Kastner further noted that neither behavior issues nor behavior plans are a bar to placement in the community. Id.

Yet, CHDC has identified only five current CHDC residents as appropriate for a more integrated setting. Undisputed Facts ¶ 32.

Ms. Richardson is not the first expert to find that a large proportion of individuals in Arkansas' HDCs could handle or benefit from more integrated settings. Undisputed Facts ¶ 65. In 1988, the Human Services Research Institute ("HSRI"), working with in-state stakeholders at the request of the state legislature and the Governor's Developmental Disabilities Planning Council, reached the same conclusion – that many residents of HDCs could appropriately live in more integrated settings. Id. As part of their study, HSRI assembled an expert panel of persons with disabilities, parents, service professionals, academics, and government officials from Arkansas. Id. These experts observed that "a present alternative [for

persons with developmental disabilities] that received great attention from panel members is the Human Development Center. The HDCs currently serve about 1,400 persons . . . but community placement for most of these persons was deemed appropriate by panel members if community service agencies were properly equipped and supported." Id.

Today -- twenty-two years after receiving HSRI's report -- Arkansas continues to institutionalize virtually the *same number* of individuals with developmental disabilities as it did in 1988. In 1988, 1,444 individuals with developmental disabilities in Arkansas were receiving residential services in a large congregate care facility (ICF/MRs of more than 16 persons). Undisputed Facts ¶ 65. Twenty-two years later, approximately 1,300 individuals in Arkansas receive residential care in large ICF/MRs. Undisputed Facts ¶ 66. Approximately 250 of these individuals are school-age children. Id.

The rate at which Arkansas continues to institutionalize persons with intellectual and developmental disabilities is also strikingly high compared to other states. This underscores the fact that individuals like those residing at CHDC could likely handle or benefit from a more integrated setting. Compared to the rest of the United States, Arkansas institutionalizes a disproportionally large number of individuals with intellectual and developmental disabilities in large state operated facilities. For example, as of June 30, 2007, Arkansas was serving more than three times as many persons with developmental disabilities in large (16+ bed), state-operated institutions as the median state, when measured in terms of rate per

100,000 in the general population. Undisputed Facts ¶ 63 (Arkansas served 38.5/per 100,000, while the United States total was 12.4/per 100,000). In addition, Arkansas had the sixth highest percentage of residents living in ICF/MRs during 2007 (40.7%) – a rate nearly twice the national median for all fifty states (22.0%). Id. In fact, at least 9 states no longer operate large (defined here as sixteen or more beds) ICF/MRs. Undisputed Facts ¶ 62.

CHDC also has a high number of school-aged residents. Undisputed Facts ¶ 64. There are now approximately 50 to 60 children at CHDC, about 10% of CHDC's total population and about 40% more than at the time of DOJ's CRIPA initial investigation commencing in 2002. Undisputed Facts ¶ 3. In contrast, of the remaining states operating large, public institutions for persons with intellectual and developmental disabilities as of June 30, 2008, almost 20% had no children or adolescents in residence whatsoever, and over 60% served no children under age 15 in such institutions. Undisputed Facts ¶ 64.

The facts that Arkansas' number of institutionalized individuals with developmental disabilities has remained relatively static for over two decades, and it has a dramatically higher rate of institutionalization than other states, underscore what Ms. Richardson concludes – and several of Defendants' own experts concede: Many of the individuals currently living at CHDC who could handle or benefit from a more integrated setting. Yet, because of CHDC's failure to provide objective, reasonable assessments to individuals, they remain institutionalized in violation of the ADA.

B. The Court Should Grant Summary Judgment as to the United States' Claim that Defendants Fail to Provide a Free Appropriate Public Education to CHDC Students, as Required by the IDEA.

Defendants' failure to conduct individualized education plan (IEP) meetings with all of the IEP team members required by the IDEA constitutes a serious procedural violation resulting in the denial of a free appropriate public education ("FAPE") to the students at CHDC. By failing to include a representative from the local education agency ("LEA representative") and a regular education teacher in IEP meetings for CHDC students, Defendants deprive CHDC students of opportunities to access public school resources and interact with their non-disabled peers on a regular basis. CHDC students also do not receive any statewide assessments. But the IDEA requires statewide assessments to ensure that students with disabilities have access to and benefit from statewide curricula that are accessible to students without disabilities.

By segregating CHDC students in separate classes on CHDC grounds away from their non-disabled peers, without access to public school resources and statewide assessments, CHDC violates the IDEA's requirement that students be educated in the least restrictive environment. The very fact that not one CHDC student attends a single class with his or her non-disabled peers demonstrates the harm of CHDC's serious procedural violations and shows that CHDC students are not educated in the least restrictive environment.

Should the Court look beyond CHDC's procedural violations to examine the substance of CHDC IEPs and their implementation, undisputed evidence indicates

that CHDC IEPs do not "meet the standards of the State educational agency." See 20 U.S.C. § 1401(9)(B). The Arkansas Department of Education ("ADE") recently cited CHDC for failing to make FAPE available to all students with identified disabilities as required by federal and state law. See Undisputed Facts ¶ 70. This determination was based on a number of enumerated areas for which ADE cited CHDC as non-compliant, including four areas of non-compliance with IEP requirements. See Id.

1. Because CHDC's Procedural IDEA Violations Deprive its Students of Educational Opportunities, the Court Need Not Reach Issues of IEP Implementation.

In Bd. of Educ. v. Rowley, the Supreme Court established a two-step inquiry for evaluating claims that students have not received a free appropriate public education under the Education for All Handicapped Children's Act, the predecessor statute to the IDEA. 458 U.S. 176, 206-07 (1982). Under this two-step analysis, a court first evaluates whether a State has complied with statutory procedural requirements. Id. at 206. Second, the court determines whether the individualized educational program developed through statutory procedures is reasonably calculated to enable the student to receive educational benefits. Id. at 206-07. Both requirements must be met. See id. As the Rowley Court emphasized, "the importance Congress attached to these procedural requirements cannot be gainsaid." Id. at 205.

After passage of the IDEA, courts have cited Rowley as establishing a two-part IDEA analysis under which a court need not reach "the merits of the

substantive provisions of the IEP" if a procedural deficiency results in a denial of FAPE. M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 644 (9th Cir. 2005); see also W.A. v. Pascarella, 153 F. Supp. 2d 144, 151 (D. Conn. 2001) ("The Court is also cognizant of the case law holding that failures to meet the Act's procedural requirements can be adequate grounds by themselves for holding that a school district has failed to provide a FAPE.").

Although it is true that "[n]ot every procedural violation . . . is sufficient to support a finding that the child in question was denied a FAPE . . . procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits clearly result in the denial of a FAPE." Amanda J. v. Clark Cty. Sch. Dist., 267 F.3d 877, 892 (9th Cir. 2001) (internal citations and quotations omitted); see also Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025, 1031 (9th Cir. 2006) ("Individuals with Disabilities Act relief is appropriate if procedural violations deprive [the student] of an educational opportunity (prejudice) or seriously infringe his parents' opportunity to participate in the formulation of the individualized education plan."); Ind. Sch. Dist. No. 283 v. S.D., 88 F.3d 556, 562 (8th Cir. 1996) ("An IEP should be set aside only if procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.") (internal quotations omitted).

Routinely failing to convene IEP teams with all of the IDEA-required members (i.e., the LEA representative and a regular education teacher), failing to invite a representative from the agency or agencies likely to provide transition services, and failing to administer statewide assessments to measure CHDC students' opportunity to access and benefit from the State's challenging academic content standards and student academic achievement standards constitute a denial of FAPE. This is because CHDC students are thereby deprived of the educational opportunities to access public school and other agency resources, to benefit from Statewide achievement standards, and to interact with their non-disabled peers.[6] See, e.g., M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 644 (9th Cir. 2005) (declining to reach the merits of the substantive provisions of a student's IEP when the school district violated the procedural requirement that at least one regular education teacher participate in the evaluation of an IEP); Amanda J., 267 F.3d at 892-93 (finding that a school district's failure to include required IEP members denied the student a FAPE).

[6] To the extent a pattern or practice must be shown for statutory claims in this case, a pattern or practice is clearly established because Defendants' conduct with regard to conducting IEP meetings and failing to administer statewide assessments is repeated and routine. See United States v. Pennsylvania, 863 F. Supp. 217, 219 (E.D. Pa. 1994) (citing CRIPA legislative history in Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 897, 96th Cong., 2d Sess., at 11-12 (1980) (A pattern or practice exists where "the unlawful act by the defendant was not an isolated or accidental departure from an otherwise lawful practice.")).

2. CHDC Fails to Satisfy the IDEA's Requirement that an LEA Representative and a Regular Education Teacher Attend IEP Meetings for CHDC Students.

The IDEA prescribes the required members of the team who must meet to evaluate special education needs for students with disabilities (the "IEP team") Specifically, 20 U.S.C. § 1414(d)(1)(B) provides:

> The term "individualized education program team" or "IEP Team" means a group of individuals composed of --
>
> (i) the parents of a child with a disability;
>
> (ii) *not less than regular education teacher of such child* (if the child is, or may be, participating in the regular education environment);
>
> (iii) not less than one special education teacher, or where appropriate, at least one special education provider of such child;
>
> (iv) *a representative of the local educational agency* who-
>
> > (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
> >
> > (II) is knowledgeable about the general curriculum; and
> >
> > (III) is knowledgeable about the availability of resources of the local educational agency;
>
> (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
>
> (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
>
> (vii) whenever appropriate, the child with a disability.

20 U.S.C. § 1414(d)(1)(B) (emphasis added).

The IDEA also provides that "[t]he regular education teacher of the child, as a member of the IEP Team, shall, consistent with paragraph 1(C),[7] participate in the review and revision of the IEP of the child." 20 U.S.C. § 1414(d)(4)(B).

Additionally, the IDEA' s implementing regulations further provide:

> The public agency must ensure that the IEP team for each child with a disability includes-
>
> (1) The parents of the child;
>
> (2) *Not less than one regular education teacher of the child* (if the child is, or may be, participating in the regular education environment)....

34 C.F.R. § 300.321(a) (emphasis added).

Regular education teachers play a critical role in developing an IEP:

---

[7] Paragraph (1)(C) provides that "[a] member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting." 20 U.S.C. § 1414(d)(1)(C)(i). In addition,

> A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if--
> (I) the parent and the local educational agency consent to the excusal; and
> (II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

20 U.S.C. § 1414(d)(1)(C)(ii).

Notably, "A parent's agreement under clause (i) and consent under clause (ii) shall be in writing." 20 U.S.C. § 1414(d)(1)(C)(iii).

> Very often, regular education teachers play a central role in the education of children with disabilities (H. Rep. No. 105-95, p. 103 (1997); S. Rep. No. 105-17, p. 23 (1997)) and have important expertise regarding the general curriculum and the general education environment. Further, with the emphasis on involvement and progress in the general curriculum added by the IDEA Amendments of 1997, regular education teachers have an increasingly critical role (together with special education and related services personnel) in implementing the program of FAPE for most children with disabilities, as described in their IEPs.

M.L., 394 F.3d at 643 (citing 34 C.F.R. §300, App. A).

Accordingly, the IDEA Amendments of 1997 added a requirement that each child's IEP team must include at least one regular education teacher of the child, if the child is, or may be, participating in the regular education environment. See 34 C.F.R. § 300.344(a)(2)); see also §§ 300.324(a)(3), (b)(3) (regarding the role of a regular education teacher in the development, review, and revision of IEPs).

The requirement for a regular education teacher to participate in students' IEP meetings is mandatory if the student is or may be participating in the regular educational environment. See 34 C.F.R. § 300.344(a)(2)); see also M.L., 394 F.3d at 643-44 (noting that the "plain meaning" of this provision of the IDEA "compels the conclusion that the requirement that [at] least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory – not discretionary").

Similarly, each IEP team meeting must include a local education agency representative ("LEA representative") who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique

needs of children with disabilities; is knowledgeable about the general curriculum; and is knowledgeable about the availability of resources of the local educational agency. See 20 U.S.C. § 1414(d)(1)(B)(iv). This requirement also is mandatory, not discretionary. See id.

IEP teams for CHDC students routinely do not include an LEA representative. See Undisputed Facts ¶ 68 (juxtaposing Defendants' denial that they "have an obligation to 'secure' the attendance of a public agency representative at each individualized education plan meeting" with testimony from defense expert Gale that the LEA representative "almost never attend[s]" CHDC youth IEP meetings, which is, in Defendants' expert's opinion, "a glaring omission when you're talking about transition services" that "should be corrected"). This deficiency causes harm to CHDC students because there is no IEP team participant that can fulfill the LEA representative's role of facilitating CHDC student access to the general curriculum and resources of the local educational agency. See 20 U.S.C. § 1414(d)(1)(B)(iv).

Nor do IEP teams for CHDC students routinely include a regular education teacher. See Undisputed Facts ¶ 69. Defendants admit that no CHDC student attends class with his or her non-disabled peers, but qualify this admission by noting that "this has not always been true and may not be true in the future." Undisputed Facts ¶ 72. But the State cannot provide CHDC students with opportunities to attend class with their non-disabled peers if regular education teachers and an LEA representative do not routinely participate in CHDC student

IEP meetings. This is a clear violation of the letter and intent of the IDEA. See 20 U.S.C. § 1414(d)(1)(B).

3. CHDC Routinely Fails to Invite a Representative of the Agency or Agencies Likely to Provide Transition Services to Assist CHDC Youth in Transitioning to Postsecondary Educational Services or to a Less Restrictive Environment.

The IDEA requires that, to the extent appropriate, schools invite a representative of any public agency or agencies to a student's IEP meeting if transition services are to be discussed at the meeting, with the student or parent's consent (parent's consent if the student has not reached the age of majority). 34 C.F.R. § 300.321(b).

On June 16, 2010, the Arkansas Department of Education ("ADE") sent CHDC a letter reporting the results of ADE's January 2010 official site monitoring visit regarding ADE's assessment of CHDC's compliance with federal and state special education laws and regulations. In this letter, ADE cited CHDC for non-compliance with due process standards because, per ADE's evaluation, "[t]here was insufficient evidence" that notices to parents identify any other agency or agencies that will be invited to send a representative to CHDC student IEP meetings to discuss transition services. See Undisputed Facts ¶ 70. Without notifying parents of the agency or agencies who may be invited to send a representative to participate in IEP meeting discussions regarding CHDC student transition services, CHDC cannot obtain the required parental consent for the agency representative's participation. As a result, CHDC students are deprived of a key component in accessing appropriate transition services.

Indeed, the United States' education expert found that, in her review of 45 CHDC student IEPs, there was not an indication that any agency representatives had participated in transition planning services for CHDC students. See Undisputed Facts ¶ 71. This deficiency deprives CHDC students of important opportunities to access services that may be provided by outside agencies to facilitate postsecondary education or education in a less restrictive environment.

4. CHDC Fails to Ensure that CHDC Students Receive Regular or Alternate Statewide Assessments, as Required by the IDEA.

The IDEA requires that students with disabilities participate in statewide assessments to the extent of their non-disabled peers – by participating in (1) general statewide assessments without accommodations, (2) general statewide assessments with accommodations, or (3) alternate assessments. See 20 U.S.C. § 1412(a)(16) (requiring that "[a]ll children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 111 of the Elementary and Secondary Education Act of 1965, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs."). To the extent that schools deem alternate assessments more appropriate for students with disabilities than general assessments, alternate assessments must be "aligned with the State's challenging academic content standards and challenging student academic achievement standards" and "measure the achievement of children with disabilities against those standards." Id.

CHDC students do not receive (1) general statewide assessments without accommodations, (2) general statewide assessments with accommodations, or (3) alternate assessments, as both of Defendants' education experts testified. See Undisputed Facts ¶ 73 (both defense experts testified that CHDC students do not receive either general or alternate statewide assessments). The State's failure to ensure that each CHDC student participates in general State and districtwide assessment programs violates the IDEA and deprives CHDC students of the opportunity to access and benefit from the State's challenging academic content standards and student academic achievement standards. See 20 U.S.C. § 1412(a)(16); see also Leighty v. Laurel Sch. Dist., 457 F. Supp. 2d 546, 561 (W.D. Pa. 2006) (citing 20 U.S.C. § 1412(a)(16) and noting that "Congress has made it clear that, to the extent possible, disabled children are to be educated and assessed in the same manner as their nondisabled peers").

5. The Undisputed Fact That Not a Single CHDC Student Attends a Single Class with His or Her Non-disabled Peers Demonstrates the Harm of CHDC's Procedural Violations and Establishes a Violation of the IDEA's Least Restrictive Environment Requirement.

The IDEA explicitly requires that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C.

§ 1412(a)(5)(A). In interpreting this statutory requirement, the Eighth Circuit has stated, "Children who can be mainstreamed should be mainstreamed, if not for the entire day, then for part of the day; similarly, children should be provided with an education close to their home, and residential placements should be resorted to only if these attempts fail or are plainly untenable." T.F. v. Special Sch. Dist. of St. Louis Cty., 449 F.3d 816, 820 (8th Cir. 2006) (internal quotations omitted). Only if "the services that make segregated placement superior cannot be feasibly provided in a non-desegregated setting" is a placement appropriate, given that "the IDEA creates a preference for mainstream education."[8] Pachl v. Seagren, 453 F.3d 1064, 1067-68 (8th Cir. 2006).

Although CHDC's procedural violations alone establish a denial of FAPE, the undisputed fact that no CHDC student attends a single class with his or her non-

[8] Pachl notes that removing a child from the mainstream setting is permissible when "the handicapped child would not benefit from mainstreaming," when "any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting," and when "the handicapped child is a disruptive force in the non-segregated setting." Pachl, 453 F.3d at 1068. To the extent Defendants claim that students are at CHDC for behavioral reasons, the Eighth Circuit has held that removal of an assertedly dangerous disabled child from her current educational placement must be supported by evidence that "(1) that maintaining the child in that placement is substantially likely to result in injury either to himself or herself, or to others, and (2) that the school district has done all that it reasonably can to reduce the risk that the child will cause injury." Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1228 (8th Cir. 1994). The records produced by Defendants do not include evidence supporting these exceptions, particularly considering that CHDC students are not mainstreamed to any extent, unlike in Pachl, which involved a dispute between 70% and 100% mainstreaming. See Pachl, 453 F.3d at 1068-69.

disabled peers provides further evidence that CHDC students are not educated in the least restrictive setting, in violation of the IDEA. See Undisputed Facts ¶ 72 (Defendants admit that CHDC school-aged youth do not attend any classes with their non-disabled peers "but this has not always been true and may not be true in the future"). Nor is there any indication from any of the CHDC students' IEPs that IEP teams conducted the required analysis of whether "the services that make segregated placement superior cannot be feasibly provided in a non-desegregated setting." Rather, IEP teams routinely "check the boxes" justifying the most restrictive placement possible for CHDC students, without any explanation of how the Eighth Circuit's required showing is met.

Most CHDC students attended public school at some point prior to their transfer to CHDC and, upon transfer to CHDC, moved to an educational environment that is much more restrictive than their prior placements. In their prior public school placements, CHDC students attended various classes with their non-disabled peers, such as physical education (CHDC student C.A. and CHDC student T.M.); electives (CHDC student R.C.); library, music, and art (CHDC student C.L.); and other regular class activities (CHDC student Z.S. and CHDC student N.S.); and non-academic classes (CHDC student B.R.) See Undisputed Facts ¶ 74 (noting examples of CHDC students' prior public school IEPs).

Even Defendants' education expert has testified that he can identify at least seven CHDC students who could be in less restrictive environments either now or eventually. See Undisputed Facts ¶ 57. In his deposition testimony, Defendants'

education expert explained how some students appear to have behavioral issues keeping them at CHDC when, in fact, they should be educated in a less restrictive environment. See id. (testimony of Defs. Expert, Dr. Bruce Gale, that "[i]n essence, there are seven students who are in the range of mild intellectual disabilities who also have significantly interfering social, emotional challenges. And my belief is that it is more of these social, emotional challenges that are keeping them at CHDC than the fact that they could not profit from being in a more typically developing environment around typically developing peers."). Students' emotional or behavioral difficulties, or an apparent lack of community mental health services, cannot be an excuse to institutionalize youth and educate those same youth in the most restrictive environment. This is particularly true, given the IDEA's requirement that education be provided in the least restrictive environment, which incorporates a clear "preference for mainstream education." Pachl, 453 F.3d at 1067-68.

6. If the Court Were to Look Beyond Procedural Requirements to Examine the Substance of CHDC IEPs and Their Implementation, Undisputed Evidence Establishes that CHDC IEPs Do Not Meet the Standards of the State Educational Agency.

Under the IDEA, a disabled student's IEP must "meet the standards of the State educational agency." 20 U.S.C. § 1401(9)(B); see also CJN v. Minneapolis Public Schs., 323 F.3d 630, 639 (8th Cir. 2003) (quoting same statutory language). The Arkansas Department of Education ("ADE") recently cited CHDC for failing to

make FAPE available to all students with identified disabilities, as required by federal and state law. See Undisputed Facts ¶ 76.

ADE based its determination that CHDC fails to provide FAPE on a number of areas of non-compliance with federal and state special education requirements, including four findings of non-compliance regarding IEP requirements. See Undisputed Facts ¶¶ 76, 77. Regarding IEPs, ADE found that (1) CHDC fails to consider special factors that impede a student's learning or that of others when developing the student's IEP; (2) IEP transition needs do not address appropriate measurable post-secondary goals based on age appropriate transition assessments; (3) IEP components are not developed to address the unique needs of individual students; and (4) parents are not informed of CHDC student progress toward meeting annual goals and short term objectives on a quarterly basis. See Undisputed Facts ¶ 77. This current evidence that CHDC IEPs fail to meet the standards of the State educational agency establishes a violation of 20 U.S.C. § 1401(9)(B) and an additional basis for summary judgment on the United States' IDEA claim, should the Court look beyond CHDC's procedural violations to examine the substance of CHDC IEPs and their implementation.

CONCLUSION

For the reasons stated above, the Court should grant the United States' Motion for Partial Summary Judgment and issue summary judgment for the United States on Count II of its Complaint, finding that Defendants fail to serve residents

in the most integrated setting appropriate to their needs, in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 – 12213.

The Court also should grant the United States' Motion for Partial Summary Judgment and issue summary judgment for the United States on Count III of its Complaint, finding that a free appropriate public education is not provided to CHDC youth, and that CHDC youth are not educated in the least restrictive environment, in violation of the IDEA, 20 U.S.C. §1400 et seq., and its implementing regulations, 28 C.F.R. pt. 35.

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July 1, 2010

CERTIFICATE OF SERVICE

I certify that on this 1st day of July 2010, I served a true and correct copy of the ***Memorandum of Law in Support of United States' Motion for Partial Summary Judgment*** via the Court's electronic filing system, upon the following:

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