

Community Integration and the Americans with Disabilities Act



July 21, 2011

Renee Wohlenhaus
Deputy Chief
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
Renee.Wohlenhaus@usdoj.gov

Overview

- Title II of the ADA
- Community integration mandate
 - Title II integration regulations
 - *Olmstead v. L.C.*
 - Elements of the Plaintiffs' Case under *Olmstead*
 - Fundamental alteration affirmative defense
 - Different types of *Olmstead* cases

TITLE II OF THE ADA

- “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be **subjected to discrimination** by any such entity.” 42 U.S. C. § 12132

New DOJ Title II Regulations

- Adoption of the 2010 ADA standards for accessible design
- Ticketing
- Service Animals
- Wheelchairs and other Power-Driven Mobility Devices
- Effective Communication (VRI)
- Residential Housing offered for sale to individual owners
- Detention and correctional facilities

New DOJ Title III regulations

- Adoption of the 2010 ADA standards
- Ticketing
- Service Animals
- Wheelchairs and other Power-Driven Mobility Devices
- Effective Communication (VRI)
- Reservations made by places of lodging
- Timeshares, condominium hotels, and other places of lodging

ADA Findings of Congress

42 U.S.C.A. § 12101

- 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;
- discrimination against individuals with disabilities persists in such critical areas as ... **institutionalization, health services...**;
- individuals with disabilities continually encounter various forms of **discrimination**, including ... **segregation**, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
- the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, **full participation, independent living**, and **economic self-sufficiency** for such individuals; and
- The purpose of the ADA is to “provide a **clear and comprehensive national mandate** for the elimination of discrimination against individuals with disabilities.

Reasonable Modification

- A public entity shall make ***reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination*** on the basis of disability....
-unless the public entity can demonstrate that making the modifications would ***fundamentally alter*** the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7)

DOJ'S ADA INTEGRATION REGULATION

- “A public entity shall administer services, programs, and activities **in the most integrated setting** appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130 (d)
- The most integrated setting is one that “enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible...” Preamble to DOJ regulations, App. B.

Methods of Administration

- “[a] public entity may not, directly or through contractual or other arrangements, **utilize criteria or methods of administration** that” have the effect of discrimination.

28 C.F.R. § 35.130(b) (3).

Olmstead v. L.C.

527 U.S. 581 (1999)

- **Plaintiffs:** L.C. and E.W., individuals with mental disabilities confined in a Georgia state –run psychiatric hospital.
- **Defendants:** Georgia officials responsible for Georgia’s mental health/developmental disabilities system.
- **Claim:** L.C. and L.W. asserted that the State's failure to discharge them from the hospital and provide them services in a community-based program, once their treating professionals determined that such placement was appropriate, violated Title II of the ADA.

Unjustified Institutionalization Violates the ADA

Olmstead's central holding is that the ADA prohibits states from unnecessarily institutionalizing persons with disabilities and from failing to serve them in the most integrated setting.

Segregation is Discrimination

- “**Unjustified isolation**, we hold, is properly regarded as discrimination based on disability.”
- “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**”
- “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**”

Elements of Plaintiffs' Olmstead Case:

- Individual can handle or benefit from community placement;
- Transfer is not opposed by the affected individual; and
- Community placement can be reasonably accommodated (i.e., would not impose a fundamental alteration, which the state must prove).

***Olmstead* Applies To Public and Private Congregate Care Settings in a State's Treatment System**

- *Olmstead* and early ADA community integration cases focused primarily on large, state-run psychiatric hospitals, ICF/MR's and public nursing homes
- *Olmstead* principles and ADA community integration requirements apply to private facilities, where placement funded by public entity:
 - The state or local government, through its administration, planning, and allocation of resources, promotes the segregation of individuals with disabilities in private facilities. ADA regs cover government's administration of programs (28 C.F.R. § 35.130)
 - DAI v. Paterson (E.D.N.Y. 2009; on appeal to Second Circuit) applied *Olmstead* to private adult homes
 - Also, pre-*Olmstead* decision: Rolland v. Celluci (D. Mass. 1999) (private nursing homes)

What is the most integrated setting?

- Two overall concepts:
 - Most integrated setting appropriate to the needs of the individual with the disability.
 - An integrated setting is one that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.
- ICFs, state hospitals, hospitals and nursing facilities are accepted as non-integrated settings.

The Most Integrated Setting

- Other non-exhaustive factors that courts have considered:
 - Geographical segregation
 - Congregate settings
 - Individual control over routine
 - Organized activities involve other residents
 - Meaningful activities (e.g. not just coloring books) that are themselves integrated
 - Employment opportunities
 - Rigid schedules, rigid rules, curfews, visitor policies
 - Choice of roommates

The Most Integrated Setting

Proposed HHS Regulations

- Proposed rules from HHS 42 CFR Part 441, 76 Fed. Reg. 21311, 21313
- Home and community-based settings (funded by 1915(c) waivers) “must be integrated into the community; must not be located in a building that is also a publicly or privately operated facility that provides institutional treatment or custodial care; must not be located in a building on the grounds of, or immediately adjacent to, a public institution; or, must not be a housing complex designed expressly around an individual’s diagnosis or disability.”

***Olmstead* Applies to People In or At-Risk of Entering an Institution**

- *Olmstead* focused on individuals currently in an institution
- Subsequent cases have applied *Olmstead* to individuals at-risk of institutionalization, including those on wait lists
 - Needed services offered in institutions but not the community.
 - Cuts in community services that would force an individual into an institution
 - Individuals are required to first go into an institution before being eligible for community services

At Risk of Institutionalization Examples

- Fisher v. Oklahoma (OK): State capped prescription drug coverage in the community, placing individuals at risk of entering a nursing facility to obtain the medications.
- Hiltibran v. Levy (MO): State failed to provide incontinence supplies to individuals in the community, placing them at risk of entering a nursing facility to obtain the supplies.
- Haddad v. Arnold (FL): State policy requiring individual to enter a nursing home for a period of time to qualify for HCBS.

Fundamental Alteration

Affirmative Defense

- Public entities are not required to make reasonable modification if doing so would be a fundamental alteration of its programs or services.
- Several varieties in *Olmstead* case law: cost-based, changes to program requirements, comprehensive effective plan

Cost-Based Fundamental Alteration

- *Olmstead*: not fair to measure cost of moving one person to community vs. whole state budget
- *Olmstead*: responsibility of entity to serve others with disabilities
- Costs, especially short term costs, may not be a fundamental alteration
- All costs of institutional care and community should be measured (e.g. Medicaid state plan services, specialized services)

Changes to program requirements

- Caps on the numbers of individuals served
- Program eligibility requirements
- Services not available under particular program
- Waiver programs requirements
- Creation of entirely new programs

Effectively working, comprehensive plan

- Origins of the defense
 - *Olmstead*: If the State were “to demonstrate that it had a comprehensive, effectively working plan...and a waiting list that moved at a reasonable pace...”
 - DOJ Amicus: If the State has a plan to deinstitutionalize individuals that requiring them to immediately move particular individuals would so disrupt the orderly implementation of the State’s plan as to cause a fundamental alteration of the program.

Effectively working, comprehensive plan

In Frederick L. v. Dep't of Public Welfare, the Third Circuit Court of Appeals required a plan that specified (at a *bare minimum*):

- A time frame or target date for placement in a community setting
- The approximate number of persons to be discharged during each time period
- Eligibility standards for community-based services
- General description of the collaboration required between relevant agencies.
- Sanchez v. Johnson and Arc of Washington v. Braddock, the Ninth Circuit Court of Appeals looked to the State's history of moving individuals to the community.

Relief in *Olmstead* cases

- *U.S. v. Georgia* – example of a negotiated consent decree.
- *DAI v. Paterson* – example of court ordered remedy

US v. GA Settlement Agreement

- Settlement Agreement entered by the Court on November 1, 2010
- Comprehensive reform of Georgia's mental health and developmental disabilities systems to prevent unnecessary institutionalization and support individuals in the community
- Court enforceable agreement with strong monitoring provisions, experienced monitor, and quality management provisions

US v. GA Settlement (cont'd)

- DD Provisions:
 - Expansion of waivers to facilitate the discharge of individuals in state-operated DD facilities and to prevent unnecessary admission of individuals with DD currently in the community
 - Expansion of family support services (for individuals on waitlist)
 - Crisis services and respite
 - Case management
 - Housing subsidies

US v. GA Settlement (cont'd)

- **Mental Health Provisions:**
 - Comprehensive crisis system (crisis hotline, mobile crisis teams, crisis apartments, crisis stabilization programs)
 - Significant expansion of ACT, intensive case management, and targeted case management
 - Significant expansion of supported housing
 - Expansion of supported employment
 - Peer and family supports

Civil Rights Division

U.S. Department of Justice

Assistant Attorney General Thomas Perez

Principal Deputy Assistant Attorney General Samuel Bagenstos

- Disability Rights Section is primary enforcer of ADA and coordinator of other Federal agencies' ADA activities.
- The Chief of the Disability Rights Section is Allison Nichol.
- Other Civil Rights Sections involved in disability rights issues include Special Litigation, Housing, Education, Criminal
- Disability Rights Section's U.S. Attorney Project coordinates work of U.S. Attorney offices that investigate and prosecute ADA cases.

Office for Civil Rights
U.S. Department of Health and
Human Services
OCR Director Georgina Verdugo

- OCR is located in the Office of the Secretary at HHS. OCR has 240 staff in 10 regional offices and at headquarters.
- OCR enforces civil rights and privacy statutes, and provides education, outreach and technical assistance.
- OCR enforces Section 504 and ADA Title II in the areas of health care and social services.

Community Living Initiative

- In honor of the 10th Anniversary of the Supreme Court's *Olmstead* decision and the 20th Anniversary of the Americans with Disabilities Act
- "The *Olmstead* ruling was a critical step forward for our nation, articulating one of the most fundamental rights of Americans with disabilities: Having the choice to live independently. I am proud to launch this initiative to reaffirm my Administration's commitment to vigorous enforcement of civil rights for Americans with disabilities and to ensuring the fullest inclusion of all people in the life of our nation."

-- President Obama, June 22, 2009.



***Olmstead* Enforcement -- a Top Priority**

- DOJ is involved in litigation in federal courts in more than 20 states to enforce *Olmstead*.
- OCR is investigating over 30 *Olmstead* complaints and several statewide compliance reviews in its ten regional offices.
- Investigations and cases involve all disability groups, public and private congregate care settings, and community services and programs

DOJ *Olmstead* Enforcement

- Statements of Interest in ongoing cases
- Intervention
- Investigations
- United States litigation
- Technical assistance

Significant Statements of Interests

- Unnecessary institutionalization of individuals
 - *Benjamin v. PA* (individuals in large state-operated ICF/MRs); plaintiffs won on summary judgment
 - *Disability Rights New Jersey v. Velez* (individuals in large state-operated ICF/MRs)
 - *Boyd v. Herrman-Steckel* (young man in nursing home with physical disabilities)
 - *OPA v. Connecticut* (individuals with mental illness in nursing homes)

Statements of Interests (cont'd)

- Challenges to policies placing individuals at risk of unnecessary institutionalization
 - *Cruz v. Dudek* and *Haddad v. Arnold* (state policy requiring individuals to enter an institution before getting priority for community services); preliminary injunctions granted in both cases
 - *Hiltibran v. Levy* (state policy to only offer medically necessary services in nursing homes and not in the community); preliminary injunction granted

Statements of Interests (cont'd)

- Budget cut cases (examples)
 - *Pitts v. Greenstein* (cuts in personal care services placing individuals at risk of entering nursing homes); state's summary judgment denied
 - *Napper v. County of Sacramento* (cuts in mental health services placing individuals at risk of institutionalization); preliminary injunction granted
 - *Marlo M. v. Cansler* (cuts in mental health and developmental disability services putting individuals at risk of institutionalization); preliminary injunction granted

Statements of Interest (cont'd)

- Supporting *Olmstead* Settlement Agreements in Private Litigation
 - *Williams v. Quinn* (supported housing for people with mental illness in private IMDs); settlement agreement approved
 - *Ligas v. Maram* (community services for people with developmental disabilities in private ICF/MRs)

Statements of Interest (cont'd)

- Children's *Olmstead* cases
 - *Troupe v. Barbour* (seeking intensive community services for children with emotional, behavioral and mental health needs under ADA and EPSDT)
 - *John B. v. Emkes* (requiring medically necessary community-based services to children under EPSDT)
 - *Hampe v. Hamos* (medically fragile youth at risk of institutionalization when they age out of state waiver program)

Intervention

- DOJ intervened in *DAI v. Patterson* and supported in the district court the remedial plan proposed by plaintiffs to significantly expand supported housing
- Participating in implementation efforts
- Defended the district court's orders on appeal in the Second Circuit

Investigations

- Individuals in or at risk of entering state-operated and private ICF/DDs
- Individuals in or at risk of entering public state hospitals, private psychiatric facilities, and emergency rooms.
- Individuals with physical disabilities, mental illness, and developmental disabilities in or at risk of entering nursing homes

Investigations (cont'd)

- Individuals in large private congregate settings such as adult homes for individuals with mental illnesses
- Children in institutional placements or at risk of out-of-home placements due to lack of community services
- Budget cuts to community services placing people at risk of institutionalization

Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997

- Gives the Attorney General authority to redress serious, systemic problems in public institutions

Cases involve pattern or practice, systemic unlawful conditions

Injunctive relief to remedy violations of Federal constitutional and statutory rights

New subpoena authority under the Affordable Care Act

CRIPA INVESTIGATIONS

- Recent findings letters include Maple Lawn Nursing Facility in Missouri, Central Virginia Training Center and New Hampshire Mental Health System and previous findings letters are on the Special Litigation website at: <http://www.justice.gov/crt/about/spl/findsettle.php>.

In keeping with Olmstead, there is a shift in focus in CRIPA cases from institutional reform to threshold question of appropriateness of institutionalization and right to live in the community

CRIPA investigations now focus first on whether individuals should be in the institution

--Look at diversion, admission, and discharge practices; those at risk of institutionalization; building community infrastructure and services (U.S. v. Georgia settlement between DOJ, OCR and State is model:

http://www.justice.gov/crt/about/spl/documents/georgia/us_v_georgia_cover.php)

United States v. Georgia

- Started as a CRIPA case, primarily focused on addressing life-threatening conditions in Georgia's psychiatric hospitals and developmental disability facilities
- Investigation shifted to focus on the lack of community services leading to the unnecessary institutionalization of thousands of individuals with mental illnesses and developmental disabilities

Federal Resources - DOJ

- ADA.gov/Olmstead
 - Briefs filed by DOJ regarding *Olmstead*; important Olmstead updates
 - DOJ Olmstead Technical Guidance (Q&A format)
- ADA Hotline
 - 800-514-0301 (voice); 800-514-0383 (TTY)
- ADA.gov
 - ADA regulations, TA manuals, ADA videos and Monthly newsletter. Links to the various agency OCR websites.

Requesting DOJ assistance

- Complaint form and filing information available <http://www.ada.gov/enforce.htm#anchor218282> (fax, mail, email). Title II and Title III complaints only. (Title I, we'll send to the EEOC)
- DOJ has the option of keeping the complaint or referring it to appropriate agency for resolution.
- If it is an *Olmstead* matter, can direct the complaint to Renee.
- For ongoing ADA cases you want DOJ to consider for involvement, can contact Renee.

Federal Resources

- HHS Office for Civil Rights investigative findings and settlements involving Section 504 and ADA in health care facilities:
<http://www.hhs.gov/ocr/civilrights/activities/examples/Olmstead/successstoriesolmstead.html>;
<http://www.hhs.gov/ocr/civilrights/activities/examples/Disability/index.html>

Requesting HHS/OCR assistance

- HHS/OCR website:
<http://www.hhs.gov/ocr/index.html>
- To file a complaint with OCR:
<http://www.hhs.gov/ocr/civilrights/complaints/index.html>