

# REVIEW OF RECENT DEPARTMENT OF JUSTICE OLMSTEAD BRIEFS

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From “**The Justice Blog**” dated December 2, 2009: “*The full and fair enforcement of the ADA and its mandate to integrate individuals with disabilities is a major priority of the Civil Rights Division. The ADA protects individuals with disabilities from discrimination by public entities.*”

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## **SUMMARY**

Recent filings by the Department of Justice in Olmstead cases provide a snapshot of the type and amount of action the current administration is taking in order to enforce the “integration mandate” especially as it relates to the impact of California budget problems on community services and supports. This is not a legal review of the cases involved.

## **Conclusions**

We need to explain to our legislators that cutting and/or eliminating community services and supports will be unsuccessful because the Department of Justice is actively supporting the civil rights of persons with disabilities to live in their communities and not be forced into segregated facilities based on budgetary problems and misallocation of funds to large institutions.

This may be the best time to begin the process of getting Congress to change Social Security regulations to make community services and supports mandatory and institutional services waiver based.

To read DOJ ADA briefs go to: [www.ada.gov/briefs/adabrief.htm](http://www.ada.gov/briefs/adabrief.htm)

## **BACKGROUND INFORMATION**

### **THE AMERICANS WITH DISABILITIES ACT (ADA)**

Congress enacted the ADA in 1990 “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” Congress found that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities: “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.”

### **ADA REGULATIONS**

As directed by Congress the Attorney General issued regulations implementing Title II, which are based on the regulations issued under section 504 of the Rehabilitation Act. The Title II regulations require public entities to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” The preamble to the “integration regulation” explains that “the most integrated setting” is one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.”

### **OLMSTEAD v. L.C.**

In 1999 the Supreme Court held that unjustified segregation of individuals with disabilities by public entities constitutes unlawful discrimination under Title II of the ADA and its integration regulation. A public entity violates Title II if it segregates individuals in institutions when those individuals could be served in the community through reasonable modifications to its program, unless it is able to demonstrate that doing so would result in a “fundamental alteration” of its program.

## BRIEFS REVIEWED

From the Department of Justice – Civil Rights Division – ADA Briefs – Title II

Date	State	Case
11/23/09	Connecticut	State of CT P&A v. State of Connecticut ...
11/24/09	Virginia	ARC of VA, Inc. v. Kaine, et al.
11/24/09	New York	Disability Advocates, Inc. & US of A v. Paterson, et al.
12/23/09	North Carolina(1)	Marlo M. & Durwood W. v. Cansler & Salacki
2/16/10	North Carolina(2)	Clinton, L. v. Cansler & Coughlin
3/2/10	California	Oster, et al. v. Wagner, et al.

## DESCRIPTION OF CASES

### Connecticut

DOJ filed – US Memorandum as Amicus Curiae in Support of Plaintiff’s Opposition to Defendant’s Motion to Dismiss

The case challenges the State of CT’s reliance on privately run segregated nursing facilities to serve the needs of individuals with mental illness, when such individuals could be more appropriately served in community-based settings. Plaintiffs allege that individuals with mental illness reside in these nursing facility settings because of a lack of community-based alternatives. The complaint alleges that Defendants’ choice of funding expensive institutional care, rather than less costly care in integrated settings, results in these unnecessary segregated placements. US Interests include: The State misconstrues the application of the ADA Title II regulation; and, protecting the ability of protection and advocacy organizations to bring such suits.

### Virginia

DOJ filed – US Memorandum of Law as Amicus Curiae in Opposition to Defendants’ Motion to Dismiss

The lawsuit challenges the decision by Governor Kaine and other Commonwealth officials to proceed with plans to build a large state-run facility to care for approximately 75 adults with disabilities who have been independently evaluated and found eligible to live in the community with assistance. A state can violate Olmstead’s integration mandate based on the manner it chooses to administer the services it provides to individuals with disabilities, including planning the settings in which mental health services are provided, and allocating resources within the mental health system. Rather than building capacity for community-based services, the State is exacerbating its existing failure to comply with Olmstead by choosing to allocate its resources in a way that ignores the needs of the individuals that it serves and perpetuates the institutional bias that the Court recognized in Olmstead.

Defendants filed a motion to dismiss the Complaint on several grounds:

- The ARC of VA has no standing either by itself or in a representative capacity;
- This matter is not ripe for adjudication because no one has been selected to live in the new facility;
- The only persons who will reside in the new facility are persons who choose to live there after they are properly evaluated;
- The Complaint fails to state claims under Ex parte Young; and,
- Ex parte Young claims against Defendants Governor Kaine and Viola O. Baskerville are otherwise improper

## **New York**

DOJ filed – Plaintiff-Intervenor US Memorandum of Law in Support of Plaintiff’s Remedial Plan and in Opposition to Defendants’ Proposed Remedial Plan

This case is at the stage of submitting a plan to implement the rulings of the Court and comply with federal law. The Court has determined that Defendants’ have failed to comply with the Supreme Court decision in Olmstead and have repeatedly shown themselves unready and unwilling to accept responsibility for remedying known Olmstead violations, back to 2002. Defendants’ proposal states that supported housing is available only to those who “are able to maintain their living environment, shop and prepare meals, and manage their medications without ongoing assistance.” The statement directly contradicts the Court’s ruling that supported housing serves individuals who have a wide range of support needs, including those who are considered “high need.” The Court found that Medicaid costs are much lower in supported housing than in Adult Homes and drive the overall cost savings of supported housing compared to Adult Homes for the State.

## **North Carolina (1)**

DOJ filed – US Memorandum as Amicus Curiae in Support of Plaintiffs’ Motion for Preliminary Injunction

This lawsuit challenges defendants’ administration of government services and programs, including major reductions in services that will force plaintiffs out of their community placements in order to receive necessary care. Plaintiffs are adults with dual diagnoses of developmental disability and mental illness who require care and supervision 24 hours a day. Both plaintiffs have been successfully living in the community with appropriate supports and services funded through a combination of Medicaid waiver funding and state supplemental funds. Defendants are responsible for the management and accountability of State and local funds. Defendant Salaki’s decision to terminate plaintiffs’ services was not required by statute, instead was at her discretion.

The State’s CAP-MR/DD waiver provides recipients with a maximum budget of \$135,000 to be used for home and community-based services. Both plaintiffs’ current service plans come in under this. Because the waiver cannot fund 24-hour services required to live in the community, plaintiffs rely on supplemental state MR/MI funds. Plaintiffs’ total budgets to remain in the community, including the necessary supplemental state funds, remain lower than the cost of institutional care. In June 2009 Defendant Salaki terminated Plaintiff’s authorizations for supplemental services. Short-term extensions and service authorization was set to expire on 12/15/09. One plaintiff has already been moved to congregate placement which is unlikely to

work and therefore one plaintiff will likely be forced to move to an institutional setting. The other plaintiff remains in his community placement, prior attempts to place him in congregate settings have failed, and it is almost certain that he will need to be placed in an institution.

## **North Carolina (2)**

DOJ filed – Statement of Interest of the United States of America

This lawsuit challenges defendants' reductions to reimbursement rates that will have the effect of eliminating medically necessary services that support plaintiffs in their homes in the community. Plaintiffs have successfully resided in the community for years and cuts to their services will drive them into institutional settings that are likely to harm them. Defendants have provided services in the community through a combination of state Medicaid waiver funding and state supplemental funds. Defendant recently issued a memorandum informing providers of significant rate cuts (ranging from nearly 30% to over 50% cuts to existing reimbursement rates). Plaintiffs receive support services in their home, including residential workers 24 hours a day. Before living at home, plaintiffs have lived in various group homes, but were discharged because the placements could not accommodate their behaviors. The reduction in the rate paid to providers was set to take effect 2/15/10.

Plaintiffs' allege that the reimbursement rate will have the effect of eliminating the ability of consumers to access a medically necessary service and is an indirect way of achieving the same result as a direct cut to the service. Plaintiffs would no longer have access to services that were originally created for their use. The cut to the rate paid to providers will force providers to lose money and plaintiffs allege that there is a "substantial certainty that, because providers will only be able to offer Supervised Living services at a loss, they will no longer offer the services. Plaintiffs further allege that the costs for comparable institutional care will be greater than the cost of serving plaintiffs appropriately in the community, should plaintiffs be forced into institutional placements due to the unavailability of community support services.

Defendants seek to moot out this lawsuit, and to that end filed a letter from the attorney for a provider saying that it has agreed to maintain current services for one plaintiff below cost, but only if a certain number of hours are reimbursed, and that if the number of hours or other terms of this 12<sup>th</sup> hour deal are altered, the provider might need to reconsider this position. The fact that defendants submitted such a letter, rather than a sworn statement, and that it includes conditional statements by the provider casts doubt about what is going unreported here, and, provides no effective rebuttal to plaintiffs' evidence.

## **California**

DOJ filed – Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees and Urging Affirmance on the Issue Addressed Herein

Statement of the Issue: Whether individuals with disabilities who currently receive community-placement services under a State's Medicaid program because the State has determined that such individuals need those services to remain safely in their homes may bring an integration claim under Title II of the ADA, if the State is going to cut or reduce those services, thereby placing such individuals at serious risk of being institutionalized.

Plaintiffs are 5 individuals with disabilities who currently receive services from CA's IHSS program, which is offered through the State's Medicaid program, Medi-Cal. They sought declaratory and injunctive relief, including a preliminary injunction, to prevent the State from implementing a change in the law for determining IHSS eligibility.

On July 28, 2009 the Governor of CA signed a bill passed by the state legislature in response to the State's current budget crisis that changed the way IHSS eligibility was determined. The new eligibility standards were scheduled to go into effect on 11/1/09. According to CDSS, 97,000 current IHSS recipients would have lost domestic and related services, and 36,000 current IHSS recipients would have lost all services. Plaintiffs have submitted substantial evidence from experts, county officials, caregivers and individual recipients showing that class members face a severe risk of institutionalization as a result of losing the services that this bill would eliminate. The Court rejected defendants' argument that plaintiffs "are not at risk of institutionalization because some may have family members who may be able to take over the care once provided by IHSS and some might find care through some other community-based service." The court explained that "defendants bear the ultimate responsibility for ensuring the State's compliance with federal disability law," and that, in any event, "the record demonstrates that alternative services are not available for a large portion of the class members who face the risk of institutionalization."

## QUOTES AND CITATIONS FROM THE BRIEFS

### General:

The President's Press Release is cited often – "The President explained that the new initiative was intended to "reaffirm his 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."

Congress found that "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.

Olmstead v. L.C.: The Supreme Court interpreted this integration mandate as requiring states that offer treatment to persons with disabilities, where appropriate, to provide such treatment in community settings rather than in institutions.

Olmstead v. L.C: 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.

Olmstead v. LC: Institutional confinement severely diminishes individuals' everyday activities.

Fisher v. Oklahoma Health Care Authority – 10<sup>th</sup> Circuit: If every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed.

NC1 – DOJ: While 10 years have passed since the Olmstead case was decided, the same concerns driving the outcome of the case and underlying the ADA are present today: a goal of "full participation, independent living, and economic self-sufficiency for such individuals."

NC1 – DOJ: The anti-discrimination laws upon which plaintiffs rely reflect important public policy commitments to equality and access. The statutes and regulations embody strong statements of public policy prohibiting discrimination and differential treatment on the basis of disability.

NC2 – DOJ: If a state fails to provide services to a qualified person in a community-based setting, as opposed to a nursing home, a plaintiff can present a title II violation.

VA – DOJ: Unnecessary segregation severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment prohibited by Olmstead.

### **Risk of Institutionalization:**

Brantley v. Maxwell-Jolly: The Court considered an aspect of CA's recent budget cuts, which would have reduced services provided to individuals with disabilities through the State's ADHC program from a maximum of 5 days to 3 days per week. The Court rejected the defendants' argument that "in order to state a Title II violation, Plaintiffs must show that the program reduction leaves them 'no choice' other than to be institutionalized in the event their ADHC services are limited to 3 days. The Court held that the risk of institutionalization is sufficient to demonstrate a violation of Title II.

Fisher v. Oklahoma Health Care Authority – 10<sup>th</sup> Circuit: The Court reasoned that the protections of the integration mandate "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation. The Court went on to conclude that "Olmstead does not imply that disabled persons, who, by reason of a change in state policy, stand imperiled with segregation

CA: Individuals with disabilities need not show that they will experience "imminent" institutionalization in order to establish a violation of the ADA. Here, current IHSS recipients may establish a violation of Title II's integration mandate by showing that the change in eligibility criteria puts them at serious risk of being institutionalized. They need not show, however, that such institutionalization will occur overnight.

NC2 – DOJ: Crucially, a plaintiff need not wait until he is placed in the institutional setting: the risk of institutionalization itself is sufficient to demonstrate a violation of title II.

NC2 – Court: Olmstead does not imply that disabled persons, who, by reason of a change in state policy, stand imperiled with segregation, may not bring a challenge to the state policy under the ADA's integration regulation without first submitting to institutionalization.

Ball v. Rodgers: Failure to provide plaintiffs with needed services "threatened Plaintiffs with institutionalization, prevented them from leaving institutions, and in some instances forced them into institutions in order to receive their necessary care.

### **Budget Deficits/Cuts:**

Fisher v. Oklahoma Health Care Authority – 10<sup>th</sup> Circuit: The fact that a state has a fiscal problem, by itself, does not lead to an automatic conclusion that providing the community services that Plaintiffs sought would be a fundamental alteration. The 10<sup>th</sup> Circuit observed further that Congress was aware when it passed the ADA that while the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole.

NC2 – DOJ: The Court should refuse defendants' invitation to approve broad brush budget cuts, made without regard to individual needs of people whose medical histories demonstrate serious harm if they are unable to maintain their current living situations.

**Resource Allocations:**

NY: The Court held that the defendants' allocation of state resources favoring institutional settings over community-based settings supported an actionable Title II claim. The court found "if Defendants allocated their resources differently, Plaintiffs could receive services in a more integrated setting.

NY – Court: Olmstead imposes obligations on states which are responsible for providing services, not on the particular facilities in which recipients are alleged to be segregated.

VA – DOJ: Rather than building community capacity, the State is exacerbating its existing failure to comply with Olmstead by choosing to allocate its resources in a way that ignores the needs of individuals with disabilities which it serves and perpetuates the institutional bias that the Court recognized in Olmstead.

**Harm to People with Disabilities:**

NC1 – DOJ: The services Plaintiffs receive in the community to support their physical and mental health needs are critical to ensuring that their conditions remain stable and enable them to remain in the community. Other courts have held that reduction or elimination of public medical benefits irreparably harms the participants in the program being cut.

Court in TN: Forcing these plaintiffs into nursing homes that would be detrimental to their care, causing, inter alia, mental depression, and some Plaintiffs, a shorter life expectancy or death.

**WHITE HOUSE STATEMENT – TENTH ANNIVERSARY OF OLMSTEAD****THE WHITE HOUSE**

Office of the Press Secretary

For Immediate Release

June 22, 2009

**President Obama Commemorates Anniversary of Olmstead and Announces New Initiatives to Assist Americans with Disabilities**

On the 10th anniversary of the landmark Supreme Court decision in the case of *Olmstead v. L.C.*, President Barack Obama today celebrated that anniversary and launched "The Year of Community Living," a new effort to assist Americans with disabilities.

Specifically, the President has directed Health and Human Services Secretary Kathleen Sebelius and Housing and Urban Development Secretary Shaun Donovan to work together to identify ways to improve access to housing, community supports, and independent living arrangements. As part of this effort, later today, Secretaries Sebelius and Donovan will announce several new initiatives including details about increased numbers of Section 8 vouchers and enhanced interagency coordination to address this critical civil rights issue. The initiative also will include listening sessions conducted by HHS across the country to hear the voices and stories of Americans and to keep the President's pledge to be as open and transparent as possible.

"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," said President Obama. "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."

In the *Olmstead* case, the Court held that the unjustified institutional isolation of people with disabilities is a form of unlawful discrimination under the Americans with Disabilities Act. Since that time, progress has been made. Many individuals have successfully transitioned to community settings, but waiting lists for community services have grown considerably and many individuals who would like to receive community services are not able to obtain them.

To help remedy that problem, the Obama Administration provided over \$140 million in the Recovery Act funding for independent living centers across the country. The Administration acknowledges that strides have been made, and knows and accepts that there is much work to do in order to maximize the choices and opportunities for individuals to receive long-term services and supports in institutional and community settings.

The President noted that his Administration looks forward to continued engagement with the disability community to achieve these goals.