

Olmstead at 12 yrs. and Beyond: A National Overview

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Protection & Advocacy for Individuals with Disabilities



Overview of Presentation

- A little background
- Key legal questions answered and still to answer
- Role of DOJ, CMS, and HHS OCR
- Impact of health reform
- Setting goals beyond 2011
- Group experiences, ideas and discussion

Olmstead confirms that the ADA includes an “integration mandate”

ADA: “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. 12132.7

DOJ regulation on this provision: (the integration mandate): Persons with disabilities must receive services in the most integrated setting appropriate to their needs. 28 C.F.R. 35.130(d)



Olmstead sets 3 criteria for “most integrated setting”

- state’s treatment professionals reasonably determine that community placement is appropriate;
- person does not oppose such placement;
- placement can reasonably be accommodated, taking into account resources available to the state and the needs of others receiving state-supported disability services

Limitation on Integration Mandate

- ADA requires reasonable modifications to avoid discrimination not fundamental alterations to the nature of the program

States can show a “reasonable modification” if:

the state develops a comprehensive, effectively working plan for placing qualified individuals in less restrictive settings, and a waiting list that moves at a reasonable pace not controlled by a state’s efforts to keep its institutions fully populated

The Supreme Court further explains the state's defense:

- State shows increased overall expenses by funding community placements without being able to take advantage of savings from closing institutions.
- State needs to maintain a range of facilities
- State needs to administer services with an even hand

After Olmstead we expected

- A shift of residents and money from institutions to community
- A vast new array of HCBS options
- A “community bias” within Medicaid
- The downsizing and closure of institutions
- Multiple federal agencies collaborating
- DOJ enforcement of Olmstead

Where we are:

- All states are spending more on HCBS
- Nationwide the institutional census not reduced
- CMS has made efforts to reduce institutional bias - but relies on “optional” programs and incentives.
- Olmstead “plans” are on back shelves
- DOJ enforcement has gotten more aggressive - broadened scope of Olmstead influence
- lawsuits argue that Medicaid cuts violate Olmstead
- States challenge ability to enforce Medicaid & ADA



When and to whom does *Olmstead* apply?

- **Does Olmstead apply in facilities that are privately operated?** yes, if state relies on these facilities as part of mental health or DD system;
- **Does Olmstead apply to persons who are at risk of becoming institutionalized as a result of the government's actions or inactions?** yes. but how do you prove you are at imminent risk?

What is the most integrated setting? Slide 1

DOJ definition: “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible”

- **DAI analysis** – degree of control that people exercise over their own lives, opportunities to develop relationships, individual choice, resemblance to settings where people without disabilities live;

What is the most integrated setting? Slide 2

- Clustered DD group homes –can they get waiver funding or are they small ICF's ?
- CMS rulemaking on characteristics of “integrated settings” for Medicaid waiver purposes
- Should individual homes not group homes be standard?
- HUD-HHS Partnerships: CMS issued a 5/5/10 “Medicaid Director” letter about partnership with HUD

Key legal question: issues of choice

- Does an individual's or guardian's "opposition to community placement" create a right to remain in particular institution?
- Does state's obligation to "maintain a range of facilities" create a mandate to keep ICF's open?
- Should class members be able to opt out of settlement?

What constitutes a fundamental alteration?

- Is plan required, is so what must it include?
- * What is scope of state budget to consider?
- What constitutes a “new services” & not required?
- Must states expand waivers as accommodation?
- Should availability of fed’l grants be considered?
- Must state show efforts to deinstitutionalize specific pop at issue or just any pop?
- Is actual deinstitutionalization required?

How much should Medicaid adapt as “reasonable accommodation”?

- Challenging restrictive Medicaid cost caps and eligibility as a reasonable modification on the individual level;
- Can individual chose family member as provider as reasonable modification?
- Can state budget cuts be stopped to prevent institutionalization of those “at risk”?

When Do Budget Cuts violate Olmstead

- Recent DOJ Guidance states:
- Budget shortages are not an automatic defense
- Will consider entire HHS Budget in calculation of fundamental alteration
- Will consider whether money can be reallocated
- Will consider whether state has taken advantage of MFP, housing vouchers, etc.

DOJ: getting more aggressive

- DOJ has found Olmstead violations can include inadequate: assessments, discharge plans, and educ. about HCBS. Also discharge to homeless shelters.
- Clarified that Olmstead Requires most integrated setting not just more integrated setting
- Recent settlements include supported employment, individual housing

HHS Office of Civil Rights

- Since the *Olmstead* decision, OCR has investigated over 500 *Olmstead* complaints and achieved corrective action in more than 60% of those cases.
- OCR is currently investigating over 30 *Olmstead* complaints and conducting 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.

The Affordable Care Act & New community based opportunities

- □ “Money follows the person” grants–
- Expanded who can be covered under the HCBS state plan option
- Community first choice
- Balanced Incentives Program
- 2402(a)
- Class Act
- Federal Coordinated Health Care Office

Setting Goals beyond 2011

- Move from group homes to individual homes
- Addressing provider and service shortages
- App. Of Olmstead in correctional facilities, assisted living centers, sheltered workshops?
- Lack of LTC in Medicare, does it violate Olmstead
- Oversight of several DOJ Olmstead settlements
- Other ideas?