

Advocates' Webinar: Litigating *Olmstead* "At Risk" Cases – Lessons Learned

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Housekeeping

- Webinar is being recorded and captioned
- All attendees have been muted
- Slides were sent in advance and will be available with the recording and sent in follow-up email
- If you have a technical issue, please send a direct message to Elizabeth Edwards.
- Please use the chat for questions; we will have time for Q&A at the end
- Reminder: Follow up advocates' discussion on July 9th at 2 pm et

Today's Outline

- Quick *Olmstead* Review
- Crafting the Complaint
- Planning to Prove It
- Crafting & Proving the Relief
- Plaintiffs and their Evolving Circumstances
 - Class Certification
 - Associational Standing
- Q&A

Quick *Olmstead* Review

Statutory Right to Community Integration

- Title II of the ADA
 - “[N]o qualified individual with a disability shall, by reason of such disability...be subjected to discrimination by any public entity.” 42 U.S.C. § 121312
 - Public entity includes state and local government
- Section 504 of the Rehabilitation Act for recipients of federal funds. 29 U.S.C. § 704
 - Note language difference: “solely by reason of”

Community Integration Regulations

- Most integrated setting appropriate to the needs of the qualified individual with disabilities
 - 28 C.F.R. § 35.130(d) (ADA); § 41.51(d) (504)
 - 45 C.F.R. § 92.207(b)(6) (§ 1557)
 - “including practices that result in the serious risk of institutionalization or segregation”
- Entity may not use criteria or methods of administration that discriminate on the basis of disability
 - 28 C.F.R. § 35.130(b)(3)(i) (ADA); 28 C.F.R. § 41.51(b)(3) (504)
- Public entity must reasonably accommodate people with disabilities to avoid disability discrimination.
 - 28 C.F.R. § 35.130(b)(7)

Olmstead v. L.C. ex rel. Zimring

527 U.S. 581 (1999)

- “unjustified institutional isolation of persons with disabilities is a form of discrimination”
- 3 Prong Test:
 - 1) Community placement is appropriate
 - 2) Individual does not oppose such placement
 - 3) Placement can be reasonably accommodated, taking into account the resources available to the state and needs of others with disabilities
- Defenses:
 - Fundamental alteration
 - Working Olmstead plan/activities
 - Standard of care
 - Causation
- ADA and Olmstead extend beyond Medicaid
 - [Statement of the U.S. DOJ on Olmstead](#)
 - [Olmstead Letter No. 4](#)



Elaine Wilson (right) and Lois Curtis were kept in a hospital against doctors' advice.

Types of Cases

Deinstitutionalization

Olmstead

Brown v. District of Columbia, 928 F.3d 1070 (D.C. Cir. 2019)

Risk of Institutionalization

Fisher v. Oklahoma Health Care Authority, 335 F.3d 1175 (10th Cir. 2013)

Pashby v. Delia, 709 F.3d 207 (4th Cir. 2013)

Community Integration

Steimel v. Wernert, 823 F.3d 902 (7th Cir. 2016)

Waskul v. Washtenaw County Community Mental Health, 979 F.3d 426 (6th Cir. 2010)

Murphy v. Harpstead, 421 F.Supp.3d 695 (D. Minn. 2019)

Employment

Foster care

Other settings

Potential Triggers for Olmstead Cases

- Elimination or reduction of community-based services
- Failure to provide needed community-based services
- Failure to provide services in the community that are available in institutional settings

- VERY fact specific! Not all of instances of these will trigger a viable Olmstead case

Evolving Olmstead Litigation

- Defendants are more frequently not settling
 - More cases going through discovery
 - More trials
- Motions to Dismiss
 - Ripeness
 - Mootness – raised frequently and fervently
 - Legal conclusions v. allegations of fact
 - Redressability
- Most integrated setting

Defining Community Integration

- “most integrated setting” – “a setting that enables individuals to interact with non-disabled persons to the fullest extent possible”
 - 28 C.F.R. 35.130(d); 28 C.F.R. pt. 35 app. A
- “offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible.” [Statement of the DOJ on Enforcement of Integration Mandate](#)
- HCBS Settings Rule – defining community-based setting characteristics
 - The requirements of HCBS settings regulation “do not replace or override the requirements of the ADA.”

79 Fed. Reg. 2959

“At Risk”; “most integrated setting”

- How much risk is enough?
 - HCBS waiver enrollees all meet LOC
 - What is the risk?
 - At what point in time?
 - Related to defendants' actions
- Sufficient community integration
 - By what standard?
 - More restrictive setting
- “Institution of 1” v. independent living
- Impact on class certification

Crafting & Proving the Case

Crafting the Complaint

- What is triggering the risk or lack of community integration?
 - Challenging an individual, policy, or structural issue?
 - How is it related to state action?
- Who is the defendant?
- Plaintiff selection
- Venue - federal court or no?
- Claim selection
 - Can the case reasonably achieve what you want?
- What is the remedy?
 - Balancing specificity with flexibility/state control
- Defending against defenses
- Class certification?
 - Associational standing?
 - P&A?
- Avoiding mootness

Planning to Prove It

- How will you prove it?
 - What is the standard?
 - Experts
 - Evidence
 - Intervening causes
 - Does the relief address the issues
- Is any requested modification reasonable?
- Evolving plaintiff circumstances

Crafting & Proving the Relief

- Good idea v. effective relief
- Is it tailored to cure the unlawful action?
- Balancing specificity v. prescriptiveness
 - Federalism
- Proving the relief redresses the harm
 - Other states
- Prospective relief

Evolving Named Plaintiff Circumstances

- How does a plaintiff stay a “strong” plaintiff?
- Plaintiffs:
 - Age
 - Have increasing needs v. risks
 - Family changes
 - What influences their risk factors?
 - Causation
 - Ebb and flow of individual circumstances
- Changing state policies
- Providers

Discovery Issues

- Lack of data
- Experts
 - Types
 - Limitation of expertise
 - Methodology
 - Conclusions v. conclusions of law
- Evidence that goes both ways
- Timing
 - End date for factual development

Class Certification Issues

- Fed. R. Civ. P. Rule 23(a)(2) & (b)(2)
- Single stroke of the pen
 - Community integration as individualized inquiry
- Fail-safe classes
- Commonality issues
- Timing/ Relation back
- Use associational standing or no?

Q&A

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