



People with Disabilities Have the Right to Age-in-Place

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Congress' Intent in Enacting the ADA

Congress explained that unjustified segregation is inherently discriminatory, *see* 42 U.S.C. §§ 12101(a)(2), (3), (5) (2012).

States MUST Integrate People With Disabilities

Title II of ADA places affirmative duty on states to provide services in most integrated settings.

Nursing facilities are institutions and by definition are not integrated.

Title II's Integration Mandate

Public entities must “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities” and provide reasonable accommodations to move people with disabilities institutionalized in segregated nursing facilities to more integrated settings when:

- (1) community placement is appropriate;
- (2) the individuals do not oppose community placement; and
- (3) return to the community can be reasonably accommodated. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587, 600 (1999); 28 CFR 35.130(d).

Method of Administering Medicaid

States have an affirmative duty to:

- Change how they administer their Medicaid long-term care services, programs and activities
- To avoid the “unjustified segregation or isolation of” people with disabilities in institutional settings.

Olmstead, 527 U.S. at 607. See also, *Day v. Dist. of Columbia*, 894 F. Supp. 2d 1, 22 (D.D.C. 2012) (citing 28 C.F.R. § 35.130(d) (ADA implementing regulations), 28 C.F.R. § 41.51(d) (Rehabilitation Act implementing regulations)).

What is an Integrated Setting?

A setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible. 28 C.F.R. § 35.130(d) (2016)

If a person is eligible for Medicaid-funded HCBS services, the institution is not the most integrated setting.

Plans to Address Segregation in the Future Are Not Enough

Olmstead liability is not defeated by the existence of plans. *Benjamin v. Dep't of Pub. Welfare of Pa.*, 768 F. Supp. 2d 747, 755-56 (M.D. Pa. 2011) (“[G]eneral assurances and good-faith intentions neither meet federal law nor a patient's expectations’ without providing when, if ever, a patient can expect to be discharged.”) (quoting *Frederick L. v. Dep't of Pub. Welfare of Pa.*, 422 F.3d 151, 158 (3d Cir. 2005)).

Fundamental Alteration

- Affirmative defense to the obligation to integrate.
- State must show that it would have to fundamentally alter its programs for people with disabilities.
- Often much litigated.

What Are Examples of Olmstead Compliance Risks?

- Over utilization of institutions as compared to utilization of HCBS;
- Structural or bureaucratic barriers to accessing available HCBS; and/or
- Failing to invest in developing sufficient community capacity.

Failure to Provide Transition Assistance is A Huge Barrier to Re-Integration

--Institutionalization isolates people away
from community supports

-- Need to recreate those supports through
case management

Transition Assistance



Transition Assistance is the Bridge

- Outreach and Education about HCBS
- Application assistance
- Connecting someone to provider that can meet needs
- Locating housing and applying for housing assistance
- Obtaining documentation for applications
- Assisting with the actual move and buying household necessities

Brown v. D.C.

District provides long term care services in the community

- Elderly and/or Physically Disabled (EPD) Medicaid Waiver
 - Same eligibility criteria as for NF services – need assistance with 2 ADLs
- State Plan Coverage for Personal Care Services
 - Less demanding eligibility criteria than EPD or NF services
- Money Follows the Person
 - Federal \$ to help people transition out of NFs
 - Must need EPD services

Brown v. D.C.

Despite availability of HCBS, D.C. consistently has NF occupancy rate of over 90%

- Failure to use MFP funds – consistently fails to meet even the lowest transition targets;

- Failure to help people transition out of NFs
 - Outreach and education about services available in community
 - Applying for services
 - Connecting to providers
 - Locating housing and applying for public housing assistance
 - Obtaining documentation for applications
 - Moving out and buying household necessities

How are At Risk Cases Different?

- Usually seeking PI or TRO;
- Proving there will not be a Fundamental Alteration is easier because seeking to maintain status quo;
- Timing is critical; and
- Requires tangible evidence of likely harm.

Issues on the Horizon:

Even if states secure wide discretion in administration of their programs and services;

Changes to Medicaid and other state programs;

Must be done with an eye toward how changes impact people with disabilities.