



## Deinstitutionalization Toolkit: **LEGAL – inDETAIL**

This section of the Deinstitutionalization Toolkit includes the supportive detail on the subject of legal issues. The research and detailed information are intended to provide background for the Deinstitutionalization Toolkit.

➤ **LEGAL – inBRIEF**

### **Law, Justice, and Advocacy**

The Department of Justice (DOJ) has two legal tools to use in deinstitutionalization cases: the Civil Rights of Institutionalized Persons Act (CRIPA) and the Americans with Disabilities Act (ADA) as interpreted in the 1999 Supreme Court decision in the case of *Olmstead v. L.C.*

**Department of Justice (DOJ):** CRIPA gives the Attorney General the authority to conduct investigations and litigation relating to conditions of confinement in state or locally operated institutions (the statute does not cover private facilities). DOJ typically negotiates with a state to develop a settlement agreement, but it has not always focused settlement agreements on community living. In some cases in the past, DOJ has focused on addressing improvements to the institutions.

With these legal foundations, DOJ may establish settlement agreements and consent decrees with states. DOJ may have different priorities under each presidential administration. Between 2008 and 2011, DOJ has focused on settlements that required states to reduce their institutional populations and to create appropriate capacity and quality assurance in the community, as evidenced by settlement agreements in Georgia in 2010 and in Illinois in 2011.

In the 2010 settlement agreement between DOJ and the State of Georgia, the state agreed to expand home and community-based services for people with mental illnesses and developmental disabilities. Under the agreement, over the next five years, Georgia will fund at least 1,000 Medicaid waivers to transition all people with developmental disabilities from state hospitals to community settings, and increase crisis, respite,



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family, and housing support services to serve individuals with developmental disabilities in community settings.

On June 15, 2011, a consent decree was finalized in the Chicago federal district court to expand community living options for people with developmental disabilities in Illinois. The decree gives people with developmental disabilities who currently live in large, private, state-supported Intermediate Care Facilities for the Developmentally Disabled (ICFs/DD) the choice to move into small community-based settings with the necessary supports. It also requires that an additional 3,000 people with developmental disabilities currently living at home be provided with community-based services.

**Protection and Advocacy Organizations:** The Protection and Advocacy (P&A) system is a national network of congressionally created, legally based disability rights agencies in each state providing legal representation and other advocacy services to people with disabilities. People with developmental disabilities are served through the Protection and Advocacy for Persons with Developmental Disabilities (PADD) program, funded in part by the federal Administration on Developmental Disabilities.

For more detailed information, contact the P&A organization in your state (see <http://www.ndrn.org/> for links to state P&A organizations).

## Overview of Relevant Laws and Court Decisions

### ***Civil Rights of Institutionalized Persons Act (CRIPA)***

In 1980, Congress enacted CRIPA to authorize DOJ to use litigation to enforce the rights of people residing in state or local institutions. The law enabled DOJ to initiate or intervene in pending lawsuits to correct egregious and systemic violations of the rights of people in public nursing homes, jails and prisons, juvenile justice facilities, and institutions housing people with intellectual disabilities or developmental disabilities (ID/DD) or mental illness. DOJ is not authorized to represent individuals; it may bring cases only in response to a pattern or practice of violations.

Settlements in CRIPA cases may allow a state to spend their resources to “fix up” an institution rather than requiring the state to develop appropriate community-based services. In 2009, for example, a DOJ settlement required Texas to undertake a variety



of measures to ensure a safe and humane environment, including adequate medical care and therapeutic supports and services, with zero tolerance for abuse or neglect of residents.

### ***The Olmstead Decision***

“*Olmstead*” is the shorthand for the 1999 Supreme Court judgment in the case *Olmstead v. L.C.* (U.S. Supreme Court, 1999). The case was brought against the Georgia State Commissioner of Human Resources on behalf of two women (E.W. and L.C.) with ID/DD and mental illnesses who were patients in a state psychiatric hospital. The women wanted to move into a community setting, and the professionals working with them agreed that the move was appropriate. However, because community services were in short supply, they remained at the hospital.

In 1995, the Atlanta Legal Aid Society sued the state, claiming that the women had the right to receive care in the most integrated setting appropriate, and that their institutionalization was discriminatory and in violation of the ADA. Eventually, the case was heard by the U.S. Supreme Court, which ruled that unjustified isolation of individuals with disabilities is properly regarded as discrimination based on disability.

The decision included some strong language about institutionalization:

- “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”; and
- “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.”

The decision requires community placement when the following three conditions are met:

- The individual can handle or benefit from community placement;
- The transfer is not opposed by the affected individual; and



- Community placement can be reasonably accommodated (i.e., would not impose a fundamental alteration).

The *Olmstead* case focused on individuals who were currently in an institution and who sought community-based care. Subsequent cases have applied *Olmstead* to individuals at risk of institutionalization, including those on waiting lists. Litigation has included cases where needed services were offered in institutions but not in the community, cases claiming that cuts in community-based services would force an individual into an institution, and situations where individuals are required to go into an institution before being eligible for community-based services (Giliberti and Frohboese, 2011).

### ***The “Right” to Choose an ICF/DD***

Some opponents of institutional closure claim that the Supreme Court decision in *Olmstead v. L.C.* and other laws and legal decisions give people the right to choose, including the right to choose to remain indefinitely in an ICF. These opponents point out that, in the *Olmstead* decision, the court wrote, “We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings. Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it” (119 S. Ct. 2176, 2187 (1999)).

The *Olmstead* decision asserts that state facilities “may” remain open without violating the ADA. The decision did not say states “must” keep institutions open in order to comply with the ADA.

The following section, written by Equip for Equality, the P&A organization in Illinois, discusses the legal issue:

*Courts generally agree that the ADA’s antidiscrimination command does not provide an actionable right to institutional care. Since Olmstead set out the three prerequisites for mandatory community-based care, only a few courts have addressed whether a plaintiff can preclude outplacement when these prerequisites are not satisfied. All but one of the decisions confirms that the ADA does not confer an enforceable right to institutional care. However, the doctrine remains ripe for clarification, as no circuit court has directly addressed this issue.*



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*When the Supreme Court decided *Olmstead v. L.C.*, 527 U.S.581 (1999), it left unanswered some questions about the scope of the ADA's Title II antidiscrimination mandate. The Court confirmed that persons with disabilities have the right to treatment in the "most integrated setting appropriate to [their] needs." 28 C.F.R. § 35.130(d) (2009). Specifically, the Court set forth a three-pronged test for transfer of individuals to community-based care:*

*"States are required to provide community-based treatment for persons with mental disabilities when (1) the State's treatment professionals determine that such placement is appropriate, (2) the affected persons do not oppose such treatment, and (3) the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities."*

*—Olmstead, 527 U.S. at 607.*

*However, the Court did not address whether individuals with disabilities have an actionable right to remain in institutions when they do not meet the requirements for compulsory community-based care. The Supreme Court has not provided any additional clarity, but a few lower courts have taken up the issue. With one exception, courts have found no enforceable right under the ADA to institutional treatment. See, e.g., *Richard C. ex rel. Kathy B. v. Houstoun*, 196 F.R.D. 288, 289 (W.D. Pa. 1999). But see *In re Easley*, 771 A.2d 844 (Pa. Comm. Ct. 2001) (finding a guardian's objection sufficient to vitiate an individual's consent to community-based care).*

*Shortly after *Olmstead*. In *Richard C.*, residents of a Pennsylvania institution brought a class action suit seeking to effectuate the ADA's integrated care requirement. 196 F.R.D. at 289. The court preliminarily certified a class and approved an agreement between the parties that would shut down the facility. *Id.* Two groups filed motions to intervene as a matter of right under Fed. R. Civ. P. 24(a): (1) family members of residents, and (2) guardians of residents. *Id.* Both groups sought to challenge the agreement because it forced residents into outplacements regardless of whether they met the three requirements set forth in *Olmstead*. *Id.* at 292. The applicants for intervention argued that *Olmstead* precluded the community placement of persons unqualified for mandatory release. The court disagreed, reasoning that it "does not logically follow that*





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*institutionalization is required if any one of the three Olmstead criteria is not met.” Id. The court’s opinion confirmed that Olmstead “does not create a standard of care;” instead, it commands states to “adhere to the ADA nondiscrimination requirement with regard to the services they in fact provide.” 527 U.S. at 603 n.14. However, the Richard C. decision was not reached on the merits; the court addressed the substantive issue, but ultimately denied the interveners motions as untimely. See 196 F.R.D. at 295-96, aff’d Richard C. v. Snider, 229 F.3d 1139 (3d Cir. 2000).*

*In a subsequent decision, Black v. Dep’t of Mental Health, the conservator and brother of a man with a mental illness brought suit against California after his brother died from improper treatment in a private community mental health facility. 83 Cal. App. 4th 739, 743 (2000). The plaintiff did not make the argument made by the interveners in Richard C. that the ADA provided a right to institutional care; instead, he alleged that the outplacement was a less integrated setting because it could not meet his brother’s treatment needs. Id. at 746-47. The court recognized this claim as a creative argument for mandatory institutional care when the three Olmstead requirements are not met. Id. at 755. In effect, the plaintiff was asserting that his brother had a right to institutional care because outplacement was not the medically appropriate decision. The court held that there is no actionable ADA discrimination claim based on mandatory, medically-inappropriate outplacement. Id. at 755 (“We do not believe [Olmstead] was either holding or signaling that a medically inappropriate transfer from institutionalization to community placement is, by itself, a violation of the integration mandate.”). The court noted in dicta that a plaintiff may have an actionable claim arising from a medically inappropriate placement under some other theory, such as state tort law. Id. at 752 n. 10. However, the Black decision confirmed that the ADA’s antidiscrimination provision does not create a right to institutional care.*

*See Easley, 771 A.2d at 853. In a Pennsylvania State case, In re Easley, the guardian of an elderly woman with a mental illness opposed her placement in a community setting. Id. at 846-47. The court granted the guardian’s request for injunctive relief, holding that deinstitutionalizing Ms. Easley over her guardian’s objection was equivalent to doing so over her own objection. Id. at 853. The court read a consent requirement into Olmstead’s deinstitutionalization mandate. The court effectively created an enforceable right to remain in an institution when one of the three Olmstead requirements is not met. Id.*



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*Aside from the Easley opinion, however, the courts seem to agree that neither persons with disabilities nor their guardians can sue to secure institutional care. Courts are sensibly distinguishing between the ADA, which protects against discrimination, and a state's responsibility to provide adequate and appropriate medical care to persons with disabilities. Until this jurisprudence becomes more well-established, however, family members of persons with disabilities may continue to bring suit under the ADA to prevent deinstitutionalization.*

### References

Giliberti, M., and R. Frohboese. (2011). Federal Enforcement of the *Olmstead* Decision. Presentation to the National Association of States United for Aging and Disability. Accessed August 25, 2011. <http://www.nasuad.org/documentation/san/NASUAD%20Presentation%20on%20Olmstead%2003%2021%2011.pdf>

Voice of the Retarded (Web site, undated). *Olmstead* Resources. Accessed August 25, 2011. <http://www.vor.net/olmstead-resources>