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Summary of U.S. Supreme Court's Opinion in Olmstead v. L.C.

I. Question Presented in Olmstead:

Does the proscription of discrimination in Title II of the Americans with Disabilities Act of 1990 ("ADA") require the placement of persons with mental disabilities in community settings rather than in institutions?

II. Holding:

The U.S. Supreme Court answered the question presented with a qualified yes. It concluded that, under Title II of the ADA, a state is required to provide community-based treatment for a person with a mental disability when:

1. The treatment professionals of the State determine that community placement is appropriate;
2. The transfer from institutional care to a less restrictive setting is not opposed by the affected person; 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.

The Court further indicated that a State could satisfy the requirements of Title II of the ADA if it had a "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated . . . ."

III. Relevant Statutes and Regulations:

A. The Americans with Disabilities Act

1. 42 U.S.C. §§ 12101(a)(2), (3), (5) provides in relevant part that:

> "The Congress finds that –
>
> . . . .
>
> (2) 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;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization . . . ;
>
> . . . .

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation . . . ."

2. 42 U.S.C. § 12101(b)(1) provides in relevant part that:

"It is the purpose of this chapter –
(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . ."

B. Part A of Title II of the Americans with Disabilities Act

42 U.S.C. § 12132 provides that:

"Subject to the provisions of this subchapter, 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."

C. Regulations Adopted by the U.S. Attorney General to Effectuate Part A of Title II of the Americans with Disabilities Act

1. 28 C.F.R. § 35.130(d) provides that:

"A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."

2. 28 C.F.R. § 35.130(b)(7) provides that:

"A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."

Supplemental Information Concerning Olmstead

Prepared by the Legal Divison of the Legislative Counsel Bureau

I. Overview of Letters Sent to State Medicaid Directors from the Federal Department of Health and Human Services

A. Developing Comprehensive, Effectively Working Plans - January 14, 2000

Based on the United States Supreme Court's indication that a State can demonstrate compliance with the ADA by showing that it has a comprehensive, effectively working plan for placing qualified persons with disabilities in less restrictive settings, and a waiting list that moves at a reasonable pace that is not controlled by the State's endeavors to keep its institutions fully populated, the United States Department of Health and Human Services ("Department") strongly urged the States to increase access to community-based services for persons with disabilities by developing comprehensive, effectively working plans for ensuring compliance with the ADA. While recognizing that there is no single model plan that will be appropriate for all States, the Department identified some of the key principles and practices that it recommended States use when developing plans. These principles and practices include:

Comprehensive, Effectively Working Plans: Develop and implement a comprehensive, effectively working plan (or plans) for providing services to eligible individuals with disabilities in more integrated, community-based settings. When carrying out this principle, the State should:

- Ensure that people with disabilities are served in the most integrated setting appropriate, including considering the existing programs and the level of awareness and agreement among stakeholders and decision-makers concerning the elements of an effective system;
- Ensure the transition into community-based settings at a reasonable pace;
- Provide assessments to determine how community living might be possible for persons with disabilities, including providing persons the opportunity for informed choice;
- Evaluate the adequacy with which the State is reviewing persons with disabilities in institutional settings to determine if they should receive services in a more integrated setting; and
- Establish procedures to prevent unjustifiable institutionalization.

Plan Development and Implementation Process: Provide an opportunity for interested persons, including persons with disabilities and their representatives, to be integral participants in plan development and follow-up. When carrying out this principle, the State should:

- Involve persons with disabilities in the process; and

- Assess what partnerships are needed to ensure that the plan is comprehensive and will work effectively.

Assessments on Behalf of Potentially Eligible Populations: Take steps to prevent or correct current and future unjustified institutionalization of persons with disabilities. When carrying out this principle, the State should:

- Ensure that it knows how many persons with disabilities are currently institutionalized and are eligible for services in community-based settings, including a consideration of the existing information and data collection systems, and any needed improvements to those systems;
- Evaluate whether existing assessment procedures are adequate to identify persons who could benefit from receiving services in a more integrated setting, and to identify persons who are at risk of placement in an unnecessarily restrictive setting; and
- Ensure that the State can act in a timely and effective manner in response to the findings of an assessment process.

Availability of Community-Integrated Services: Ensure the availability of community-integrated services. When carrying out this principle, the State should:

- Identify what community-based services are available in the State, assess the extent to which these programs are able to serve persons in the most integrated services appropriate, and identify any needed improvements;
- Evaluate whether the identified supports and services meet the needs of persons who are likely to require assistance to live in the community, and identify any needed changes;
- Evaluate whether its system adequately plans for making supports and services available to assist persons who reside in their own homes with the presence of other family members, and whether the plan addresses the needs of persons without family members or other informal caregivers;
- Examine how the identified supports and services integrate the person into the community;
- Review available funding sources to increase the availability of community-based services, considering what efforts are under way to coordinate access to the services and the extent to which the funding sources can be organized into a coherent system of long-term care to provide people with reasonable, timely access to services;
- Assess how well the current service system works for various groups, including a review of changes that might make services a reality in the most integrated setting appropriate for all groups; and
- Examine the operation of any waiting lists, and determine any actions needed to ensure that persons are moved off waiting lists and receive needed community services at a reasonable pace.

Informed Choice: Afford individuals with disabilities and their families the opportunity to make informed choices regarding how their needs can best be met in community or institutional settings. When carrying out this principle, the State should:

- Ensure that persons who may be eligible to receive services in more integrated, community-based settings are given the opportunity to make informed choices regarding how their needs can best be met; and
- Address what information, education and referral systems would be useful to ensure that persons with disabilities receive the information necessary to make informed choices.

Implications for State and Community Infrastructures: Take steps to ensure that quality assurance, quality improvement and sound management support implementation of the plan. When carrying out this principle, the State should:

- Evaluate how quality assurance and quality improvement can be conducted effectively as more persons with disabilities live in community settings; and
- Examine how it can best manage the overall system of health and long-term care so that placement in the most integrated setting appropriate becomes the norm, considering what planning, contracting and management infrastructures might be necessary to achieve this result at both the State and local community level.

B. Questions and Responses Concerning Olmstead - July 25, 2000

How is the Department addressing the complaints it has received alleging that States are not providing services to qualified persons with disabilities in the most integrated setting?

The Department's Office for Civil Rights ("OCR") is responsible for investigating complaints alleging discrimination on the basis of disability by public entities related to health and human services, and by entities receiving funds from the Department. The OCR's first objective is to work to obtain voluntary compliance with the Olmstead decision whenever possible. Based on the Department's belief that planning is a prudent and practical recommendation for moving forward, the OCR is urging States to bring all relevant stakeholders together to develop and implement comprehensive and effective working plans for providing services to all qualified persons with disabilities in the most integrated setting. The OCR is further working with States to cooperatively resolve complaints filed on behalf of individuals. If the OCR cannot negotiate a satisfactory resolution, the complaint may be referred to the Department of Justice for resolution.

Does the Olmstead decision require States to have plans to provide services to people with disabilities in the most integrated setting?

The decision does not require a State to have such a plan, but developing and implementing a comprehensive plan or supplementing existing plans to address any unmet needs is an important way that States may be able to demonstrate that they are in compliance with ADA requirements and to actively address discrimination.

Why should a State engage in planning activity undertaken in response to a complaint filed with the Office for Civil Rights ("OCR")? Will it protect the State from other investigations or litigation?

The OCR is directed pursuant to regulations issued under Title II of the ADA to investigate complaints against health and human service-related State and local government entities. The OCR has informed the States against which it has received Olmstead-type complaints of its desire to try and resolve the complaints by helping the State convene stakeholders to develop a comprehensive, effectively working plan. Where States or other "respondents" (entities against which the OCR has received complaints) engage in planning processes in good faith and at a reasonable pace, the OCR may determine it is possible to allow plan development to proceed in lieu of an investigation. Where a State or other respondent evinces no intent to undertake planning, or where delays in doing so evidence a lack of good faith, or where a State or other respondent utterly fails to involve stakeholders in plan development, the OCR may determine it necessary to commence a full-blown investigation. Following an investigation, if a violation is found and no resolution is reached, a case may be referred to the Department of Justice ("DOJ") for litigation.

An agreement between a State and the OCR would not have any direct impact on pending or future Title II litigation brought by a private party or the DOJ unless the private parties or the DOJ enter into explicit agreements with the State that incorporate the OCR's agreement, either in whole or in part.

Is Olmstead limited to people with disabilities similar to the disabilities of the women in the case, mental retardation and mental illness?

No. The principles set forth in the Supreme Court's decision in Olmstead apply to all individuals with disabilities protected from discrimination by Title II of the ADA. The ADA prohibits discrimination against "qualified individual(s) with a disability." The ADA defines "disability," with respect to an individual, as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

(42 U.S.C. § 12102).

To be a "qualified" individual with a disability, the person must meet the essential eligibility requirements for receipt of services or participation in a public entity's programs, activities or services. (See 42 U.S.C. § 12131(2)). For example, if the program at issue is open only to children, and that eligibility criterion is central to the program's purpose, the individual must satisfy this eligibility requirement.

C. Department's Review of Federal Policies to Facilitate Fulfillment of the ADA - July 25, 2000

This letter summarized the efforts of the Department concerning Federal policies to support States in complying with the ADA. These efforts were aimed at supporting States in: assisting people with disabilities to make a successful transition from nursing homes and other institutions into the community; expanding the availability and quality of home and community-based services; and ensuring that services are comparably available to all.

Attached to the letter were a list and description of policy changes and clarifications by the Department to give States more flexibility to serve people with disabilities in different settings. They were provided as guidance on how States may use the flexibility of Medicaid to expand services in a variety of ways.

D. Issues Related to Home and Community-Based Services ("HCBS") Waivers - January 10, 2001

This letter addresses certain questions related to State discretion in the design and operation of HCBS waivers under section 1915(c) of the Social Security Act. The letter also explains some of the principles and considerations that the Department will apply in the review of waiver requests and waiver amendments. Further, the Department addresses questions that have arisen to improve the adequacy and availability of home and community-based services.

The Department notes that current law requires States to identify the total number of people who may be served in an HCBS waiver in any year. States may derive this overall enrollment limit from the amount of funding the Legislature has appropriated. However, once persons are enrolled in the waiver, the State may not cap or limit the number of enrolled waiver participants who may receive a covered waiver service that has been found necessary by an assessment. Finally, this letter clarifies ways in which Medicaid HCBS waivers and the Medicaid Early and Periodic Screening, Diagnostic and Treatment ("EPSDT") services interact to ensure that children receive the full complement of services they may need.

E. Additional Tools Available to Improve State Health and Long-Term Service Systems to Fulfill the ADA - January 10, 2001

In this letter the Department emphasized its commitment to providing active assistance to States to build better health and long-term service systems that enable integrated, community living. Specifically, the Department provided a brief overview of some new tools that States might find useful. These include:

A final rule that removes barriers which previously prevented States from providing effective health and long-term care coverage to selected groups of individuals.
A collaboration with the U.S. Department of Housing and Urban Development ("HUD") to assist States in the appropriate transition of people from institutional to community settings.
Systems change grants to promote the design and delivery of home and community-based services that support persons with a disability or chronic illness to live and participate in their communities.
Grants to support State efforts to improve community-based personal assistance services that are designed to ensure that people who have a disability or chronic illness have maximum control over their lives.

II. The Executive Branch of the Federal Government

A. The New Freedom Initiative

The New Freedom Initiative was announced by President Bush on February 1, 2001, as part of a nationwide effort to remove barriers to community living for people with disabilities. The goals of the Initiative are to:

Increase access to assistive and universally designed technologies;
Expand educational opportunities for Americans with disabilities;
Promote homeownership for Americans with disabilities;
Integrate Americans with disabilities into the workforce;
Expand transportation options; and
Promote full access to community life.

As part of promoting full access to community life, the President noted that Olmstead has yet to be fully implemented. He further noted that he believes that community-based care is critically important to promoting maximum independence and to integrating individuals with disabilities into community life.

B. Executive Order 13217: Community-Based Alternatives for Individuals with Disabilities

To carry out the New Freedom Initiative's commitment to swift implementation of Olmstead, on June 18, 2001, the President issued an Executive Order entitled "Community-Based Alternatives for Individuals with Disabilities." The Order commits the United States to community-based alternatives for individuals with disabilities, recognizing that such services advance the best interests of Americans. The Order also states that "[t]he United States seeks to ensure that America's community-based programs effectively foster independence and participation in the community for Americans with disabilities." The Order then sets forth the holding in Olmstead and

concludes that the Federal Government must assist States and localities to implement swiftly the decision to "help ensure that all Americans have the opportunity to live close to their families and friends, to live more independently, to engage in productive employment, and to participate in community life."

Section 2 of the Order sets forth the duties of various Federal agencies in swiftly implementing the Olmstead decision. Specifically:

The Attorney General, the Secretaries of Health and Human Services, Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration shall work cooperatively to ensure that the Olmstead decision is implemented in a timely manner. Specifically, the designated agencies should work with States to help them assess their compliance with the Olmstead decision and the ADA in providing services to qualified individuals with disabilities in community-based settings, as long as such services are appropriate to the needs of those individuals. These agencies should provide technical guidance and work cooperatively with States to achieve the goals of Title II of the ADA, particularly where States have chosen to develop comprehensive, effectively working plans to provide services to qualified individuals with disabilities in the most integrated settings. These agencies should also ensure that existing Federal resources are used in the most effective manner to support the goals of the ADA. The Secretary of Health and Human Services shall take the lead in coordinating these efforts.

The Attorney General, the Secretaries of Health and Human Services, Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration shall evaluate the policies, programs, statutes, and regulations of their respective agencies to determine whether any should be revised or modified to improve the availability of community-based services for qualified individuals with disabilities. The review shall focus on identifying affected populations, improving the flow of information about supports in the community, and removing barriers that impede opportunities for community placement. The review should ensure the involvement of consumers, advocacy organizations, providers, and relevant agency representatives. Each agency head should report to the President, through the Secretary of Health and Human Services, with the results of their evaluation within 120 days (by October 16, 2001).

The Attorney General and the Secretary of Health and Human Services shall fully enforce Title II of the ADA, including investigating and resolving complaints filed on behalf of individuals who allege that they have been the victims of unjustified institutionalization. Whenever possible, the Department of Justice and the Department of Health and Human Services should work cooperatively with States to resolve these complaints, and should use alternative dispute resolution to bring these complaints to a quick and constructive resolution.

Relevant Case Law Subsequent to Olmstead

A. A State may defend itself against a case based on Olmstead by showing that making the modifications requested by the plaintiff would constitute a fundamental alteration of the program.

Williams v. Wasserman, 164 F.Supp.2d 591 (D.Md. 2001): In this case, the plaintiffs argue that they have been kept in state institutions despite acknowledgments that the residential hospitals are not appropriate for them and recommendations that they be placed in the community. They contend that this institutionalization violates the ADA and their due process rights.

"Against this background, throughout the trial, the parties disagreed on the proper method for measuring the cost of community-based treatment as compared to the cost of institutionalization. The plaintiffs focused primarily on the per capita cost of a community placement; the defendants pointed to the continuing fixed cost of maintaining the State's mental hospitals in addition to the cost of individual community placements. In Olmstead, the Supreme Court came down squarely on the side of the defendants in this debate. Rejecting the 'simple comparison' between community placement and institutional confinement, Justice Ginsburg recognized that a 'State ... may experience increased overall expenses by funding community placements without being able to take advantage of the savings associated with the closure of institutions.' This must be taken into account even if it is only an 'interim' cost. Olmstead also recognized that some individuals 'may need institutional care from time to time to stabilize acute psychiatric symptoms.' In this case, it is undisputed that the State will need to maintain some threshold number of hospital beds indefinitely for acute and, in a small percentage of cases, long-term care." 164 F.Supp. 2d at 636 (citations omitted).

Measured against the three to five year time frame, and considering the need to maintain a minimum number of hospital beds and also to fund placements for other persons in need of community treatment, the State's progress in placing members of the TBI/NRDD [Traumatic Brain Injury/Nonretarded Developmentally Disabled] population into the community has been acceptable. The immediate shift of resources sought by plaintiffs would have resulted in a fundamental alteration of the State's provision of services within the meaning of Olmstead. 164 F.Supp. 2d at 636.

Pennsylvania Protection and Advocacy, Inc. v. Department of Public Welfare of Commonwealth of Pennsylvania, 2003 WL 292066 (M.D. Pa. Jan 15, 2003): The court concluded, based on the defendant's calculations, that the plaintiff's requested relief would fundamentally alter the State's program. The defendants noted that the annual cost for one resident placed in the community would be $52,742.50, and the cost would increase to $4,377,627.60 per year for all 83 residents discussed by the plaintiff. The defendants added that even if all 83 residents went from the institutional setting in which they are currently located to the least costly setting ($257 per day), the additional cost to

the State would be $3,574,810 annually. Since the Office of Mental Health and Substance Abuse Services has only a finite amount of money to devote to those with mental disabilities, the requested relief would fundamentally alter the program by forcing the defendants to shift funding from other eligible people to these residents.

In reaching this conclusion, the court noted that the Olmstead plurality intended that resources available for mental-health services be the relevant figure in a fundamental alteration examination, as evidenced by the plurality's discussion of available resources in relation to the responsibility the State had undertaken for all persons with mental disabilities, not the entire state budget, or a departmental budget. The court stated that this means the mental health budget. In addition, the court noted that the ADA does not allow it to review how State officials have allocated resources within the Department of Public Welfare's budget to see if it has provided sufficient funding for those disabled persons qualified for community placement.

Makin ex rel. Russell v. Hawaii, 114 F.Supp.2d 1017 (D.Hawaii 1999): In this case, the defendant argues that any modification to the program would require them to ignore State funding limits and, therefore, fundamentally alter the HCBS-MR [Home and Community Based Services for the Developmentally Disabled or Mentally Retarded] program to an unlimited state funded program. Further, it claims that requiring the State to ignore the population limits is a fundamental alteration. Also, the State argues that providing more individuals with services would force it to exceed its federal funding limits, making it take on 100% of the costs of these additional individuals' care. The court concluded that these arguments fail to show how the modification would fundamentally alter the program, since it merely argues that the State would potentially have a problem funding it.

Another argument set forth by the state is that forcing the State to provide services to all qualified individuals would force it to reconsider the program, its eligibility criteria, services provided and whether to terminate it. The court concluded that this argument lacks substance since it fails to show that the modification itself would alter the program.

Finally, the State argues that the court must take into account the State's available resources and other programs that it has undertaken "for the care and treatment of a large and diverse population of persons with mental disabilities," citing Olmstead. Defendants claim that requiring that all eligible individuals be admitted to the program would necessarily decrease ICF-MR [Intermediate Care Facility] funding, which would be inequitable to that program. The court acknowledges these potential problems and it will consider all relevant facts in determining whether a modification of the program is prudent in light of the State's other undertakings. Under the Act, a court must examine the State's current program and require feasible modifications that do not alter the program in such a way that will cause other programs to suffer unjustly. However, the defendants have not shown that any modification to the program would fundamentally alter it.

The plaintiffs claim that modifications are possible in this case if the State would responsibly develop its program. Plaintiffs alleged that HCBS-MR services can be provided at one-fourth the cost of ICF/MR services. Plaintiffs also claim that Defendants intentionally underfund the program and mismanage the wait list, forcing the "qualified individuals" to accept institutional services. Plaintiffs cite to Williams, 937 F.Supp. at 524, to show that a "reasonable modification" would be to require the State to allow Plaintiffs a choice between home-based care and ICF/MRs. In that case, the court held that forcing the State to make home care available to residents of a nursing home was a "reasonable accommodation" under the ADA because the home-based care was less expensive.

Additionally, the plaintiffs do not seek a modification of the HCBS-MR program that will require the State to provide the entire class with services. They simply request that the State be required to responsibly develop the program in such a way that will allow the HCBS-MR wait list to move at a reasonable pace.

The Olmstead court held that if the State could prove that it was developing a "comprehensive plan" to keep the wait list "moving at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable modifications standard would be met." However, the State has provided no evidence of any such plan. The only evidence of any effort to decrease the wait list is the increase in "slots" over the next few years. That single piece of evidence, though, does not show that the State is complying with the ADA by acting responsibly.

B. The ADA does not mandate the provision of new benefits.

Rodriguez v. City of New York, 197 F.3d 611 (2nd Cir. (N.Y.) 1999): Class action was brought challenging failure of New York City to include safety-monitoring services along with other personal care services to Medicaid recipients who suffered from mental disabilities that caused them to require assistance with daily living tasks. At its crux, the claim is that the provision of Medicaid-funded services to one group of disabled persons discriminated against other disabled persons who need different services. The services that New York provides to the mentally disabled are no different from those provided to the physically disabled. Neither group is provided with independently tasked safety monitoring. The Olmstead decision is inapposite.

"In Olmstead, the parties disputed only--and the Court addressed only--where Georgia should provide treatment, not whether it must provide it. Georgia already had numerous State programs that provided community-based treatment that the Olmstead respondents were qualified to receive. The State contended that even though these services existed, it had a cost justification to keep certain mentally disabled individuals institutionalized.

The portion of the opinion most relevant to the instant dispute was the Court's statement that it was explicitly not holding that 'the ADA imposes on the States a standard of care for whatever medical services they render, or that the ADA requires States to provide a certain level of benefits to individuals with disabilities.' Olmstead does not, therefore,

stand for the proposition that States must provide disabled individuals with the opportunity to remain out of institutions. Instead, it holds only that 'States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.'

Appellees want New York to provide a new benefit, while Olmstead reaffirms that the ADA does not mandate the provision of new benefits. Under the ADA, it is not our role to determine what Medicaid benefits New York must provide. Rather, we must determine whether New York discriminates on the basis of a mental disability with regard to the benefits it does provide. Because New York does not 'task' safety monitoring as a separate benefit for anyone, it does not violate the ADA by failing to provide this benefit to appellees." 197 F.3d at 619 (citations omitted).

Townsend v. Quasim, 163 F.Supp.2d 1281 (W.D.Wash. 2001): Plaintiffs are a class of Washington residents who are or will be (1) individuals with a "disability" within the meaning of the Americans with Disabilities Act ("ADA"); (2) eligible under the State Medicaid Plan for nursing facility care; and (3) eligible for COPES Medicaid waiver services but for having income that exceeds the categorically needy income limit (300 percent of the Supplemental Security Income ("SSI") federal benefit rate). The plaintiffs have filed suit alleging that Washington State's current provisions for the medically needy violate the ADA. As long as the State provides long-term care to the medically needy, plaintiffs contend that the medically needy are also entitled to those long-term care services in the most integrated setting appropriate to their needs in accord with 28 C.F.R. § 35.130(d).

Plaintiffs contend that the State's failure to provide them benefits similar to the categorically needy under the COPES program violates the ADA. However, this argument fails because any such exclusion is based on an individual's financial income rather than their disability, and a State may exclude disabled individuals from a program based upon factors unrelated to their disability. In addition, the plaintiff class does not "meet the essential eligibility requirements" of the COPES program because, by class definition, they exceed the income limitations of the COPES program. Furthermore, modifying the income limitation of the COPES program would be a fundamental alteration to the character of the COPES program, and the ADA does not require fundamental alterations of an essential eligibility requirement.

In the alternative, the plaintiffs argue that the integration mandate of the ADA requires placement in a more integrated setting. The issue becomes whether the ADA requires the State to develop and fund a program that would allow individuals in the plaintiff class to be placed in a more integrated setting. In Olmstead, the plaintiffs' treatment professionals concluded that the plaintiffs should be placed in a community-based program. The program for which the plaintiffs sought access already existed. However, the women remained institutionalized. The Olmstead court proceeded to consider whether the ADA required integration. Although holding that the plaintiffs should be placed in a more integrated setting, the issue of whether a State must develop and fund a program was not

presented or addressed in the decision. The Supreme Court expressly stated that it did not hold that "the ADA imposes on the States a standard of care for whatever medical services they render, or that the ADA requires States to provide a certain level of benefits to individuals with disabilities." The current dispute is similar to Rodriguez. Washington State does not offer a community based program for the medically needy. Rather, the COPES program is only available to the categorically needy pursuant to a Medicaid waiver. The plaintiffs now seek to require the State to develop and fund these new services for the medically needy to the same extent these services exist for the categorically needy under the COPES program. Neither the ADA nor Olmstead mandate such a result. Rather, the ADA simply requires nondiscrimination "with regard to services they in fact provide." Washington State does not provide community-based services for which the medically needy are eligible. Therefore, the ADA does not require the creation of such a program for the medically needy. 163 F.Supp.2d at 1285-1287 (citations omitted).

C. A State may not successfully defend itself against a case based on Olmstead solely by placing persons on a waiting list.

Frederick L. v. Department of Public Welfare, 157 F.Supp.2d 509 (E.D. Pa. 2001): "In the context of Olmstead, Defendants' argument goes to the third factor--whether community placement can be reasonably accommodated with the resources available to the State and the needs of others with mental disabilities. Individuals with mental disabilities who are recommended for community placement by treatment professionals and who do not oppose such placement are not left without recourse under Olmstead simply because the State has secured their indefinite placement on a waiting list. Olmstead certainly does not provide this type of blanket insulation from liability." 157 F.Supp.2d at 541.

D. Olmstead does not hold that a medically inappropriate transfer from institutionalization to community placement is, by itself, a violation of the integration mandate.

Black v. Department of Mental Health, 83 Cal.App.4th 739 (2000): If a person with a disability is not a suitable candidate for treatment in a more integrated setting, it would be inappropriate to transfer the person there. If an assessment by the State's own treatment professionals does not indicate that a person with a disability can be properly treated in a more integrated setting, then that person with a disability is not eligible for the State's more integrated services and the antidiscrimination protections of the ADA are not triggered. Therefore, when the Olmstead court said the ADA does not condone transferring to community placement an institutionalized person with a disability who will not benefit from such a placement, we do not believe it was either holding or signaling that a medically inappropriate transfer from institutionalization to community placement is, by itself, a violation of the integration mandate. 83 CalApp.4th at 754-755.

E. Olmstead does not require institutionalization if any one of its three criteria is not met.

Richard C. ex rel. Kathy B. v. Houstoun, 196 F.R.D. 288 (W.D. Pa. 1999): In Olmstead, the Supreme Court was considering the circumstances under which the ADA requires the placement of institutionalized disabled persons into community-based treatment programs. It does not logically follow that institutionalization is required if any one of the three Olmstead criteria is not met.

F. A person's nonopposition to being transferred from an institution must be competent.

In re Easly, 771 A.2d 844 (Pa.Cmwlth. 2001): Placement in a community based facility must be voluntary and by only requiring nonopposition instead of "competent" nonopposition would result in the removal of the voluntary aspect of placement in such a facility.

G. Olmstead does not affect insurance classifications.

Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. (Wash.) 2000): Former employee brought action alleging that former employer and administrator of its disability plan violated the ADA and Washington law by providing greater benefits for physical disabilities than for mental ones. The court held that "Olmstead does not speak to insurance classifications such as the one at issue. Olmstead spoke to segregation of the disabled through unwarranted institutional confinement. Applying Olmstead to insurance classifications would conflict with the Court's decisions in Alexander v. Choate and Traynor v. Turnage, which both endorse distinctions between types of disabilities, and Congress's clear instruction in the insurance safe harbor that the Act was not intended to reach common insurance practices such as underwriting of risks." 198 F.3d at 1117-1118 (citations omitted).

Wilson v. Globe Specialty Products, Inc., 117 F.Supp.2d 92 (D.Mass. 2000): The plaintiff alleges that by limiting his mental-disability benefits to twenty-four months, Defendants violated the ADA, and the Employment Retirement Income Securities Act ("ERISA"). Today, this court joins the numerous courts which hold that the ADA does not require equal benefits for different disabilities. The defendant's reliance on Olmstead is not compelling. "Olmstead involved Title II of the ADA, the provision governing reasonable accommodation by public entities, and one not at issue in this case. More compelling, however, Olmstead bears little factual resemblance to the case at hand. In Olmstead, the court required the State of Georgia, under the ADA's insistence upon reasonable accommodation, to place two qualified, mentally-disabled women in less restrictive, community-based treatment centers instead of continuing their institutionalization. Disparate treatment of different disabilities was not at issue." 117 F.Supp.2d at 97.

El-Hajj v. Fortis Benefits Ins. Co., 156 F.Supp.2d 27 (D.Me. 2001): The plaintiff asserts that because defendant's policy of insurance provides superior benefits to those physically disabled as compared to those psychologically disabled, it necessarily must follow that Defendant's policy violates the ADA. Several courts specifically have found that Olmstead does not alter the validity of the line of cases holding that an insurer does not transgress the ADA by treating mental and physical disabilities differently. The Court found that the ADA does not create a cause of action against insurers who provide different levels of coverage for those who are mentally disabled versus those who are physically disabled.