



How ICF Residents Can Use Olmstead as a Sword, not a Shield

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VOR ANNUAL MEETING
“Making It Happen”
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Cliff Note Version



“The best defense is a good offense.”

Jack Dempsey

Offensive Tools

- Legislation
- Education
- Popular Opinion
- Litigation
 - Our focus
 - Using Illinois as an example

[Timeline](#)

Olmstead Decision (1999)



- What it Actually Said:
“Unjustified institutional isolation of persons with disabilities is a form of discrimination.”
- 3 prongs:
 1. the State’s treatment professionals have determined that community placement is appropriate for the individual.
 2. Choice – the individual wants to actually move.
 3. Must consider state resources and the needs of other people with disabilities.

The Original Olmstead (1928)

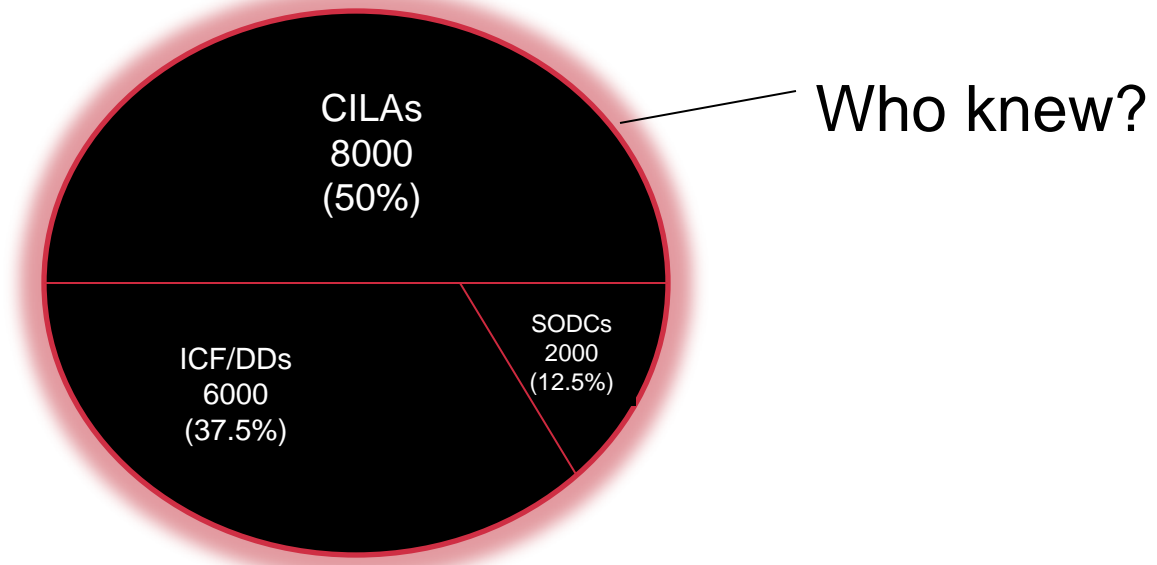
“The makers of our Constitution conferred the right to be left alone – the most comprehensive of rights and the right most valued by civilized men.”

Justice Louis Brandeis

[Timeline](#)

The Illinois Profile (2005)

- Private ICF Residents: 6000 (in 240 ICF-DDs)
- Public ICF Residents: 2000 (in 9 SODCs)
- CILAs: 8000



Approximate Cost Per Resident:

- Private ICF Residents: \$55,000
- CILAs Residents: \$55,000
- Public ICF (SODC): \$135,000

Using Olmstead as a Sword



The Illinois Example: *Ligas* Class Action

- Filed in 2005
- Plaintiffs: Stanley Ligas and 8 High Functioning Individuals
- Plaintiffs' Counsel: ACLU, Equip for Equality, and Access Living
- Defendant: State of Illinois
- Stated Goal: Expanding “choice”
- Real (or Effective) Target: Private ICF's

Using Olmstead as a Sword



The Intervenors

- Who are we?
- The faces and families of those who want to remain in their ICF's
- Goals and Interests Consistent with ICF's: residents want to remain in their ICF so they need viable ICF's

Using Olmstead as a Sword



What Happened?

Using Olmstead as a Sword

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We won!

Using Olmstead as a Sword



Some more detail:

- We lost, we lost, we lost, we lost, and then we won.

Using Olmstead as a Sword



- 2005: Class certified and intervention denied.
- 2007: Subpoena battle over residents' medical records.
- 2008: Intervention denied again.
- 2009: Proposed settlement.
- 2009: Objection process and fairness hearing.
- 2009: Settlement rejected and class decertified.
- 2010: Second settlement rejected and our intervention allowed.
- 2011: Negotiate new settlement that protects ICF choice
- 2012-Present: Implementation

Using Olmstead as a Sword

	ORIGINAL	FINAL
3000 New CILA/Community Placements	Yes	Yes
Elimination of ICF-DD Beds	Yes	No
Continued Funding of ICF-DDs Included	No	Yes
Annual Evaluations of All ICF-DD Residents	Yes	No
New Entry Restrictions on ICF-DDs	Yes	No
Targeted Beneficiary	ICF-DD Residents	Unserved (At-home) Population

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Lessons of Court Fight:

- Unity
- Organization
- Work Smarter, Not Harder

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Our Focus: ICF *Potential* Class Members

- Every ICF resident has the right to move to a CILA (or theoretically at-home waiver services)
- But every resident also has the right to stay in their ICF . . .

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- . . . and the State *must* fund and honor the ICF choice.

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Paragraph 4 of the Consent Decree

4. Development of Resource Capacity. The choices of Individuals with Developmental Disabilities, including Class Members, to receive Community-Based Services or placement in a Community-Based Setting **or to receive ICF/MR services in an ICF-DD will be honored**; provided, however, that this commitment to honoring choice does not alter Defendants' current obligations under existing law regarding licensed ICF-DD capacity system-wide or at any specific ICF-DD, and provided that, under current applicable law, this commitment does not entitle an Individual with Developmental Disabilities to receive ICF/MR services in a specific ICF-DD. Defendants shall implement sufficient measures to ensure the availability of services, supports and other resources of sufficient quality, scope and variety to meet their obligations to such Individuals under the Decree and the Implementation Plan consistent with such choices. **While the Decree remains in effect, any amendment to the State Plan submitted by the State pursuant to 42 U.S.C. § 1396, et seq. will continue to include ICF-DD services as an alternative choice for long-term care services for eligible Individuals with Developmental Disabilities.** Nothing in this Decree shall impair Defendants' ability to make changes in their provision of supports and services to Individuals with Developmental Disabilities, including Class Members, regardless of setting, provided that Defendants continue to honor Individuals' choices and fulfill Defendants' obligations under the Decree and Implementation Plan. **Resources necessary to meet the needs of Individuals with Developmental Disabilities who choose to receive services in ICFs-DD shall be made available and such resources will not be affected by Defendants' fulfillment of their obligations under the Decree,** including the obligations under Paragraphs 17 through 19 and 21 through 23. Funding for services for each Individual with Developmental Disabilities will be based on the Individual's needs using federally approved objective criteria regardless of whether the Individual chooses to receive services in an ICF-DD or in a Community-Based Setting; provided, however, nothing in this Decree shall require Defendants to change their current method for establishing funding or from adopting new methods based upon federally approved objective criteria.

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STOP AND THINK:

- Olmstead changes nothing regarding the *right* to live and remain in an ICF.
- Olmstead actually protects the ICF choice.

Using Olmstead as a Sword



Using the Decree to Work for ICF Residents:

- Bedholds
- ICF Rates
- Demanding the choice remain real and viable

Using Olmstead as a Sword



- But the real lesson of our fight is that the real power actually resides with the families and ICF providers.
- When they demand that their ICF *right* be honored, it is.
- When providers speak with one, united voice, they can be powerful.
- Legal arguments good, organized united group better
- Real choice is a two-way street
- Hard to win a case when you are not a party and there is no “V.”