Olmstead Protects Individual Choice and Recognizes the Need for Higher Levels of Care

By Caroline A. Lahrmann

Individuals with intellectual and developmental disabilities (I/DD) are far too frequently finding life-sustaining services pulled out from under them by agencies charged with the duty to protect them – namely state departments of developmental disabilities and protection and advocacy organizations. They attempt to use the law as a weapon against the community of people with disabilities instead of the tonic it is meant to be.

These agencies tell the public and lawmakers, wrongly. that the Americans with Disabilities Act (ADA) and the U.S. Supreme Court *Olmstead* decision require “de-institutionalization” and “community integration,” regardless of individual need and choice. We are told that “least restrictive environment” in all cases means small community settings, even when many individuals with I/DD cannot be safely served in such settings **and/*or*** they choose the higher level of care provided in large facilities, such as Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs/IID), facility-based day programs and sheltered workshops.

Don’t be fooled by this deception, and don’t let your elected representatives be fooled either. *Olmstead’s* majority and concurring opinions take great care to stress that “institutions” such as ICFs/IID are a critical part of a range of services that a state must provide to meet the needs of the diverse community of people with mental disabilities. *Olmstead* recognizes that there are individuals who desire and require a higher level of care for whom “institutions” must remain available. *Olmstead* also states that the wishes of individuals are paramount in determining residential placement.

The importance of individual choice, including for some the choice of “institutional care,” is repeated throughout *Olmstead’s* majority opinion as follows:

> *“Such action (community placement) is in order when the State’s treatment professionals have determined that community placement is appropriate, **the transfer from institutional care to a less restrictive setting is not opposed by the affected individual**, and the placement can be reasonably accommodated taking into account the resources available to the State and the needs of others with mental disabilities.”*
> *(Emphasis added.)*

> *“But we recognize, as well, the States’ need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States’ obligation to administer services with an even hand.”*

> *“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.”*

> *“As already observed...the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk...Nor is it the ADA’s mission to drive States to move institutionalized patients into an inappropriate setting...”*

"For other individuals, no placement outside the institution may ever be appropriate...for these persons, institutional settings are needed and must remain available."

*"For these reasons stated, we conclude that, under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, **the affected persons do not oppose such treatment**, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities."*
(Emphasis added.)

In his concurring opinion to *Olmstead*, Justice Anthony Kennedy warned against its misinterpretation, specifically pointing to state agencies. Kennedy states in Part I of his concurring opinion, which Justice Stephen Breyer joined, that:

"It would be unreasonable, it would be a tragic event, then, were the American with Disabilities Act of 1990 (ADA) to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision."

Justice Kennedy then quotes from the majority opinion,

*"Justice Ginsburg's opinion takes account of this background. It is careful, and quite correct, to say that **it is not "the ADA's mission to drive States to move institutionalized patients into an inappropriate setting..."** (Emphasis added.)*

Justice Kennedy concludes,

*"In light of these concerns, if the principle of liability announced by the Court is not applied with caution and circumspection, **States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition."** (Emphasis added.)*

Justice Kennedy's warning has sadly proven prophetic for developmentally disabled citizens around the country who have been forced out of their chosen ICF/IID homes, facility-based day programs and sheltered workshops because of real or perceived threats of litigation, oftentimes from federally-funded protection and advocacy agencies set up to protect our most vulnerable citizens.

Olmstead is not a decision to be feared by individuals seeking specialized services for their unique needs connected to their intellectual and developmental disabilities. Congress demonstrated this fact when it recognized the importance of considering individual choice based on need in ADA (Olmstead) enforcement activities in this December 2014 Report language to accompany the Consolidated and Further Continuing Appropriations Act of 2014:

"Deinstitutionalization.-There is a nationwide trend towards deinstitutionalization of patients with intellectual or developmental disabilities in favor of community-based settings. The Department [of Justice] is strongly urged to continue to factor the needs and desires of patients, their families, caregivers, and other stakeholders, as well as the need to provide proper settings for care, into its enforcement of the Americans with Disabilities Act." [Conference Report to accompany the Consolidated and Further Continuing Appropriations Act, 2014(for Commerce, Justice, Science, and Related Agencies, p. 17) (December 2014)].

Olmstead embraces options. Its careful and responsible findings respect the diversity inherent in the community of people with mental disabilities and seek to ensure that all people receive safe, appropriate, and individually-driven services.

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