

Stop the Shutdowns Factsheet #2: Olmstead

A great many arguments about whether Massachusetts should close some or all of its six developmental centers refer to the 1999 Supreme Court review of Olmstead vs. L.C. and E.W. (Sometimes called Olmstead v. Zimring after the guardian ad litem.

The Case: L.C. and E.W. were two women with mental retardation who had been treated for co-existing psychiatric issues in a locked-ward Georgia mental hospital. Their doctors said that their mental illness was controlled enough for them to live successfully in the community, but the state would not release them. They won at every court level, and were successfully living in a community residential setting as the case was argued, given the importance of clarifying the Americans with Disabilities Act. The plurality opinion – in a 6-3 case with three different concurring opinions – held that “unnecessary segregation” of people with any disability was discrimination under the Americans with Disability Act: ““Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with mental disabilities, and the States' obligation to administer services with an even hand.”¹

COFAR’s national umbrella, VOR, filed a brief in favor of the two women², part of which (“Each disabled person is entitled to treatment in the most integrated setting possible for that person - recognizing on a case-by-case basis, that setting may be an institution.”) was quoted in the plurality opinion.³ Contrary to statements by Gary Blumenthal of the Massachusetts Association of Developmental Disabilities Providers, VOR is not “segregationist,” nor does COFAR oppose community programs for those who can utilize them.⁴ The women did not contest their period of treatment in the state hospital, and the David Bazelon Center for Mental Health Law summary of the case notes that “...it recognized that, during the course of litigation, there may be times when a person can be treated in the community and others when institutionalization is necessary.”⁵

The Argument for Facility Closing: Because the plurality opinion held that unnecessary isolation was discriminatory, some civil rights lawyers have seen the decision as a mandate to close all congregate facilities and even pediatric nursing homes. An industry of “Olmstead Cases” and “Olmstead Plans” has arisen to carry out this apparent (to some) mandate against secure and comprehensive treatment centers.⁶ In response, U.S. Rep. Barney Frank has introduced HR1255 requiring opt-out rights in federally funded class-action suits.⁷

What The Decision Actually Says About Facility Closing: The plurality opinion (written by Justice Ginsburg) says: “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.” and, “Unjustified isolation, we hold, is properly regarding as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of

¹ Plurality opinion: <http://supct.law.cornell.edu/supct/html/98-536.ZO.html>

² <http://www.vor.net/olmstead.htm>

³ Plurality opinion, *ibid*; VOR amicus brief, *ibid*.

⁴ See VOR’s Olmstead Press Release, <http://www.vor.net/olmstead%20Decision%20Press%20Release.htm>, and generally, http://www.vor.net/olmstead_resources.htm

⁵ <http://www.bazelon.org/issues/disabilityrights/incourt/olmstead/lcbkgrnd.htm>

⁶ See for example a resource page for federally-funded “Protection and Advocacy” services at <http://www.pascenter.org/olmstead/>

⁷ <http://www.vor.net/HR1255positions.htm>

persons with diverse mental disabilities, and the States' obligation to administer services with an even hand."⁸

The concurring opinion by Justice Kennedy with Justice Souter in agreement is even more explicit: "It would be unreasonable, it would be a tragic event, then, were the Americans 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." And "...States may be pressured into attempting compliance on the cheap, placing marginal patents into integrated settings devoid of the services and attention necessary for their condition."⁹

The Supreme Court Set Conditions: The plurality opinion ends by setting three conditions: "...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."

These conditions cut two ways in evaluating options for DMR/DDS. One debate is about whether these conditions can be met for each of about 500 residents of developmental centers who would be displaced by the Governor's plan to close four of the six centers in four years. Another potential debate concerns individuals who qualify for community treatments but have not been offered them, or have not been offered everything they need.

The conditions have also shaped the political debate over the future of facilities in Massachusetts. Because most facility residents have family guardians, who are aware of their loved one's wishes, there are periodic attacks on individual guardians or even, in some legal documents, attacks on guardianship rights in general¹⁰. Because fiscal resources are permitted to affect such decisions, there is a history of exaggerated financial claims –most often comparing people with very different levels of disability. In the major peer-reviewed meta-study of costs, there was no support for the argument that community-based treatment is less expensive, when studies were controlled for age and degree of disability, and what differences were identified were primarily attributed to staffing and wages.¹¹

It is likely that the House of Representatives' vote to request a cost study before closing any developmental center is a response to the third condition in a period of difficult state budgets, and that the shrill opposition to that study from closure-advocates and the Department reflects fear of the outcome.

In addition, some 20 years after the Olmstead decision, and after thousands of people have left developmental centers for community living with varying degrees of success, there has to be some presumption that the remaining residents cannot be treated appropriately outside a secure, comprehensive facility; don't want to leave; would require more expensive supports in the community; or all three.

⁸ Plurality opinion, *ibid*.

⁹ <http://supct.law.cornell.edu/supct/html/98-536.ZC1.html>

¹⁰ For example, Arc Mass response to Ricci Monitor's report, <http://www.centerforpublicrep.org/uploads/Oc/3V/Oc3VZgCCtvmwcbkk0nRUXA/Report-memo-FINAL.pdf> pp 2-3; Center for Public Representation "Guardian's Right to Choose Ward's Friends," <http://www.centerforpublicrep.org/community-integration/guardians-authority-to-choose-a-wards-friends-and-associates>

¹¹ Walsh, Kastner, and Green, "Cost Comparisons of Community and Institutional Residential Settings: Historical Review of Selected Research," *Mental Retardation*, Vol. 41, Number 2, April 2003, abstract, [http://aamr.allenpress.com/aamronline/?request=get-abstract&doi=10.1352%2F0047-6765\(2003\)041%3C0103:CCOCAI%3E2.0.CO%3B2](http://aamr.allenpress.com/aamronline/?request=get-abstract&doi=10.1352%2F0047-6765(2003)041%3C0103:CCOCAI%3E2.0.CO%3B2), Executive summary, http://www.vor.net/executive_summary.htm