



# Federal Enforcement of the Olmstead Decision

**National Association of States United for Aging and Disability**

March 31, 2011

Mary Giliberti  
Supervisory Civil Rights Analyst  
Office for Civil Rights  
U.S. Department of Health and  
Human Services

[Mary.Giliberti@hhs.gov](mailto:Mary.Giliberti@hhs.gov)

Robinsue Frohboese  
Special Counsel for  
Community Integration  
Civil Rights Division  
U.S. Department of Justice

[Robinsue.Frohboese@usdoj.gov](mailto:Robinsue.Frohboese@usdoj.gov)



# OVERVIEW



- DOJ/Civil Rights Division and HHS/Office for Civil Rights' organization, responsibilities, and collaboration on Olmstead and community integration
- ADA community integration rights and responsibilities; the Olmstead decision and its application
- Other civil rights areas related to aging and disabilities
- Federal government resources



# Civil Rights Division

## U.S. Department of Justice

Assistant Attorney General Tom Perez



- Disability Rights Section is primary enforcer of ADA and coordinator of other Federal agencies' ADA activities
- Other Civil Rights Sections involved in disability rights issues include Special Litigation, Housing, Education, Criminal
- Disability Rights Section's U.S. Attorney Project coordinates work of U.S. Attorney offices that investigate and prosecute ADA cases



# Office for Civil Rights

## U.S. Department of Health and Human Services

### OCR Director Georgina Verdugo



- OCR is located in the Office of the Secretary at HHS. OCR has 240 staff in 10 regional offices and at headquarters.
- OCR enforces civil rights and privacy statutes, and provides education, outreach and technical assistance.
- OCR enforces Section 504 and ADA Title II in the areas of health care and social services.



## **Collaboration Between the Office for Civil Rights and the Department of Justice**

- OCR and DOJ share briefs, letters of findings, and strategy to ensure consistent enforcement
- OCR and DOJ coordinate investigations and can jointly investigate a complaint
- OCR and DOJ jointly provide training and technical assistance to stakeholders



# Community Living Initiative

- In honor of the 10<sup>th</sup> Anniversary of the Supreme Court's *Olmstead* decision and the 20<sup>th</sup> Anniversary of the Americans with Disabilities Act
- "The *Olmstead* ruling was a critical step forward for our nation, articulating one of the most fundamental rights of Americans with disabilities: Having the choice to live independently. I am proud to launch this initiative to reaffirm my Administration's commitment to vigorous enforcement of civil rights for Americans with disabilities and to ensuring the fullest inclusion of all people in the life of our nation."

**-- President Obama, June 22, 2009.**





## ***Olmstead* Enforcement -- a Top Priority**



- DOJ is involved in litigation in federal courts in more than 20 states to enforce *Olmstead*.
- OCR is investigating over 30 *Olmstead* complaints and several statewide compliance reviews in its ten regional offices.
- Investigations and cases involve all disability groups, public and private congregate care settings, and community services and programs



# TITLE II OF THE ADA



- “[N]o 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.” 42 U.S. C. § 12132



# DOJ'S ADA INTEGRATION REGULATION



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

**28 C.F.R. § 35.130 (d)**



## Reasonable Modification

- 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.  
28 C.F.R. § 35.130(b)(7)



# *Olmstead v. L.C.*



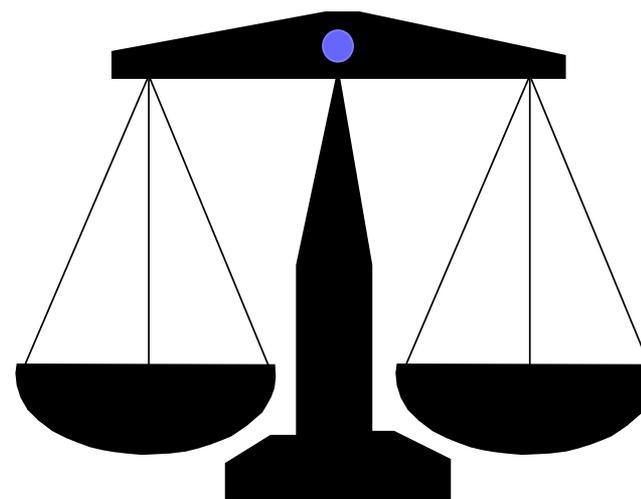
- **Plaintiffs:** L.C. and E.W., individuals with mental disabilities confined in a Georgia state –run psychiatric hospital.
- **Defendants:** Georgia officials responsible for Georgia’s mental health/developmental disabilities system.
- **Claim:** L.C. and L.W. asserted that the State's failure to discharge them from the hospital and provide them services in a community-based program, once their treating professionals determined that such placement was appropriate, violated Title II of the ADA.



# Unjustified Institutionalization Violates the ADA



***Olmstead's* central holding is that the ADA prohibits states from unnecessarily institutionalizing persons with disabilities and from failing to serve them in the most integrated setting.**





# Segregation is Discrimination



- **“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”**
- **“confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement,<sup>1,3</sup> and cultural enrichment”**



## **Community Placement Required When:**

- Individual can handle or benefit from community placement;
- Transfer is not opposed by the affected individual; and
- Community placement can be reasonably accommodated (i.e., would not impose a fundamental alteration, which the state must prove).



# ***Olmstead* Applies To Public and Private Congregate Care Settings in a State's Treatment System**



- *Olmstead* and early ADA community integration cases focused primarily on large, state-run psychiatric hospitals, ICF/MR's and public nursing homes
- *Olmstead* principles and ADA community integration requirements apply to private facilities where:
  - The state or local government, through its administration, planning, and allocation of resources, promotes the segregation of individuals with disabilities in private facilities. ADA regs cover government's administration of programs (28 C.F.R. § 35.130)
  - DAI v. Patterson (E.D.N.Y. 2009; on appeal to Second Circuit) applied *Olmstead* to private adult homes
  - Also, pre-*Olmstead* decision: Rolland v. Celluci (D. Mass. 1999) (private nursing homes)



## ***Olmstead* Applies to People In or At-Risk of Entering an Institution**



- *Olmstead* focused on individuals currently in an institution
- Subsequent cases have applied *Olmstead* to individuals at-risk of institutionalization, including those on wait lists
  - Needed services offered in institutions (including nursing homes) but not the community
  - Cuts in community services that would force an individual into an institution (including nursing homes)
  - Individuals are required to first go into an institution before being eligible for community services



# Examples of DOJ Involvement in Nursing Home *Olmstead* Cases



- OPA v. Connecticut (CT): Seeking community-based services for individuals with mental illness in nursing homes and at risk of nursing home admission who could be served in community settings with appropriate supports (Motion to dismiss denied; class certification granted March 2010).
- Hiltibran v. Levy (MO): Challenging State practice requiring nursing home placement to cover incontinence supplies for Medicaid recipients over age 20 living at home (Preliminary injunction granted December 2010).



## Examples of DOJ Involvement in Nursing Home *Olmstead* Cases



- Florida cases challenging state policy requiring individual to enter a nursing home for a period of time to qualify for HCBS. Haddad v. Arnold (M.D. Fla.) preliminary injunction issued in July 2010; denial of defendants' motion to dismiss in March 2011; Cruz v. Dudek (S.D. Fla), motion to dismiss denied in January 2011.
- Long v. Dudek (N.D.Fla.): Class action challenging institutionalization of individuals in nursing homes who could be and want to be served in the community. Summary judgment motions denied in January 2011.



# Examples of OCR Complaint Resolutions

- Issued a letter of finding where an individual was at risk of institutionalization from lack of adequate attendant care services
- Worked with state and CMS to resolve complaint involving lack of providers. State applied for self-direction waiver
- Individual residing in 700+ bed nursing home now living in a community-based setting of his choice after OCR contacted the Medicaid agency for an assessment



# Olmstead Plans

Courts have varied in their decisions about what is required.

In Frederick L. v. Dep't of Public Welfare, the Third Circuit Court of Appeals required a plan that specified:

- A time frame or target date for placement in a community setting
- The approximate number of persons to be discharged during each time period
- Eligibility standards for community-based services
- General description of the collaboration required between relevant agencies.



# Opportunities for States



- Dear State Medicaid Director letter, May 20, 2010  
<https://www.cms.gov/smdl/downloads/SMD10008.pdf>
- Community First Choice Option, NPRM published Feb. 25, 2011  
<http://www.federalregister.gov/articles/2011/02/25/2011-3946/medicaid-program-community-first-choice-option>
- Fact Sheet on the Affordable Care Act and Americans with Disabilities  
[http://www.healthcare.gov/news/factsheets/affordable\\_care\\_act\\_americans\\_disabilities.html](http://www.healthcare.gov/news/factsheets/affordable_care_act_americans_disabilities.html)



# Title VI of the Civil Rights Act



- Prohibits discrimination on the basis of race, color and national origin in programs receiving federal financial assistance, 42 U.S.C. § 2000d et seq.
- Implemented by 45 C.F.R. Part 80 (HHS regulation)
- HHS Guidance to FFA Recipients Regarding Title VI Prohibition against Discrimination Affecting LEP Persons; issued in 2003



# Title VI and Limited English Proficient (LEP) Persons

- An LEP individual is a person whose primary language is not English and who has a limited ability to read, write, speak or understand English.
- Title VI and the implementing regulations prohibit conduct that has a disproportionate adverse impact on the basis of national origin. Failure to provide LEP individuals meaningful access may constitute discrimination.



# Age Discrimination Act of 1975

- Prohibits discrimination on the basis of **age** in programs or activities receiving Federal financial assistance. 42 U.S.C. §§ 6101-6107
- Applies to persons of all ages
- Does not cover employment discrimination.  
(See Age Discrimination in Employment Act, **ADEA**)
- Implemented by 45 C.F.R. Part 90 (HHS is coordinating agency)



## Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997



- Gives the Attorney General authority to redress serious, systemic problems in public institutions
- Cases involve pattern or practice, systemic unlawful conditions
- Injunctive relief to remedy violations of Federal constitutional and statutory rights
- New subpoena authority under the Affordable Care Act



# CRIPA INVESTIGATIONS



- Recent CRIPA findings letter in county nursing home in Mississippi; recent settlement in State Veteran's home in Alabama . Copies of these and other nursing home matters are on the Special Litigation website at: <http://www.justice.gov/crt/about/spl/findsettle.php>.
- In keeping with Olmstead, there is a shift in focus in CRIPA cases from institutional reform to threshold question of appropriateness of institutionalization and right to live in the community
- CRIPA investigations now focus first on whether individuals should be in the institution
  - Look at diversion, admission, and discharge practices; those at risk of institutionalization; building community infrastructure and services (U.S. v. Georgia settlement between DOJ, OCR and State is model: [http://www.justice.gov/crt/about/spl/documents/georgia/us\\_v\\_georgia\\_cover.php](http://www.justice.gov/crt/about/spl/documents/georgia/us_v_georgia_cover.php))



# Federal Web Resources



- DOJ ADA briefs and settlements: <http://www.ada.gov/enforce.htm>
- Special Litigation, Civil Rights Division website with CRIPA findings letters, pleadings, settlements, and court decisions:  
<http://www.justice.gov/crt/split/findsettle.phphttp>
- HHS Office for Civil Rights investigative findings and settlements involving Section 504 and ADA in health care facilities:  
<http://www.hhs.gov/ocr/civilrights/activities/examples/Olmstead/successstoriesolmstead.html>;  
<http://www.hhs.gov/ocr/civilrights/activities/examples/Disability/index.html>
- HHS and DOJ enforcement activities to ensure adequate communication in health care facilities with persons who have limited English proficiency or disabilities:  
<http://www.hhs.gov/ocr/civilrights/resources/specialtopics/hospitalcommunication/heccomplianceactivities.html>