



2020 Annual P&A Legal Directors Meeting

Session 1, 1:00 – 2:00pm ET
Monday June 15, 2020



Meeting Agenda

Session 1: 1:00 – 2:00 ET

Overview of Issues Across the Network

Realizing the Promise of Olmstead: Ensuring Informed Choice

Session 2: 2:30 – 3:30 ET

Discussion with U.S. Department of Justice, Civil Rights Division

Session 3: 4:00 – 5:15 ET

Responding to COVID-19: Monitoring During a Pandemic

Discussion: Recruitment and Retention of Attorneys

Overview of Issues Across the Network

Curt Decker
National Disability Rights Network

REALIZING THE PROMISE OF OLMSTEAD: ENSURING INFORMED CHOICE FOR INSTITUTIONALIZED INDIVIDUALS TO RECEIVE SERVICES IN THE MOST INTEGRATED SETTING

**Steven Schwartz
Cathy Costanzo
Center for Public Representation**

**Legal Director's Meeting
National Disability Rights Network
June, 2020**



Overview

- The evolution of Olmstead's choice prong
- The judicial application of Olmstead's choice prong
- The impact of disability and institutionalization on decision making
- The waiver paradigm
- Accommodations based upon disability
- Accommodations based upon institutionalization
- Decision making by persons who lack capacity

The New Olmstead Challenge

- In a number of recent cases, and often as a result of last minute Olmstead Plans created after the filing of litigation, states have argued that they have fulfilled their obligation under Olmstead by offering institutionalized individuals an option to leave the facility
 - If the individual does not immediately accept the offer, the state concludes the person has made a choice not to leave the facility
- Similarly, courts have refused to certify classes, decertified classes, demanded class definitions that exclude persons who oppose, and allowed intervention by guardians who oppose community placement

The Evolution of Choice in the Olmstead Case

- Prior to the Supreme Court's decision, there was no issue about choice in the evolution of the case
 - The named plaintiffs were quite clear that they wanted to leave the state hospital and live in the community
 - The district court and appeals court never considered or addressed the issue of choice, except to note the plaintiffs' clear preference
 - But the Supreme Court, concerned about the implications of its decision on other institutionalized persons, added a qualification to the Integration Mandate

Olmstead's Do Not Oppose Standard

- Even in the Supreme Court, neither the parties nor most of the amici addressed the issue of choice
- But the VOR and APA amici briefs, plus suggestions from consumers and states, led the Court to consider the issue
- Importantly, it did so by requiring that the individual with a disability “not oppose” a transition to the community
 - Not that a person speaking on the individual’s behalf, or a professional, request or chose an integrated setting
- The framing of this qualification reflects both a compromise between the opposing positions of various amici and the reality that the decision would not be limited to the named plaintiffs

Post-Olmstead Decisions on Choice

- Only a handful of lower court cases have focused on the do not oppose factor
- Even fewer have relied upon the “do not oppose” standard, or described the evidence necessary to prove opposition to transition
- And only a couple have discussed actions that promote meaningful choice
- None have determined what accommodations are necessary to ensure informed choice

Post-Olmstead Themes

- The few courts which have addressed choice have done so in four contexts:
 - The assessment process to determine preferences (*Messier*)
 - The state's obligation to provide education and information: in-reach (*DAI*)
 - The impact of institutionalization: learned helplessness, dependency, and undue deference
 - Procedural applications: intervention and class certification (*Ball, Ligas*)
- Only one court has confronted the dilemma of the absence of any indication of choice (*Benjamin*)
- Several courts have rejected guardian's claim that they and their wards have a right to remain in a facility (*Illinois League, Sciarrillo*)

The Impact of Disability on Decision Making

- The impact of cognitive, psychiatric, and other disabilities
 - Limitations in understanding, considering, and communicating options
 - Limitations in perception, reasoning, and conceptualizing of options
 - Desire to please
 - Fear of the unknown
- Environmental Factors and the Vestiges of institutionalization
 - Passivity and learned helplessness
 - Limited opportunities to make choices
 - Limited experiences of community options

Supports to Promote Informed Choice

- Assessment of capacity
- Information and education to support choice making
 - Decision making tools
 - Accessible information
 - Individualized modifications to choice making process
- Expanded opportunities to make choices
- Actual experience of community options

The Waiver Paradigm

- In other contexts, before a person can forego an important right (i.e. counsel, self-incrimination, reproductive capacity), there must be a “knowing and informed waiver”
- Pursuant to the ADA’s integration mandate, the state’s obligation to provide services in an integrated setting is based upon a basic or fundamental right not to be unnecessarily institutionalized in a segregated setting
 - Segregation also implicates the right to travel, to freedom of movement, to bodily private, and to association
- The same “knowing and informed” standard should apply to a decision to remain in an institution and to waive the right to live in the community

The Waiver Paradigm (2)

- In order to find a waiver of a basic right, courts consider the totality of circumstances
 - Silence is never an acceptable waiver
 - The impact of the person's disability and any environmental factors
 - The understanding of all realistic options
 - The consequences of a waiver
- As a result, foregoing the right to live in the community requires a knowing and informed decision, and an articulated preference, to remain in an institution

Reasonable Accommodations to Enable Informed Choice

- A public entity has a duty to provide reasonable accommodations that would allow the individual to meaningfully participate in its program
- This obligation extends to the choice of whether to remain or leave an institution
- The obligation requires the entity to provide whatever supports, information, education, opportunities, and experiences are necessary to accommodate the impact of the disability on the individual's ability to make an informed choice of whether to oppose community living
- There is a separate and distinct obligation to redress the vestiges of unnecessary institutionalization and its impact on decision making

Accommodations to the Impact of Disability on Informed Choice

- Accessible, available, and individually- appropriate community supports that fully address the person's needs and preferences
- Individualized transition process that describes the person's preferences and needs and begins with the presumption that the person can live in the community
- Identification of concrete alternatives that address preferences and needs, and that are incorporated in transition plan

Accommodations to the Impact of Disability on Informed Choice (2)

- Periodic and accessible information about community living
- Practical and ongoing opportunities to experience community living
- Support services that allow the person to participate in community activities while still in the facility
- Qualified professional to assist in the transition planning and process

Accommodations to the Impact of Institutionalization on Informed Choice

- In the absence of accessible and appropriate alternatives offered prior to institutionalization, the decision to enter the facility was not an informed choice to forego community living
 - The entity must accommodate the cause and consequences of unnecessary institutionalization
 - The entity must accommodate the vestiges of institutionalization with opportunities to experience community
- The absence of a request to transition is not an informed choice to remain in the facility
 - The entity must offer concrete and feasible alternatives that reflect the person's preferences and needs

Accommodations to the Impact of Institutionalization on Informed Choice

- A prior indication to remain is not binding and does not mean the person opposes transition
- An expression of interest to explore even the possibility of transition can never be considered opposition to transition
 - The entity must continue to offer transition assistance and alternatives

Decision Making by Incapacitated Persons

- The role of guardians and families are determined through formal and informal procedures
- The UGCOPPA imposes limitations on the authority of guardians
- Effectuating the person's preferences through the substituted judgment standard
 - The role of courts in applying the standard
- Alternatives to guardianship
 - Supported decision making
- The default of community living

Supported Decision-Making

- Article 12 of the CRPD recognizes the right and ability of **all** persons to make decisions and to express their preferences, with appropriate supports
- Supported Decision-Making – drawing on a group of supporters the person chooses to help advise him/her about certain decision-making areas
- Supporters can help the person obtain the necessary information and experiences that would allow them to make an informed decision, considering the pros and cons associated with a decision about where to live

Substituted/Supported Decisions to Remain in an Institution

- Five principles
 - Given the basic right to live in the community, substituted decision makers must determine the substituted judgment of the person
 - The presumptive substituted judgment is to live in an integrated setting
 - That presumption cannot be overcome absent clear and convincing evidence
 - That presumption cannot be over-ridden except after review and approval of a court