QUESTIONS AND ANSWERS ABOUT THE *OLMSTEAD* v. *L.C.* DECISION

1) In a nutshell, what does the *Olmstead* v. *L.C.* decision mean for people with disabilities?

In *Olmstead* v. *L.C. and E. W.*, 119 S.Ct. 2176 (1999) the Supreme Court stated loudly and clearly that the denial of community placements to individuals with disabilities is precisely the kind of segregation that Congress sought to eliminate in passing the Americans with Disabilities Act (ADA). The Supreme Court correctly noted that unnecessary segregation and institutionalization constitute discrimination and violate the ADA'S *integration mandate* unless certain defenses are established. The decision presents new opportunities for advocating for community-based services and supports for people with disabilities.

2) **Who are Olmstead, L.C and E.W? Why did their case get decided by the Supreme Court?**

L.C. and E.W. (Lois Curtis and Elaine Wilson) are two women who have mental illness and mental retardation and were confined in a Georgia state psychiatric hospital. L.C. and E.W. wanted to receive appropriate services in the community and live outside of the state hospital. Their doctors agreed that the women were ready for discharge to the community. However, the state already maintained a long list of qualified persons waiting for one of the state's few community placements to became available. As a result, L.C. and E.W. remained unnecessarily institutionalized for years as they waited on this list. L.C. and E.W. filed suit against Tommy Olmstead, the Commissioner of Georgia's Department of Human Resources. That lawsuit, which is now referred to as *Olmstead* v. *L.C,* charged that Olmstead and the State of Georgia violated the ADA integration mandate by failing to provide L.C. and E.W. services in the most integrated setting appropriate to meet their needs, which in their case was the community, not an institution. After years of litigation, Olmstead and the State of Georgia asked the Supreme Court to decide once and for all whether unnecessary institutionalization of individuals with disabilities is a form of discrimination prohibited by the ADA.

3) **L.C. and E.W. had mental retardation and mental illness. Does that mean this decision only impacts people with mental retardation and mental illness?**

No. This decision involved interpretation of the ADA. The ADA prohibits discrimination against persons with disabilities regardless of their disability. The ADA requires services to be provided to individuals with disabilities in the *most integrated setting* appropriate to their needs, regardless of disability and regardless of whether they live in an institution, a nursing home or the community.

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4) What is the *ADA integration mandate* referred to by the Supreme Court?

When Congress passed the ADA it included a prohibition of discrimination against individuals with disabilities in the provision of public services by state and local governments. Specifically, Title II of the ADA states:

> ...no qualified individual with a disability shall, by reason of his disability, be excluded from participation in, or be denied benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity...

Congress also instructed the U.S. Attorney General to issue regulations defining the forms of discrimination prohibited by this section of the law. The Attorney General issued this regulation, commonly referred to as *the integration mandate:*

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

[28 CFR Section 35.130(d)]

5) When the Supreme Court uses the word *institution,* does that also include nursing homes?

Yes. The Supreme Court declared that the ADA requires services for individuals with disabilities to be provided in the most integrated setting appropriate to their needs. If a qualified individual wants to receive services in the community rather than in a nursing home, and the state refuses to do so, the state is violating the ADA—unless the state can establish the defenses discussed below.

6) Does this decision only affect people who are institutionalized? What about people who are on waiting lists to receive community services, but do not live in institutions—how are they impacted by the decision?

It seems reasonable that a state would need to provide services to all persons at risk of institutionalization if the state claimed to have a *comprehensive, effectively working plan* for placing qualified persons in the most integrated settings as a defense to a lawsuit. (This state defense to a lawsuit for failure to comply with the ADA integration mandate is explained in question numbers 10 and 11 in this document.) Planning and comprehensiveness by their nature require thinking ahead to those at risk of institutionalization. If an individual is on a waiting list to receive community supports, the state can presume that that person is not currently receiving

adequate community supports. If a person is not receiving appropriate community services, then they are at risk of institutionalization.

7) Does the *Olmstead v. L.C.* decision establish that all institutionalization constitutes discrimination prohibited by the ADA integration mandate?

No. The decision establishes that the ADA integration mandate requires the state to place persons with disabilities in community settings if the community, not an institution, is the most integrated setting appropriate to their needs. The Supreme Court set up a two-part inquiry to demonstrate that the community is the most integrated setting appropriate. First, the state's treating professionals should determine that community placement is appropriate for the individual. Second, the transfer from institutional care to a more integrated setting should not be opposed by the affected individual. If that two-part inquiry is met, then that person is presumed to be unnecessarily institutionalized, unless the state can establish certain defenses.

8) If a state treating professional fails to determine that the community is the most integrated setting appropriate to meet an individuals needs, can the assessment of the state's treating professional be challenged?

Yes. The decision leaves room for the state's treating professional's assessment to be challenged. When the Supreme Court explained its two-part inquiry, it said that states may *generally rely on the reasonable assessment* of their own professionals as to whether an individual is appropriate for community-based services. Certainly, *generally rely on* does not mean total deference to the treating professionals on this matter. The Court said the state treating professionals assessment must be *reasonable.*

While the Court did not define the elements of a *reasonable* assessment, a strong case can be made that, to be reasonable, an assessment must be made by a qualified professional who is familiar with relevant professional standards and the capacities of community systems. An assessment could be challenged as unreasonable if it is made by an unqualified professional. A professional may be unqualified not only because the professional lacks appropriate credentials, but also because the professional lacks important knowledge. First, the professional may have no real knowledge of the individual. Second, the professional may be ignorant of current standards in the field, or be unfamiliar with capacities of community systems, especially services that are now available to meet even the most challenging of needs. (For example: wrap-around, crisis and respite services.)

The Court seems to leave room for an individual to ask for another assessment from an independent evaluator or for the state professional's opinion to be challenged. An assessment may be challenged also as unreasonable if it is the product of a flawed process. For example, it is common for institutions to judge an individual *not ready* for the community solely because there is no community placement currently available for that individual. Institutional staff that determine individuals to be ready for discharge only if and when services become available (i.e.,

a community *slot* opens up) are not making *reasonable* assessments of community readiness. Such assessments should be based on the capacities and needs of the individual with a disability, and on whether appropriately crafted community services can meet those needs. Whether appropriately crafted services are currently available in the community has no bearing on whether the community is the most integrated setting appropriate for an individual.

9) What if an individual opposes community placement. Does that mean the individual has a right to remain in an institution?

No. Institutional advocates in Pennsylvania made this argument before the U.S. District Court for the Western District of Pennsylvania. The District Court held that the *Olmstead* decision does not give a person a right to remain in an institution. Specifically, advocates for institutionalization sought to intervene in a case called *Richard C. v. Houstoun,* (W.D. Pa. Sept. 29, 1999). These advocates wanted to intervene in the case so that they could challenge a settlement agreement under which Pennsylvania agreed to place residents of a state mental retardation facility into appropriate, community programs. The proposed intervenors, relying on the *Olmstead* decision, argued that the facility's residents have a right to remain in the facility if they oppose community placement. The District Court rejected the proposed intervenors' argument and made it clear that nothing in the *Olmstead* decision precludes a state from closing or downsizing institutions or placing individual residents into the community and that the ADA does not confer on individuals the right to veto such actions.

10) Unnecessary institutionalization is considered unlawful under the ADA integration mandate unless the state can establish certain defenses. What are those defenses?

The Supreme Court makes clear that unnecessary institutionalization is presumed to be discrimination under the ADA and is therefore illegal. However, the Court does offer states a defense to lawsuits challenging states' failure to provide services in the most integrated setting appropriate to the individuals needs. The Court held that a state is not required to transfer an unnecessarily institutionalized person to the community if doing so would *fundamentally alter* the state program that the lawsuit is challenging.

The Court said that the state may look at three factors in order to establish that serving an unnecessarily institutionalized individual(s) in a more integrated setting would require a fundamental alteration of its program.

Factor One: The cost of providing community services to the individual(s). However, the Court is clear that states will have to bear some costs to accommodate plaintiffs' community service needs. The Court recognizes that needless institutionalization is the very kind of discrimination that the ADA was designed to redress, and emphasizes the need for states to accommodate individuals' interest in being served in the community. Nine years of implementing ADA requirements clearly demonstrates an accommodation may be reasonable even if it imposes costs.

Factor Two: The resources available to the state to fund community services. Resources available to the state are not limited to those already invested in the community system. At a minimum, they include the resources invested in the institutions in which plaintiffs reside. The Court endorses the notion that a state can be required to fund community placements by moving resources from institutions to the community. It may also be true that resources available to the state should include resources that the state might obtain by aggressively seeking additional funds from its legislature, or by restructuring or refining its Medicaid program (e.g., participating in optional programs, broadening service definitions, and expanding waiver programs), or by taking advantage of other available state and federal resources.

Factor Three: The "needs of others with mental disabilities," including, "the State's need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities and the State's obligation to administer services with an even hand." The Court's concern that states maintain a *range of facilities* and be *even-handed* does not automatically mean a loss of community placements for people with disabilities. In fact, since most states have an institutional bias that results in too much institutional capacity and too few community services, increasing the amount of community services would only improve the range of facilities offered in a state. Thus, from the advocates perspective, it is helpful that the Court expressly recognized the need for states to operate systems with an appropriate array of services, including sufficient community services.

II) Does the *Olmstead v. L.C.* decision require the state to develop a plan for moving unnecessarily institutionalized persons into appropriate community placements?

The decision says a state may have a defense to lawsuits challenging the state's failure to serve individuals in the most integrated setting appropriate if it has a "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings."

The Court did not define a *comprehensive* plan. It seems appropriate that a *comprehensive* plan is one that addresses the placement needs of all individuals who are unnecessarily institutionalized or at risk of institutionalization. A state may have different plans to address different populations, as long as the needs of all individuals unnecessarily institutionalized are addressed.

The Court does not define *effective.* It seems logical, however, that an *effective* plan must have certain features:

- The plan must be directly linked with the resources to fund its activities. A plan that cannot be implemented because of insufficient resources is not an *effectively working* plan.

- The plan must ensure the identification of individuals who are needlessly confined, what services they require, and the cost of those services. Without such information, the state has no means to even evaluate whether unnecessarily institutionalized persons are moved from the institution to the community.

- The plan must include quality assurance and evaluation components; for example, ongoing monitoring and adjustment of community supports to ensure they are of high quality and meet individualized needs. Without a system to evaluate quality of community services, individuals are at risk of returning to institutions unnecessarily. A more detailed template of essential elements of a state plan is available from the Consortium for Citizens with Disabilities.

12) Does the decision give states a *date certain* by which time they are required to be serving all unnecessarily institutionalized persons in the community with supports?

No. The Court did not provide a specific date by which all individuals have to be appropriately served. However, the tone of the decision certainly suggests a sense of urgency. After all, this is about an ongoing violation of a person's civil rights. The Court concedes that a state may maintain a waiting list of individuals appropriate for community services. At the same time, the Court is wary that a state may use such a list to delay community integration and it acts to forbid such stalling tactics by clarifying that "a waiting list [must move] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated."

What constitutes a reasonable pace is not defined by the Court. Once again, since the issue involves the denial of civil rights, only quick action would be reasonable. The U.S. District Court for the Southern District of West Virginia in *Benjamin H.* v. *Ohl* (1999) and the 11th Circuit Court in *Doe* v. *Chiles* (Florida, 1998) ordered that reasonable promptness for the delivery of Medicaid services to an individual as required by the federal Medicaid statute is no more that 90 days from the time the need was identified and requested. Advocates may wish to use this as a benchmark for determining reasonable pace. The key, of course, is that an individual must be discharged to an existing network of quality supports and services. Meeting a deadline is no excuse for a hasty placement that results in an inadequate array of community supports and services.

13) How can I help to make sure that my state complies with the Supreme Court mandate and provides supports and services to individuals with disabilities in the most appropriate setting to meet their needs?

People with disabilities and their advocates can make sure that their state officials know of the Supreme Court's mandate and comply with the decision in this case. In most cases, compliance will mean that the state develops a *comprehensive, effectively working plan* for placing qualified persons in more integrated settings. Consumers and advocates must insist on meaningful input into this plan. Beyond input, consumers and advocates must be prepared to react if the elements of the plan are not implemented. This is a big job and is larger than any one person. Advocates are encouraged to work in coalition with other consumers and disability organizations to increase the chance that their voice is heard.

Getting involved in the planning process need not be the sole focus of advocacy efforts. Advocates should insist that the state planning process move expeditiously, and that it be accompanied by some immediate effort to expand the state's capacity for serving people in the

community. Advocates should be alert to the danger that some states may use the planning process merely to delay and stall efforts to immediately place those individuals who are already identified as appropriate for community services.

The national disability community has established July 26, 2000—the 10th anniversary of the ADA—as its deadline for states to make significant progress in placing qualified people in integrated settings.