Olmstead v. L.C.: Judicial and Legislative Developments in the Law of Deinstitutionalization

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Summary

The Supreme Court ruled in *Olmstead v. L.C.*, 527 U.S. 581 (1999), that, under Title II of the Americans with Disabilities Act (ADA) and its implementing regulations, states must transfer individuals with mental disabilities into non-institutional settings when: a state treatment professional has determined such an environment is appropriate; the community placement is not opposed by the individual with a disability; and the placement can be reasonably accommodated. In subsequent litigation, appellate courts have (1) rejected interpretations of *Olmstead* that would make it more difficult to establish a *prima facie* violation and (2) distinguished "reasonable accommodations," which *Olmstead* requires states to make to their programs and services, from "fundamental alterations," which it does not.

In addition to these judicial developments, the 2010 health care reform package, the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148) as amended by the Health Care and Education Reconciliation Act (HCERA, P.L. 111-152) (collectively, the Affordable Care Act, or ACA), has the potential to influence states' *Olmstead* initiatives. The health care reform law revises the federal Medicaid statute to give states greater incentives to provide home and community-based care services to people with disabilities, offer states greater flexibility in the kinds of packages of home and community-based services they can offer, and, perhaps, enable states to provide more Medicaid beneficiaries with long-term care services in their communities. Because judicial developments under *Olmstead* often occur in the context of federal Medicaid law, particularly Medicaid waiver programs, the health care reform law's changes to the Medicaid program may affect the outcome of future cases on deinstitutionalization.

This report will discuss the Supreme Court's decision, selected subsequent appellate court decisions, the implications of health care reform for future developments, and methods of *Olmstead* enforcement.

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Introduction

The Americans with Disabilities Act (ADA) offers legal protection to individuals with disabilities facing discrimination in employment, public accommodations, and services provided by the telecommunications, transportation, and public sectors.[1] Its stated purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] Title II of the ADA states in part that "no 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."[3] A public entity is defined as a state or local government.[4] The Department of Justice (DOJ) has promulgated detailed regulations for Title II. One of these regulations, the so-called integration regulation, interprets Title II to mean that "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[5] However, the integrated setting is not required if "the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[6]

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court held that, under Title II of the ADA and the integration regulation promulgated by the DOJ, state action to unjustly isolate people with disabilities is a form of prohibited discrimination. Since then, appellate courts have more clearly articulated states' *Olmstead* obligations. In addition to these judicial developments, the recent health care reform package, the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148) as amended by the Health Care and Education Reconciliation Act (HCERA, P.L. 111-152) (collectively the Affordable Care Act, or ACA), has the potential to influence states' *Olmstead* initiatives. Specifically, the Affordable Care Act revised the federal Medicaid statute to give states greater incentives to provide home and community-based care services to people with disabilities, offer states greater flexibility in the kinds of packages of home and community-based services they can offer, and, perhaps, enable states to provide more Medicaid beneficiaries with long-term care services in their communities. Because judicial developments under *Olmstead* often take federal Medicaid law into account, PPACA amendments to that law may affect the outcome of future cases on deinstitutionalization.

Olmstead v. L.C.

In *Olmstead v. L.C.*,[7] the Supreme Court held that "unjustified isolation ... is properly regarded as discrimination based on disability" under Title II of the ADA and its implementing regulations.[8]

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[1] 42 U.S.C. §12101 *et seq.* For a more detailed discussion of the ADA, see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by (name redacted) and (name redacted).

[2] 42 U.S.C. §12101(b)(1).

[3] *Id.* at §§12131-12133.

[4] *Id.*

[5] 28 C.F.R. §35.130(d).

[6] *Id.* at §35.130(b)(7).

[7] 527 U.S. 581 (1999).

[8] *Id.* at 597. Specifically, the case was decided in the context of two regulations promulgated by the DOJ to implement Title II of the ADA. *Id.* at 592. The first regulation, the "integration regulation," requires public entities to administer (continued...)

The plaintiffs in *Olmstead* were mentally disabled individuals who were voluntarily confined to a state hospital's psychiatric unit. Their physicians had determined that they were capable of living in a community-based environment. Georgia refused to transfer the individuals to a less restrictive setting, although the programs were available. The plaintiffs then brought suit under the ADA arguing that their segregation in the state institution violated Title II of the act.[9] Georgia argued that its actions did not fall within the ADA's concept of discrimination because it had decided to keep the plaintiffs in institutions not because of their disabilities but because of other factors.[10] In addition, Georgia claimed that the federal Medicaid statute (42 U.S.C. §1396 *et seq.*) "reflected a congressional policy preference for treatment in the institution over treatment in the community."[11]

The Court rejected Georgia's arguments, holding that the ADA reflects a "more comprehensive view of the concept of discrimination."[12] Specifically, the Court held that the ADA defines discrimination to include the unjustified segregation of individuals with disabilities and thereby requires states to provide community-based treatment for persons with mental disabilities when three conditions are satisfied: (1) the state's treatment professionals determine that such placement is appropriate, (2) the affected persons do not oppose it, and (3) the placement can be reasonably accommodated given the state's resources and the needs of others with mental disabilities.[13] Regarding the third condition, the Court held that requiring community-based care is not a reasonable accommodation if, because of budgetary constraints, it would fundamentally alter the state's services and programs by forcing the state to mete out its mental health services inequitably.[14]

(...continued)

"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). The second requires public entities to "make reasonable modifications" to avoid discrimination on the basis of disability "unless those modifications would entail a 'fundamental alteration.'" 28 C.F.R. 35.130(b)(7). The Supreme Court noted that the applicability, not the validity, of those regulations was at issue in *Olmstead*. *Olmstead*, 527 U.S. at 592.

[9] *Olmstead*, 527 U.S. at 593-94.

[10] *See id*. at 597-98.

[11] Brief for Petitioners at 29, *Olmstead*, 527 U.S. 581 (No. 98-536). The Court rejected this argument, stating that Medicaid has provided funding for state-run home and community-based care since 1981. *Olmstead*, 527 U.S. at 601. But a decade after the *Olmstead* decision, the National Disability Rights Network suggested that the Medicaid statute continued to hinder state compliance with *Olmstead* by stating a preference for institution based care. NATIONAL DISABILITY RIGHTS NETWORK, A DECADE OF "LITTLE PROGRESS" IMPLEMENTING *OLMSTEAD*: EVALUATING FEDERAL AGENCY IMPACT AFTER 10 YEARS 12 (2009), *available at* http://www.napas.org/Decade_of_Little_Progress_Implementing_Olmstead.pdf (last visited May 12, 2010). Some among the disability rights community are now touting the Community Choice Act of 2009, H.R. 1670 (111th Cong.) and S. 683 (111th Cong.), as necessary to put an end to Medicaid's institutional bias. *E.g.* ADAPT AND THE COALITION FOR COMMUNITY INTEGRATION, THE COST AND BENEFITS OF THE COMMUNITY CHOICE ACT (CCA) FOR MIDDLE CLASS TAXPAYERS 1 (2010), http://www.cdrnys.org/images/files/The%20Cost%20and%20Benefits%20of%20CCA%20-%20final%20-%20April%202010.pdf (last visited May 13, 2010). However, provisions of the Patient Protection and Affordable Care Act (P.L. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, P.L. 111-152, 124 Stat. 1029) might have also lessened the alleged institutional bias in the Medicaid statute. *See infra* "*Olmstead* and the Affordable Care Act of 2010."

[12] *Olmstead*, 527 U.S. at 598.

[13] *Id.* at 587, 600.

[14] *Id.* at 597, 604; 28 C.F.R. §35.130(b)(7).

In Part III-B of the *Olmstead* opinion, a plurality set a benchmark by which the reasonableness of the state provision of community care to the plaintiffs could be assessed.[15] The plurality stated that to determine whether the provision of community care is a reasonable accommodation to, or a fundamental alteration of, the state's services and programs, a plaintiff's request must be reviewed in the context of the state's responsibility for the care and treatment of its disabled population as a whole.[16] From this viewpoint, neither a state's marginal cost of placing the plaintiff nor the immediate placement of all qualified persons is the touchstone.[17] Instead, a state could satisfy its obligation if, because of budget constraints, it maintains a waitlist of qualified persons needing community placement so long as the waitlist moves at a "reasonable pace not controlled by the [s]tate's endeavors to keep its institutions fully populated" and is part of a "comprehensive, effectively working plan for placing qualified persons … in less restrictive settings."[18]

Selected Appellate Decisions

Early case law interpreting *Olmstead* focused primarily on the complaint: what does a plaintiff need to allege to establish a *prima facie* case that a state failed to fulfill the ADA's integration requirement? More recent case law, however, has focused on the defense: what does a defendant need to prove to show that providing the services requested would necessitate a fundamental alteration of its programs and services?

A *Prima Facie* Case of Discrimination by Segregation

The appellate courts have generally rejected interpretations of *Olmstead* that would make it more difficult for plaintiffs to establish a *prima facie* case that the state has failed to fulfill the ADA's integration requirement. Accordingly, they have held that a *prima facie* violation of the ADA's integration requirement may exist even absent allegations that (1) the state placed or held the qualified individuals in an institution, (2) the state uses disability-specific criteria to decide who is eligible for community-based services, or (3) the plaintiffs are eligible to receive the requested services under state law. Several of these cases are considered below.

State Action to Move the Plaintiff into Institutional Care

In *Fisher v. Oklahoma Health Care Authority*,[19] the Court of Appeals for the Tenth Circuit considered whether *Olmstead* only obligated states to integrate individuals who, because of state action, were placed or held in institutions. The court ruled that state action to place or hold

[15] *Olmstead*, 527 U.S. at 603. Justice Stevens did not join this portion of the opinion because he objected to the Supreme Court attempting to define a standard for a "fundamental alteration" defense in its review of a circuit court decision that had remanded that very issue for consideration by a lower court. *Id.* at 607-08 (Stevens, J., concurring in part and concurring in the judgment).

[16] *Olmstead*, 527 U.S. at 604. The plurality rejected other possible benchmarks, indicating that the reasonableness of providing the plaintiffs with community care is not assessed by comparing the cost of doing so with either the cost of providing *institutional* care to the plaintiffs or the size of the state's mental health budget. *Id.* at 603-04.

[17] *Olmstead*, 527 U.S. at 605-06.

[18] *Id*.

[19] 335 F.3d 1175 (10th Cir. 2003).

qualified individuals in segregated settings is not a necessary element of a *prima facie* violation of Title II of the ADA.[20] Instead, *Olmstead* applies not only when a state places or holds a qualified person in a facility but also when a state prevents a qualified person from receiving services in an integrated setting.[21]

In that case, the Oklahoma agency responsible for administering the state's Medicaid program decided to fully fund nursing home residents' prescription medicines, but to fund only five prescription medicines per month for Medicaid recipients in community-based care.[22] In its motion for summary judgment, the state argued that the plaintiffs could not maintain a claim under the ADA because the state had not placed them in, nor forced them to enter, an institution.[23] The court disagreed, suggesting that if a state action has the effect of compelling persons with disabilities to move into institutions, a court could find that the state failed to satisfy the integration requirement of the ADA.[24]

Use of Disability-Based Criteria

In *Townsend v. Quasim*,[25] the Court of Appeals for the Ninth Circuit considered whether plaintiffs must allege that the state excluded the plaintiffs from the community because of their disabilities.[26] The court ruled that *Olmstead* did not require plaintiffs to allege that, but for their disability, the state would have integrated them into the community.[27] Instead, a state could be found to have discriminated against plaintiffs even if the state segregated them for disability-neutral reasons.[28]

At issue in *Quasim* was a Washington State regulation effectively barring disabled persons with income above a certain level from community-based Medicaid services.[29] Although the plaintiff had been receiving community-based care, once his income increased above that level, Washington asked him to choose between moving into a nursing home or foregoing his community care.[30] In its motion for summary judgment, Washington argued that the ADA permitted states to bar certain disabled individuals from community-based care so long as it did so on the basis of disability-neutral criteria, such as an individual's income level, rather than on the basis of the individual's disabilities.[31] The court disagreed, writing that even the application of disability-neutral eligibility criteria can be a form of disability-based discrimination if it causes qualified people with disabilities to receive services in unduly restrictive settings.[32] States are obligated under *Olmstead* to make reasonable modifications to the criteria they use to determine

[20] *See id.* at 1181.

[21] *See id.* at 1181.

[22] *Id.* at 1177.

[23] *See id*. at 1178, 1181.

[24] *Fisher*, 335 F.3d at 1182.

[25] 328 F.3d 511 (9th Cir. 2003).

[26] *Id.* at 513.

[27] *See id.* at 516-17.

[28] *See id.*

[29] *Id.* at 514-15.

[30] *Quasim*, 335 F.3d at 514-15.

[31] *See id.* at 515.

[32] *Id.* at 516-17.

which disabled individuals are eligible for community-based care.[33] Accordingly, the court held that Washington should be found in violation of the ADA unless it could show that providing the requested services would fundamentally alter the nature of its Medicaid program.[34]

"Qualified" to Receive Community-Based Services

Finally, in *Radaszewski v. Maram*,[35] the Court of Appeals for the Seventh Circuit considered whether plaintiffs must allege that, under state law, they are "qualified" to receive community-based services.[36] The court ruled that plaintiffs had sufficiently alleged that they were "qualified" to receive community care without asserting that they were eligible to receive it under state law.[37]

At issue in *Radaszewski* were Illinois regulations that provided at-home care to disabled individuals under the age of 21, but barred the provision of that same care to disabled individuals 21 or older if the cost of providing it exceeded a set amount.[38] The plaintiff, the mother of a boy who had been severely disabled since the age of 13, filed suit against the state under the ADA when she was told that, because of these regulations, her son would have to move into an institution in order to continue receiving state funded round-the-clock care.[39] The state argued that the plaintiff's complaint was deficient because it failed to allege that her son was "qualified" to receive community-based services under the state's rules of eligibility.[40] The court rejected this argument, finding that a plaintiff establishes a *prima facie* case of disability-based discrimination if the complaint alleges the plaintiff is qualified under the three-factor *Olmstead* test to receive care in a less restrictive setting.[41] In other words, a plaintiff has satisfied his burden of pleading so long as he alleges that (1) the state has deemed him able to live in a community-based setting, (2) he is not opposed to living there, and (3) with a reasonable modification to state rules or practices, he would be eligible to live there.[42]

The Availability of the "Fundamental Alteration" Defense

A second body of appellate cases subsequent to the *Olmstead* decision examines the fundamental alteration defense and its application to various programs for individuals with developmental disabilities. Typically, states defend their non-compliance with *Olmstead* on one of three grounds: (1) they have a "comprehensive, effectively working plan" that meets the standard of the *Olmstead* plurality, (2) budget constraints prevent them from developing and implementing such a plan, or (3) the services sought would be "new" and therefore require a fundamental alteration of the state's program. Only in some instances have courts found a state sufficiently committed to

[33] *Id.*

[34] *Id.* at 518.

[35] 383 F.3d 599 (7th Cir. 2004).

[36] *Id.* at 612.

[37] *Id.* at 613.

[38] *Id.* at 600.

[39] *Id.*

[40] *Radaszewski*, 383 F.3d at 612.

[41] *Id.*

[42] *Id.*

deinstitutionalization and therefore ruled in favor of the state because the requested services require a fundamental alteration of the state's policies and programs.

Definition of a "Comprehensive, Effectively Working Plan"

Two significant appellate court cases, *The Arc of Washington State, Inc. v. Braddock*[43] and *Sanchez v. Johnson*,[44] held that the state was entitled to claim the fundamental alteration defense because its program for deinstitutionalizing individuals with developmental disabilities was already adequate and did not warrant further modification. In both of these cases, the court looked at the size, availability, funding, and effects of each program before concluding that it was indeed a "comprehensive, effectively working plan."[45]

For example, in *Braddock*, the Court of Appeals for the Ninth Circuit considered whether *Olmstead* required a state with a waitlist of qualified individuals seeking care in home or community-based programs to request federal authorization for an increase in the size of its Medicaid waiver program because such an increase would enable the state to provide home and community-based care to greater numbers.[46] The Ninth Circuit held that it did not when the state had a "comprehensive deinstitutionalization scheme" because requiring a state in that position to request an increase in its Medicaid waiver program would constitute a fundamental alteration of the state's programs.[47] The court reasoned that the state of Washington's program was comprehensive, genuine, and effective because (1) it was "sizeable" and "full"; (2) all eligible persons with disabilities had an opportunity to participate in the program (once space became available); (3) the state had steadily increased the budget for providing services to individuals with disabilities who were living at home; and (4) the program had "significantly reduced" the size of the state's institutionalized population.[48] The court found that the state of Washington had shown a "'comprehensive, effectively working plan,' ... and that its commitment to deinstitutionalization ... [was] 'genuine, comprehensive and reasonable.'"[49]

In *Sanchez* the plaintiffs argued that the state of California violated the ADA's integration requirement because it paid community-based service providers lower wages and benefits than it paid employees of state institutions.[50] Because community-based services were underfunded, the plaintiffs argued that California was unable to enlist the number of providers necessary to ensure that community-based care was available to all qualified persons with disabilities.[51] In response, California argued that the plan it already had in place for deinstitutionalizing disabled persons was comprehensive and effective, and, therefore, any requirement that California pay its community-based employees more would fundamentally alter its program. The Ninth Circuit agreed, finding that California had a reasonable rate of deinstitutionalization (which, according to the district court's findings, led to a decrease in California's institutional population by 20%

[43] 427 F.3d 615 (9th Cir. 2005).

[44] 416 F.3d 1051 (9th Cir. 2005).

[45] *E.g. Braddock*, 427 F.3d at 621-22; *Sanchez*, 416 F.3d at 1067-68.

[46] *Braddock*, 427 F.3d at 619.

[47] *Id.*

[48] *Id.* at 621-22.

[49] *Id*. at 621.

[50] *See Sanchez*, 416 F.3d at 1053.

[51] *See id.* at 1055.

between 1996 and 2000 despite a simultaneous increase in caseload) and had increased its efforts and budget for deinstitutionalization (including an increase in spending for individuals in community settings by 196% between 1991 and 2001).[52]

However, in a third case, *Frederick L. v. Department of Public Welfare of Pennsylvania*,[53] the Third Circuit held that Pennsylvania's deinstitutionalization plan was not sufficient for the state to prevail on its fundamental alteration defense. In that case, Pennsylvania's Department of Public Welfare claimed that it had a plan that showed the "required commitment to deinstitutionalization."[54] In its analysis, however, the court found that while Pennsylvania's plan stated a goal of closing up to 250 state hospital beds per year, it lacked "measurable goals" and "any commitment to implement" the more specific plans developed by each of the regions served by a state psychiatric hospital.[55] Accordingly, the court held that Pennsylvania's "general assurances and good-faith intentions to effectuate deinstitutionalization" were insufficient.[56] To be a "comprehensive, effectively working plan," as intended by *Olmstead*, Pennsylvania needed to include in its program "an adequately specific comprehensive plan for placing eligible patients in community-based programs by a target date."[57]

The Effect of Budget and Fiscal Constraints on Compliance

On occasion, a state has conceded in litigation that its programs do not comply with *Olmstead* but claimed that the cost of compliance—the cost of creating a "comprehensive, effectively working plan"—is so substantial as to amount to a fundamental alteration. These arguments are not generally successful. For example, in *Pennsylvania Protection and Advocacy, Inc. v. Pennsylvania Department of Public Welfare*,[58] the Court of Appeals for the Third Circuit held that a state could not avoid its obligation to create a comprehensive and effectively working plan for deinstitutionalization simply because it believes developing such a plan "would be too costly or would otherwise fundamentally alter" an existing, but noncompliant, program.[59] According to the court, budgetary constraints alone are insufficient grounds for a fundamental alteration defense.[60] The *Olmstead* opinion, the Third Circuit wrote, "allows for a fundamental alteration defense *only if* the accused agency has developed and implemented a plan to come into compliance with the ADA."[61]

[52] *Id.* at 1067-68.

[53] 422 F.3d 151 (3d Cir. 2005).

[54] *Id.* at 154-55.

[55] *Id.* at 157-58.

[56] *Id.* at 158-59.

[57] *Id.*

[58] 402 F.3d 374 (3d Cir. 2005).

[59] *Id.* at 381.

[60] *Id.* at 380.

[61] *Id.* at 380 (emphasis added).

Similarly, in *Fisher*, discussed above, Oklahoma argued that it could not remove the cap on funding for the prescription medicines of community-based care recipients because of a state financial crisis.[62] The Tenth Circuit was not persuaded. The court found that the existence of a state fiscal problem does necessarily guarantee that only a fundamental alteration to the state's prescription benefits program would ensure that the state dispensed those benefits equally to community-care recipients and residents of institutions.[63] After all, wrote the court, if a state were permitted to disregard the ADA's integration mandate every time its budget was tight and complying would require an outlay of funds, the "integration mandate would be hollow indeed."[64]

Definition and Provision of "New" Services

In other cases, a state has refused to expand its community-based programs to include certain individuals on the grounds that doing so would require creating new services, which would fundamentally alter its existing program.[65] In these cases, the question often comes down to how to define the services sought. States seek to characterize the services requested narrowly so as to distinguish them from the services it already offers, while plaintiffs typically do the opposite.

In *Quasim*, the Ninth Circuit found that the state mischaracterized the services (the provision of personal care services to individuals with disabilities with an income above a level set by the state) as new, when in fact the state already provides them to individuals with disabilities in nursing homes.[66] Accordingly, the court rejected the state's fundamental alteration defense to the extent that it was based on the state having to create a new service. In support of its holding, the court wrote that states should not be able to avoid compliance with the ADA simply by describing the services they offer in one location as being distinct from the exact same services they offer in another.[67]

In *Radaszewski*, the Seventh Circuit relied on *Quasim*'s reasoning and reached a similar decision. In that case, the state defined the service requested as one-on-one at-home nursing care for more than five hours a day.[68] Accordingly, it argued that it did not provide that particular service, and therefore would have to create it in order to keep the plaintiff's son in the community.[69] As in *Quasim*, the court found that the state had mischaracterized the services as new. The court pointed to the state's own admission that it would have to provide this same level of private duty nursing in some form to the plaintiff's son if he moved into an institution.[70] Accordingly, the court found that the state could not succeed on its fundamental alteration defense solely on the grounds that it would need to create a new service.[71]

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[62] 335 F.3d at 1182.

[63] *Id.* at 1182.

[64] *Id.* at 1183.

[65] *E.g. Radaszewski*, 383 F.3d at 609. States may draw support for these arguments from a footnote in the *Olmstead* opinion. *See Olmstead*, 527 U.S. at 603 n.14 ("... States must adhere to the ADA's nondiscrimination requirement with regard to the services they *in fact provide*." (emphasis added)).

[66] 328 F.3d at 517-18.

[67] *Id.* at 517.

[68] 383 F.3d at 609.

[69] *Id.*

[70] *Id.* at 611.

[71] *Id.*

Olmstead and the Affordable Care Act of 2010

The Patient Protection and Affordable Care Act (P.L. 111-148), as amended by the Health Care and Education Reconciliation Act (P.L. 111-152) (hereinafter referred to collectively as the Affordable Care Act or ACA), provided incentives for states to expand their offerings of home and community-based services to better enable individuals with disabilities to live in the community.[72] Among the provisions of ACA with the potential to affect developments under *Olmstead* are:

- Section 2401 ("Community First Choice Option"), which allows states to offer personal care attendant services as an optional benefit to certain Medicaid beneficiaries and receive a six-percentage-point increase in the federal matching rate for doing so.
- Section 2402, which both gives states more flexibility to offer different packages of long-term care services to different target groups and creates a new eligibility pathway into Medicaid for people who need long-term care services, particularly those who need only very limited long-term care assistance.
- Section 2403, which both extends funding for state Money Follows the Person (MFP) demonstration projects and lowers the eligibility requirements for individuals who would like to participate in a state's MFP demonstration project so that more individuals are eligible to receive community-based support for their transition out of a long-term care facility.
- Section 10202, which allows qualifying states to receive temporary bonus payments for increasing their share of their Medicaid long-term care spending for home and community-based services and supports and reducing their share of spending for institutional long-term care.[73]

ACA also established the Community Living Assistance Services and Supports (CLASS) program to, *inter alia*, provide a financing mechanism for long-term care services and supports to empower individuals with functional limitations to live in the community.[74] However, ACA also contained provisions relating to the CLASS program's solvency and financial independence, reflecting concerns about the program's long-term financial viability. Pursuant to these provisions, the Department of Health and Humans Services (HHS) assessed the actuarial soundness of its options for implementing the CLASS program and, in October 2011, informed Congress that it did "not see a viable path forward for CLASS implementation" at that time.[75]

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[72] Additionally, the Senate expressed concern in section 2406 of ACA, which is titled "Sense of the Senate Regarding Long-Term Care," that a majority of Medicaid long-term care spending goes toward institutional, rather than community-based, care, and called on Congress to address long-term services and supports in a comprehensive way.

[73] For more on the Medicaid provisions in PPACA, see CRS Report R41210, *Medicaid and the State Children's Health Insurance Program (CHIP) Provisions in PPACA: Summary and Timeline*, by (name redacted) et al.

[74] P.L. 111-148, §8002(a), *codified at* 42 U.S.C. §§300ll *et seq.* For more on the CLASS program, see CRS Report R40842, *Community Living Assistance Services and Supports (CLASS) Provisions in the Patient Protection and Affordable Care Act (ACA)*, by (name redacted) and (name redacted).

[75] Letter from Kathleen Sebelius, Secretary of the Department of Health and Human Services, to John Boehner, Speaker of the House of Representatives (October 14, 2011), *available at* http://www.hhs.gov/secretary/letter10142011.html. *See also* Department of Health and Human Services, A Report on the Actuarial, Marketing, and Legal Analyses of the CLASS Program (2011), http://aspe.hhs.gov/daltcp/reports/2011/class/index.pdf. Legislation was (continued...)

Although some of ACA's provisions have taken effect—for example, the Community First Choice Option became effective in October 2011—its implementation is not yet complete. Nevertheless, many expect that the Affordable Care Act will influence the future of states' *Olmstead* initiatives by shifting Medicaid spending away from institutional care to some degree.[76]

Enforcing *Olmstead*

The ADA's integration mandate may be enforced through a private action—a lawsuit brought by a private individual—or an action brought by the Department of Justice.[77] Congress has also vested the independent protection and advocacy system (P&As) with the duty and authority to, *inter alia*, investigate alleged violations of the rights of individuals with disabilities and pursue policy changes and legal remedies on their behalf.[78] Federal courts have held that these P&A organizations have standing to enforce the integration mandate by filing suit on behalf of facility residents,[79] a view supported by the Department of Justice.[80]

Recently, some have expressed concern that the interests of the residents of intermediate care facilities for people with mental disabilities and their legal guardians are not adequately protected in representational litigation brought by the Department of Justice and the state P&A agencies.[81] Proponents of this view have advocated for legislation requiring the Department of Justice and P&A agencies to satisfy additional procedures before initiating lawsuits on behalf of the residents of these facilities. Critics, however, contend that such laws would undermine the capacity of

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also introduced in the 112th Congress to repeal the CLASS program. Fiscal Responsibility and Retirement Security Act of 2011, H.R. 1173 (112th Cong., 1st Sess.); Repeal the CLASS Entitlement Act, S. 720 (112th Cong., 1st Sess.).

[76] *See, e.g.,* Eric Carlson and Gene Coffey, Nat'l Senior Citizens Law Center, 10-Plus Years After the *Olmstead* Ruling: Progress, Problems, and Opportunities 10 (2010), *available at* http://www.nsclc.org/wp-content/uploads/2011/07/NSCLC-Olmstead-Report-LT.pdf (suggesting that ACA will "further shift" the focus of Medicaid spending).

[77] A title II complaint form can be downloaded from http://www.ada.gov. The complaint should be sent to the Civil Rights Division of the Department of Justice. The Department of Justice also runs a toll-free ADA Information Line for information about filing a complaint and *Olmstead* enforcement more generally.

[78] 42 U.S.C. §§10805, 15043. There is a protection and advocacy organization in every state. The National Disability Rights Network maintains a printable list of each state protection and advocacy agency at http://www.ndrn.org/images/Documents/PA_CAP_List2011-EDs.pdf

[79] *See, e.g.,* State Office of Protection & Advocacy for Persons with Disabilities v. Connecticut, 706 F. Supp.2d 266, 282-84 (D. Conn. 2010) (finding that Connecticut protection and advocacy organization had associational standing to bring suits under *Olmstead* on behalf of individuals with disabilities in nursing facilities); Disability Advocates Inc. v. Paterson, 598 F. Supp.2d 289, 307-310 (E.D. N.Y. 2009) (finding that New York protection and advocacy organization had associational standing to bring suits under *Olmstead* on behalf of individuals with disabilities living in adult homes). *See also* Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1638, 1642 (2010) (holding that the Eleventh Amendment is not offended by the Virginia P&A organization, a state agency, suing state officials to enforce federal law); Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1111, 1116 (9th Cir. 2003) (finding that the Oregon protection and advocacy organization had associational standing).

[80] Department of Justice Civil Rights Division, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* 8-9 (2011), *available at* http://www.ada.gov/olmstead/q&a_olmstead.pdf.

[81] *See, e.g.,* Parent Hospital Association, *Urge Your Representative to Co-Sponsor H.R. 2032*, PARENT HOSPITAL ASSOCIATION BLOG (June 6, 2011), http://blog.parenthospitalassociation.org/2011/06/urge-your-representative-to-co-sponsor-hr-2032.html (describing H.R. 2032 (112th Cong., 1st Sess.) as helping residents of intermediate care facilities and their guardians participate in the decision-making process about where a person with a disability should live); VOR, H.R. 2032 (June 30, 2011), http://www.vor.net/legislative-voice/legislation/210-hr-2032.

facility residents to challenge their institutionalization and/or their living conditions and hinder the enforcement of federal law.[82] This legislation may also be perceived as duplicative because (1) the Federal Rules of Civil Procedure already contain safeguards designed to ensure that class actions fairly and adequately represent class members' interests;[83] and (2) the Department of Justice generally interviews residents, staff, and other individuals familiar with a given facility before commencing litigation.[84]

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[82] *See, e.g.,* Letter from Thomas M. Susman, Director of the Governmental Affairs Office of the American Bar Association, to Chairman Smith and Ranking Member Conyers of the House Committee on the Judiciary (June 15, 2011) (stating that H.R. 2032 (112th Cong., 1st Sess.) would limit the ability of those representing individuals with disabilities from protecting their legal rights and allow guardians to prevent federal judges from awarding complete relief to individuals whose rights were violated); The Arc, *The Arc's Position on H.R. 2032*, http://www.ifelected.com/thearc/issues/bills/?bill=49069566&size=full (last visited November 15, 2011).

[83] *See, e.g.,* Letter from Thomas M. Susman, *supra* note 82 (describing H.R. 2032 (112th Cong., 1st Sess.) as "unnecessary" because, under Rule 23 of the Federal Rules of Civil Procedure, a court can require notice be given to all class members and cannot allow a settlement, dismissal, or compromise of the action without a fairness hearing). *See also* F. R. CIV. P. 23 (authorizing the court to "direct appropriate notice to the class" of the filing of an action and forbidding any settlement, dismissal, or compromise of a class action without a fairness hearing, which presents an opportunity for class members to express their views on the proposed outcome); F. R. CIV. P. 24 (permitting class members to intervene as parties in the class to ensure that they are adequately represented).

[84] *See* DEPARTMENT OF JUSTICE, SUMMARY OF CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS, http://www.justice.gov/crt/about/spl/cripa.php (last visited November 15, 2011) (stating that institutional conditions are evaluated through tours of the facilities, observations of the facilities' procedures and practices, and, *inter alia*, interviews with residents, staff, and others).