

# After Olmstead: Advocating for Integration for Persons with Disabilities in Minnesota

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## 1) Introduction

- a) A developmental disability is a severe, chronic disability, expected to last indefinitely which:
- is attributable to a mental or physical impairment or a combination of mental and physical impairments;
  - is manifested before the person attains age 22;
  - results in substantial functional limitations in three or more of the following areas of major life activity: self-care | receptive and expressive language | learning | mobility | self-direction | capacity for independent living, and economic self-sufficiency;
  - Examples of developmental disabilities include:
    - Autism *Prader Willi - eat inedible products*
    - Cerebral palsy
    - Down syndrome
    - Fetal alcohol syndrome
    - Intellectual disability
    - Spina Bifida
- b) Services and payment
- Long term Care Services: Staffing, equipment, programs, etc. (traditionally in Nursing homes and other institutions)
  - Payment: Public funding through Medicaid (health Insurance for low income an disabled people – can pay for long term care service)

*UN Chair for people with disabilities*

## 2) Brief history of residential services and supports

- a. Nationally – The Debate on Deinstitutionalization in the 1970's and 80's
- i. Legal theories focus on maltreatment, right/refusal of treatment. See Samuel R. Bagenstos, The Past and Future of Deinstitutionalization Litigation, 34 CARDOZO LAW REVIEW (2012). *– good article!*
- b. Minnesota *early leader!*
- i. *invented RCAS* *←* *Welsch v. Likins*, 373 F.Supp. 487 (D. Minn. February 15, 1974) – Leads to *Welsch* Consent Decree and a Deinstitutionalization Plan. *→* *waives institutional rules to create state program*
  - ii. MN is an early adopter Medicaid Waivers: Section 1915 (c) of the Social Security Act enables states to request a waiver of applicable federal Medicaid requirements to provide enhanced community support services to those Medicaid beneficiaries who would otherwise require institutional care. 42 U.S.C. § 1396n(c); 42 C.F.R. § 441.300 et seq.
  - iii. 42 U.S.C. § 1396n(c)(1) “The Secretary may by waiver provide that a State plan approved under this title may include as “medical assistance” under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision

of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan."

3) **Olmstead v. LC 527 U.S. 581 (1999)** *beginning of integration mandate work, but Ashcroft not into it (blame) # of people in nursing homes increased (like Sank's 50th)*

a. Drawback of pre-ADA legal Theories – No Leverage to Mandate Community Services

b. Early 1990's Passage of ADA and Implementing Regulations – Including the Integration Mandate

- i. 28 C.F.R. § 35.130(d) (the "integration mandate") requires a "public entity (to) administer...programs...in the most integrated setting appropriate to the needs of qualified individuals with disabilities."
- ii. A related regulation requires public entities to "make reasonable modifications" to avoid discrimination on the basis of disability but does not require measures that would "fundamentally alter" the nature of the entity's programs. 28 C.F.R. § 35.130(b)(7).

c. *Olmstead's* Interpretation of the Integration Mandate – Court Holds:

- i. Under Title II of the ADA, states are required to place persons with mental disabilities in community settings rather than in institutions when:
  1. The state's treatment professionals have determined that community placement is appropriate;
  2. The transfer from institutional care to a less restrictive setting is not opposed by the affected individual; and
  3. The placement can be reasonably accommodated taking into account the resources available to the state and the needs of others with mental disabilities.

4) **Enforcement and Evolution of *Olmstead***

a. A spotty History

- i. *Olmstead* Plans
- ii. 2009 Enforcement Surge: The Year of Community Living
  1. <http://www.ada.gov/olmstead/index.htm>

b. A focus on the *Characteristics* of Institutional Settings

- i. *Disability Advocates, Inc. v. David A. Paterson and Others*, 653 F.Supp.2d 184 (2009)
- ii. Segregated/Sheltered Workshops: Oregon and Rhode Island

5) **So – What's Minnesota's Problem?**

a. Overreliance on Group Homes: Was the Only Option Developed, But Not even Available

*unique 6/c affirmative*

*DOJ -- inclinal system change*

*Brown v. Board*

- i. Early 1980's until 2009 Large Scale "Investment" in 4 Person Group Homes. Built to solve the "Two Bucket Problem" of Using Medicaid Waiver Dollars for very-low income individuals.
- ii. But – by 2009 – highest average waiver cost leads to state-wide moratorium and a system without many alternatives.
- b. Group Home System, Provider Service Plans morph Case Management
- c. Provider System Heavily invested in Group Home System to keep people safe
- d. Parallel developments in Day-Programming Services – Together have a system that keep people safe, but does not promote integration

#### **6) Legal Tools To Address**

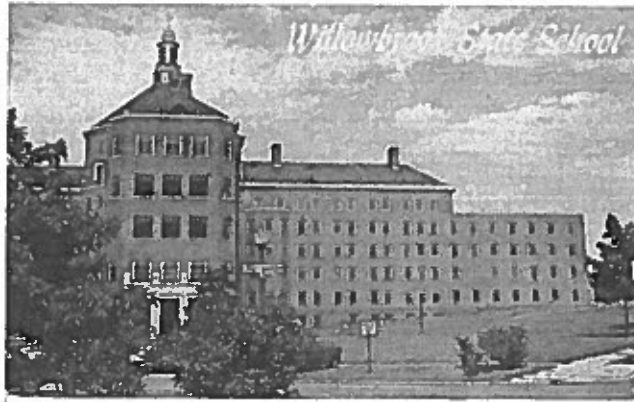
- a. Litigation: Olmstead Civil Rights Claims
- b. MN Olmstead Plan: Google MN Olmstead Plan
- c. HCBS Settings Rule

#### **7) Remedies – What will help?**

- a. Consumer Control
  - i. Consumer-Directed Services
  - ii. Separate Housing Subsidies from the Service Provider
- b. Person Centered Planning and Individualized Options (Making "enabled" a reality)
  - i. Planning services that *Enable Interactions*
    - 1. Hire "staff" that enables interaction v. Hiring "shift staff" to watch, run, staff a 1-4 group home
  - ii. Individual Housing Options – Turning Around the Titanic
    - 1. Case managers, Individuals, and families have resources about how to develop a transition plan into the "most integrated setting"
      - a. Person Centered Planning as a distinct service
      - b. Provider incentives for new business models

#### **8) Advocacy Opportunities – Olmstead Next Steps**

- a. Olmstead and integration mandate are important building blocks for Anyone interested in public interest work (Disability Rights; Criminal Justice System; Legal Aid; Poverty Law and Advocacy; Policy Issues)



Full Documentary: <https://www.youtube.com/watch?v=FKC2zBghUAI>

Geraldo and Bernard: [https://www.youtube.com/watch?v=RA7sX\\_FYSCY](https://www.youtube.com/watch?v=RA7sX_FYSCY)



*Lois Curtis for  
interviewer's mandate*  
→

Lois Curtis Profile:

<https://assignmentatlanta.wordpress.com/2010/11/27/unlocked-the-lois-curtis-story/>