

**WHERE HAVE ALL THE DEVELOPMENTAL CENTERS
GONE? THE FEDERAL PUSH FOR COMMUNITY-BASED
SERVICES FOR PEOPLE WITH INTELLECTUAL AND
DEVELOPMENTAL DISABILITIES**

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I. INTRODUCTION

Across the country, the trend in treating individuals with intellectual and developmental disabilities has been deinstitutionalization. In recent years, several states have been working to transition the treatment of their intellectually and developmentally disabled citizens from state-operated developmental centers to community-based services.¹ In the process, numerous developmental centers have been closed. While some residents, parents, advocates and professionals are pleased with this direction, others are fighting the process.

This article sheds light on the current state of affairs. Part II provides a snapshot of the public services available for individuals with intellectual and developmental disabilities and explores recent trends in the deinstitutionalization movement.² Part III provides an overview of the relevant provisions of the Americans with Disabilities Act, as interpreted by the landmark case of *Olmstead v. L.C.*³ Part IV provides more information about the current push by the Department of Justice to ensure adequate community based services and summarizes some of the predictable players in lawsuits arising in connection with the proposed closure of developmental centers.⁴ Lastly, Part V reviews a couple of recent cases where efforts toward deinstitutionalization have led to civil lawsuits in federal court.⁵ Beyond the scope of this article is a broader issue: As a society, we have had

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¹ See, e.g., *Overview: Developmental Center Closure*, OHIO DEP'T OF DEV. DISABILITIES, (Feb. 13, 2015), <http://dodd.ohio.gov/OurFuture/Documents/DCClosureOverview.pdf>.

² See *infra* Part II.

³ 527 U.S. 581 (1999). See *infra* Part III.

⁴ See *infra* Part IV.

⁵ See *infra* Part V.

great success in discharging intellectually and developmentally disabled residents from our state institutions; have we been as effective in providing them the services they need to successfully live in the community?

II. BACKGROUND FACTS, FIGURES AND TRENDS

It is estimated that there are between 4.6 and 7.7 million Americans living with intellectual and developmental disabilities (IDD).⁶ Approximately 460,600 of those individuals currently receive residential care.⁷ A developmental disability is a severe chronic disability that can be either cognitive or physical, or both.⁸ Individuals born with developmental disabilities may have physical issues that prevent them from being able to walk, feed themselves, or do many other activities of daily living.⁹ An intellectual disability is a form of a developmental disability “characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills.”¹⁰ The intellectual disabilities category encompasses a number of conditions, including autism, Downs Syndrome, self-destructive behavior, and what has been traditionally referred to as “retardation.”¹¹

Roughly 91% of individuals with IDD receive their care from non-governmental agencies.¹² The rest, approximately 41,680 people, live in state-operated IDD or psychiatric facilities.¹³

⁶ *How Prevalent are Intellectual and Developmental Disabilities in the United States?*, BETHESDA INSTITUTE, (2012), <http://bethesda institute.org/document.doc?id=413>.

⁷ See Sheryl Larson et al., *Residential Services for Persons with Intellectual or Developmental Disabilities: Status and Trends through 2011*, INST. ON CMTY INTEGRATION: UNIV. OF MINN., at xii (2013) [hereinafter Larson et al.], available at <http://rtc.umn.edu/risp/docs/risp2011.pdf> (based on estimates for June 30, 2011).

⁸ *Frequently Asked Questions on Intellectual Disability*, AM. ASS’N ON INTELLECTUAL & DEV. DISABILITIES, <http://aaid.org/intellectual-disability/definition/faqs-on-intellectual-disability#.UsWpKPRDuSo> (last visited Mar. 30, 2015) [hereinafter *Frequently Asked Questions on Intellectual Disability*].

⁹ See Order Approving Consent Decree at 3, *United States v. Virginia*, 282 F.R.D. 403 (E.D. Va. 2012) (No. 3:12-CV-00059-JAG).

¹⁰ *Frequently Asked Questions on Intellectual Disability*, *supra* note 8.

¹¹ Order Approving Consent Decree, *supra* note 9, at 3.

¹² Larson et al., *supra* note 7, at 40. See also *id.* at 50 (reporting that “[b]etween 1977 and 2011, the proportion of people with IDD living in settings operated by non-state agencies increased from 37% to 91% overall).

¹³ Larson et al., *supra* note 7, at 7.

As of June 30, 2011, there were 2,418 state-operated residential facilities for people with IDD, approximately 200 of which were considered large, serving sixteen or more residents.¹⁴ Most of these larger facilities, often referred to as “developmental centers,” were built 50 to 100 years ago and were designed for many more residents than they typically house today.¹⁵ As of 2011, the states operating the greatest number of large public IDD facilities were Texas, with thirteen facilities; New York and Ohio, each with ten facilities; Missouri, with nine facilities; Illinois, with eight facilities; and New Jersey, with seven facilities.¹⁶

There has been a steady decrease in the use of large state-run residential facilities for IDD individuals since 1967, when the number of people with IDD living in state-run institutions peaked at 194,650.¹⁷ By 2011, the average daily population of large state-operated facilities declined to 29,809.¹⁸ Between 1960 and 2011, a total of 209 large state-operated IDD facilities were closed by forty-three states and the District of Columbia.¹⁹ An additional thirteen facilities were projected to be closed between 2012 and 2014.²⁰

Although some of the decline may be due to deinstitutionalization efforts by various groups for legal or ideological reasons, economics also play an important role, as large state-run facilities for people with IDD have become increasingly expensive to maintain. Average annual per resident costs (in 2011 dollars) have increased from \$6,778 in 1950, to \$27,264 in 1970, to \$123,553 in 1990, to \$201,234 in 2010.²¹ Factors contributing to these increasing costs have been (1) “creation of the Intermediate Care

¹⁴ *Id.* at 5.

¹⁵ NAT'L COUNCIL ON DISABILITY, DEINSTITUTIONALIZATION: UNFINISHED BUSINESS, (COMPANION PAPER TO UNFINISHED BUSINESS TOOLKIT) 13 (2012) [hereinafter UNFINISHED BUSINESS], available at <http://www.ncd.gov/publications/2012/Sept192012/> (follow “Unfinished Business” PDF hyperlink).

¹⁶ See Larson et al., *supra* note 7, at 20.

¹⁷ NAT'L COUNCIL ON DISABILITY, DEINSTITUTIONALIZATION TOOLKIT: INSTITUTIONS – *IN BRIEF* 1 (2012) [hereinafter INSTITUTIONS – *IN BRIEF*], available at <http://www.ncd.gov/publications/2012/DIToolkit/Institutions/inBrief/> (follow “Institutions inBrief” PDF hyperlink).

¹⁸ Larson et al., *supra* note 7, at xi.

¹⁹ *Id.* at 20.

²⁰ *Id.* at 20, xiv.

²¹ *Id.* at 18 (also providing that in 2011, the average annual per resident cost increased to \$226,106). See also *id.* at xiv (reporting that some of the highest average per resident costs were in Nebraska, Connecticut and New York).

Facility for Persons with Mental Retardation ('ICF-ID')²² program in 1971; (2) court decisions and settlements that have forced program improvements; and (3) decreasing numbers of residents sharing the fixed costs of maintaining institutions."²³

The ICF-ID program allows a facility to qualify for Medicaid funding.²⁴ Before Medicaid was enacted, there was no federal funding of long-term supports and services for individuals with IDD.²⁵ Beginning in 1971, federal financial participation for intermediate care provided in facilities for people with IDD was authorized.²⁶ "The ICF-ID legislation was designed to provide substantial federal incentives for upgrading the physical environment and the quality of care and rehabilitation being provided" and for providing long-term support programs for active treatment for persons with IDD.²⁷ Since states overwhelmingly opted to have their IDD facilities certified as part of the ICF-ID program, most states had to invest substantial funds to bring their facilities into conformity with the program's standards.²⁸

²² Originally known as Intermediate Care for People with Mental Retardation (ICF-MR). *Id.* at 55. The term "mental retardation" has been considered outdated since the passage of Rosa's Law in 2010. *See id.*; *Introduction to Intellectual Disabilities*, THE ARC, (Mar. 1, 2011), <http://www.thearc.org/document.doc?id=3661>.

²³ Larson et al., *supra* note 7, at 19.

²⁴ *See id.* at 55.

²⁵ *Id.* "Medicaid was enacted as Medical Assistance, Title XIX of the Social Security Act," in 1965. *Id.* It is a partnership between the federal and state governments in which a state pays for a portion of providing services and the federal government matches the state funds at a rate ranging from 50% to 75% depending on the state's per capita income. *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 56. Interestingly, in the context of the growing support for community residential services, critics charged that ICF-ID program

- 1) had created direct incentives for maintaining people in large state facilities by providing federal contributions to the costs of those facilities;
- 2) had diverted funds that could otherwise have been spent on community program development . . . ;
- 3) had promoted the development of large private ICF-ID facilities for people leaving large state facilities . . . ; and
- 4) had promoted organizational inefficiency and individual dependency by promoting a single uniform standard for care and oversight of ICF-ID residents irrespective of the nature and degree of their disabilities and/or their relative capacity for independence.

Id.

In the early 1980s, federal support of community-based services for IDD individuals was made possible when the Medicaid Home and Community Based Services (“HCBS”) waiver program was instituted.²⁹ The program was designed to provide non-institutional, community-based services to Medicaid eligible individuals who were either older or disabled and who, in the absence of the alternative services, would remain susceptible to being placed in an ICF-ID or other Medicaid sponsored facility.³⁰

The HCBS waivers are essentially packages for community-based services to support an individual who would otherwise be eligible for Medicaid institutional care. “Since 1985 several additional Medicaid waiver authorities, regulations and interpretive guidelines have been added that allow states to expand the use of Medicaid funded community services to reduce the need for institutional services.”³¹ Examples of such “community based long-term services and supports available to people with IDD include . . . service coordination/case management, homemaker, home health aide, personal care, adult day services, day and residential habilitation, and respite care.”³²

The push towards deinstitutionalization would only get stronger, however, with the passage of the Americans with Disabilities Act in 1990 and the subsequent landmark Supreme Court case of *Olmstead v. L.C.*

III. TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND THE *OLMSTEAD* HOLDING

*Olmstead v. L.C.*³³ involved a claim that confinement of patients to a state institution was a violation of Title II of the Americans with Disabilities Act of 1990 (“ADA”)³⁴ because other, less segregated treatment options, were available.³⁵

The facts of *Olmstead* involve two intellectually disabled women, each of whom was also diagnosed with a separate mental illness.³⁶ Both were

²⁹ See *id.* at 57.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 58.

³³ 527 U.S. 581 (1999).

³⁴ 42 U.S.C. §§ 12131–34 (2013).

³⁵ *Olmstead*, 527 U.S. at 593.

³⁶ *Id.* (Lois Curtis (“L.C.”) was diagnosed with schizophrenia and Elaine Wilson (“E.W.”) was diagnosed with a personality disorder). See also *The Olmstead Decision*, JUDGE DAVID L. BAZELON CTR FOR MENTAL HEALTH LAW, <http://www.bazelon.org/Where-We-Stand/>

treated at a psychiatric unit in a hospital run by the State of Georgia.³⁷ Even after their respective treatment teams had concluded that each woman could receive appropriate treatment in a community-based setting, they were confined to the psychiatric hospital.³⁸

The women filed suit against the Commissioner of the Georgia Department of Human Resources, the superintendent of the hospital, and the executive director of the county's regional board, alleging that their confinement in a segregated environment was discriminatory under Title II of the ADA.³⁹ After judgments in favor of the women at the U.S. District Court for the Northern District of Georgia and the Eleventh Circuit Court of Appeals, the Supreme Court granted certiorari.⁴⁰

Title II of the ADA provides that “[s]ubject to the provisions of this subchapter, 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.”⁴¹ Under Title II, a “public entity” includes “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”⁴²

Also relevant to the Court's analysis were the regulations to Title II issued by the Attorney General.⁴³ The so-called *Integration Regulation* (also known as the *Integration Mandate*) provides that “[a] public entity shall administer services, programs, and activities in the most integrated

Community/Integration/Olmstead-Implementing-the-Integration-Mandate/The-Olmstead-Decision-.aspx (last visited Feb. 19, 2015) [hereinafter JUDGE DAVID L. BAZELON CTR].

³⁷ *Olmstead*, 527 U.S. at 593.

³⁸ *Id.*

³⁹ *Id.* at 593–94.

⁴⁰ *Id.* at 594–96.

⁴¹ 42 U.S.C. § 12132 (2013).

⁴² *Id.* § 12131. This section also defines the term “qualified individual with a disability” as:

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id.

⁴³ See *id.* § 12134 (providing that the Attorney General is to issue regulations implementing the provisions of Title II).

setting appropriate to the needs of qualified individuals with disabilities.”⁴⁴ Based on the preamble to the regulations, such a setting allows for the individuals with disabilities to interact with non-disabled individuals to the maximum extent possible.⁴⁵ The *Reasonable Modifications Regulation* further states that that public entities “make reasonable modifications” to avoid discrimination on the basis of disability, unless those modifications would involve a fundamental alteration to the “nature of the service, program, or activity.”⁴⁶

The question before the *Olmstead* Court was whether the ADA’s Title II prohibition against discrimination required states to place individuals with intellectual and developmental disabilities in community settings rather than in institutions.⁴⁷

In a 6-3 opinion written by Justice Ginsburg, the Supreme Court held that “under Title II of the ADA, States are required to provide individuals with mental disabilities with community[-based treatment] 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 community placement can be reasonably accommodated, taking into account the resources available to the [s]tate and the needs of others with mental disabilities.”⁴⁸

The Court also emphasized that considerable discretion must be left to the states and public entities in determining the proper balance between providing community-based services and completely reworking their programs for the Intellectually and Developmentally Disabled.⁴⁹ In essence, states were tasked with creating the “most integrated setting”⁵⁰ alternatives in which IDD individuals can “interact with non-disabled persons to the fullest extent possible.”⁵¹ Such settings are located within mainstream

⁴⁴ 28 C.F.R. § 35.130(d) (2014).

⁴⁵ *See id.* pt. 35, app. B, § 35.133.

⁴⁶ *Id.* § 35.130(b)(7).

⁴⁷ *Olmstead*, 527 U.S. at 587. *But cf.* Kevin M. Cremin, *Challenges to Institutionalization: The Definition of “Institution” and the Future of Olmstead Litigation*, 17 TEX. J. C.L. & C.R. 143 (2012) (suggesting that the term “institution” is defined in various ways depending on the context).

⁴⁸ *Olmstead*, 527 U.S. at 607.

⁴⁹ *See id.* at 605–07.

⁵⁰ *Id.*

⁵¹ 28 C.F.R. pt. 35, app. A § 35.130 (2014). *See also* STATEMENT OF THE DEPARTMENT OF JUSTICE ON ENFORCEMENT OF THE INTEGRATION MANDATE OF TITLE II OF THE AMERICANS

society and allow individuals to choose their daily routines and provide those individuals with access to community activities and resources and to non-disabled persons.⁵²

To the extent that the *most integrative setting* for IDD individuals is not feasible, states may raise the *fundamental alteration* defense, which excuses a state from providing for the most integrated setting when it can prove that the modification would fundamentally alter its service system.⁵³ The burden of proof is on the state to establish that the most integrative setting would fundamentally alter its service system.⁵⁴

Ultimately, the two IDD plaintiffs of *Olmstead*, Elaine Wilson and Lois Curtis, were provided supportive housing in community settings where they both reportedly did very well.⁵⁵

IV. DEINSTITUTIONALIZATION AFTER *OLMSTEAD*: THE CURRENT LANDSCAPE

Since *Olmstead*, several state and local governments have increased their community-based alternatives to institutional care for IDD individuals in or at risk of segregation in state-run facilities or other segregated settings; however, waiting lists for community-based services have grown considerably and the supply of community services does not yet meet this increased demand.⁵⁶

WITH DISABILITIES ACT AND *OLMSTEAD V. L.C.*, U.S. DEP'T. OF JUSTICE 2 (2011) [hereinafter STATEMENT OF THE DEPARTMENT OF JUSTICE], available at http://www.ada.gov/olmstead/q&a_olmstead.pdf.

⁵² See STATEMENT OF THE DEPARTMENT OF JUSTICE, *supra* note 51, at 2.

⁵³ See *Olmstead*, 527 U.S. at 603, 605–06 (“The reasonable-modifications regulation speaks of ‘reasonable modifications’ to avoid discrimination, and allows States to resist modifications that entail a ‘fundamental alteration’ of the States services and programs.” And that “If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.”). See also STATEMENT OF THE DEPARTMENT OF JUSTICE, *supra* note 51, at 6–7.

⁵⁴ See STATEMENT OF THE DEPARTMENT OF JUSTICE, *supra* note 51, at 6–7.

⁵⁵ See JUDGE DAVID L. BAZELON CTR, *supra* note 36. See also Sue Jamieson, *Olmstead Champion Meets the President*, WHITE HOUSE OFFICE OF PUB. ENGAGEMENT (June 22, 2011), <http://www.whitehouse.gov/blog/2011/06/22/olmstead-champion-meets-president> (reporting a meeting between President Obama and Lois Curtis in 2011 during which Ms. Curtis presented the President with one of her original oil paintings).

⁵⁶ See Press Release, White House Office of the Press Secretary, President Obama Commemorates Anniversary of *Olmstead* and Announces New Initiatives to Assist

Changes in the way Medicaid funds are utilized have had a positive impact on the growth of community-based services. Both states and individuals have been given more flexibility with regard to how their Medicaid dollars can be spent.⁵⁷

There has been increased delivery of long-term services and support through Medicaid managed care programs that allow states to try new approaches in their financing and delivering of services.⁵⁸ In all states, Medicaid is seen as a significant resource for maintaining or establishing community-based services as an alternative to institutional care.⁵⁹ In addition, individualization of Medicaid-funded services has been expanded to the extent that participants (or their legal representatives) have the ability to choose the types of covered services they receive.⁶⁰

In 2001, *Real Choice Systems Change Grants* for community living were funded by Congress to assist states in revamping their long-term care systems “to rely less on institutional services and to increase access to home and community-based services.”⁶¹ The Medicaid *Money Follows the Person* program, authorized in 2005, “offers states increased federal financing to move people from institutional settings to home and community-based services.”⁶² Furthermore, expanded federal funds matching state dollars spent on HCBS waivers and other Medicaid services, as well as a restraint on state options for restricting eligibility for such services, were provided for under the American Recovery and Reinvestment Act of 2009.⁶³

Even after all of these congressional efforts to assist states in providing community-based services for IDD individuals, the demand has still not been fulfilled and many remain bound by an antiquated institutional system. Lawsuits in connection with unnecessary deinstitutionalization existed prior to *Olmstead*, but the legal arguments and theories employed in such cases

Americans with Disabilities, (Jun. 22, 2009), <http://www.whitehouse.gov/the-press-office/president-obama-commemorates-anniversary-olmstead-and-announces-new-initiatives-ass> [hereinafter White House Press Release].

⁵⁷ Larson et al., *supra* note 7, at 58.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *Id.* at 58. *See also* UNFINISHED BUSINESS, *supra* note 15, at 19.

⁶³ UNFINISHED BUSINESS, *supra* note 15, at 19. *See also* White House Press Release, *supra* note 56 (“[T]he Obama Administration provided over \$140 million in the Recovery Act funding for independent living centers across the country.”).

changed after the Court's 1999 decision.⁶⁴ After *Olmstead*, advocates of deinstitutionalization moved from making arguments based on the Due Process Clause of the Fourteenth Amendment⁶⁵ to arguments centered on antidiscrimination pursuant to the Americans with Disabilities Act and the *Olmstead* holding.⁶⁶

Ten years after *Olmstead*, the Executive Branch of the federal government instituted a new initiative to enforce the *Olmstead* ruling, including measures aimed at closing down state institutions and establishing additional community-based services for the IDD community.

A. The Year of Community Living and the U.S. Department of Justice

President Obama initiated "The Year of Community Living" on the anniversary of *Olmstead*.⁶⁷ At that time, the President proclaimed that:

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.⁶⁸

To kick off the new initiative, the President tasked the Secretary of Health and Human Services and the Secretary of Housing and Urban Development with finding ways in which access to housing, community supports and independent living arrangements could be improved.⁶⁹ Other federal agencies were also directed "to vigorously enforce the civil rights of Americans with disabilities."⁷⁰

"Since [this new initiative], the [U.S.] Department of Justice [(DOJ)] has made enforcement of *Olmstead* [and the Integration Mandate] a top

⁶⁴ See Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 31–32 (2012).

⁶⁵ U.S. CONST. amend. XIV, § 1.

⁶⁶ See Bagenstos, *supra* note 64, at 32.

⁶⁷ See STATEMENT OF THE DEPARTMENT OF JUSTICE, *supra* note 51, at 1.

⁶⁸ White House Press Release, *supra* note 56.

⁶⁹ *Id.*

⁷⁰ STATEMENT OF THE DEPARTMENT OF JUSTICE, *supra* note 51, at 1.

priority.”⁷¹ The DOJ has been committed to vindicating the rights of disabled individuals, including those with IDD, by advocating for such individuals to live integrated lives in accordance with the Americans with Disabilities Act (“ADA”) as interpreted by *Olmstead*.⁷²

In applying *Olmstead*, the DOJ sees state segregation of the IDD population into institutional facilities and away from the community as unlawfully discriminatory.⁷³ The Department has stated that “segregated settings often have qualities of an institutional nature.”⁷⁴ Within that category are:

- (1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals’ ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for daytime activities primarily with other individuals with disabilities.⁷⁵

In 2011, to “commemorate the [twelfth] anniversary of the *Olmstead* decision,” the DOJ issued a technical assistance guide to help state and local governments comply with the Integration Mandate of Title II of the ADA.⁷⁶ In it, the DOJ provides that states, to the extent that they have not yet complied with the Integration Mandate, must at least have appropriate *Olmstead Plans* in place for its implementation.⁷⁷

A comprehensive, effectively working plan must do more than provide vague assurances of future integrated options or describe the entity’s general history of increased funding for community services and decreased institutional populations. Instead, it must reflect an analysis of the extent to which the public entity is providing services in the most integrated setting and must contain concrete and reliable

⁷¹ *Id.* It is also worth noting that the DOJ’s position can be inferred from its general use of the term “Integration Mandate,” as opposed to “Integration Regulation,” when referring to its basis for action.

⁷² *See id.*

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 3.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1.

⁷⁷ *Id.* at 6.

commitments to expand integrated opportunities. The plan must have specific and reasonable timeframes and measurable goals for which the public entity may be held accountable, and there must be funding to support the plan, which may come from reallocating existing service dollars. The plan should include commitments for each group of persons who are unnecessarily segregated, such as individuals residing in facilities for individuals with developmental disabilities, psychiatric hospitals, nursing homes and board and care homes, or individuals spending their days in sheltered workshops or segregated day programs. To be effective, the plan must have demonstrated success in actually moving individuals to integrated settings in accordance with the plan. . . . Any plan should be evaluated in light of the length of time that has passed since the Supreme Court's decision in *Olmstead*, including a fact-specific inquiry into what the public entity could have accomplished in the past and what it could accomplish in the future.⁷⁸

The DOJ recognizes that states may raise the fundamental alterations defense,⁷⁹ but the DOJ will only accept such a defense as legitimate when there is an acceptable *Olmstead* Plan in place and implementation of that plan is already underway.⁸⁰ The standards required for Medicaid purposes are separate from the requirements of the Integration Mandate and establishing programs outside of those covered by Medicaid, therefore, is not necessarily a fundamental alteration.⁸¹ In addition, the DOJ takes the position that state budget cuts can violate the Integration Mandate “when significant funding cuts to community services create a risk of institutionalization or segregation” for certain individuals.⁸²

In sum, the DOJ's position, based on the *Olmstead* ruling, is that states must alter their government sponsored services for disabled individuals so that the use of state-operated segregated institutional settings is ultimately eliminated and the use of integrated community settings becomes the norm.

⁷⁸ *Id.* at 6–7.

⁷⁹ *Id.* See also 28 C.F.R. §§ 35.130(b)(7) (2014) (connection with the ADA's Reasonable Modifications Regulation).

⁸⁰ STATEMENT OF THE DEPARTMENT OF JUSTICE, *supra* note 51, at 7.

⁸¹ *Id.* at 5.

⁸² *Id.* at 5–6.

To the extent that a state does not comply, the DOJ will actively advocate on behalf of the necessary changes and, when the state is amenable to such, the DOJ will work with the state to ensure appropriate compliance.

The Civil Rights of Institutionalized Persons Act (CRIPA),⁸³ passed in 1980, authorizes the Attorney General and the DOJ to conduct investigations and litigations relating to conditions of confinement in institutions operated by state and local government.⁸⁴ Although on its own, a CRIPA action may call for a state to improve poor institutional settings and not provide for community-based services,⁸⁵ in conjunction with Title II of the ADA, the DOJ's Special Litigation Section may initiate a lawsuit in order to entice a state to develop an acceptable *Olmstead* Plan as part of the settlement agreement.⁸⁶

The DOJ recognizes that it is not alone in the fight for deinstitutionalization.⁸⁷ It supports the role of protection and advocacy organizations⁸⁸ and, of course, private individuals in bringing actions against state actors for unnecessary institutionalization.⁸⁹ However paternalistic it may be, the DOJ has taken the position that those institutionalized individuals and families of institutionalized individuals who oppose a move toward more integrated settings have been influenced to think that way.⁹⁰ The DOJ therefore believes that in order to provide individuals with an opportunity to make an informed decision, public entities

⁸³ 42 U.S.C. §§ 1997–1997j (2013).

⁸⁴ INSTITUTIONS – *IN BRIEF*, *supra* note 17, at 6. Under CRIPA, the DOJ may initiate or intervene in pending lawsuits to correct egregious and systemic violations of the rights of people in public nursing homes, jails and prisons, juvenile justice facilities, and institutions housing people with IDD or mental illness. 42 U.S.C. §§ 1997a–1997c.

⁸⁵ *See* INSTITUTIONS – *IN BRIEF*, *supra* note 17, at 6.

⁸⁶ *See id.* at 6–7.

⁸⁷ *See id.* at 8–9.

⁸⁸ *Id.* *See also* 42 U.S.C. §§ 10801–27 (2013). These organizations are part of the Protection and Advocacy (“P&A”) system established by Congress to provide legal representation and other advocacy services to people with disabilities. INSTITUTIONS – *IN BRIEF*, *supra* note 17, at 6; 42 U.S.C. § 10801. The P&A system is a national network of independent agencies in each state, funded in part by the federal Administration on Developmental Disabilities. *Id.* §§ 10802, 10827.

⁸⁹ STATEMENT OF THE DEPARTMENT OF JUSTICE, *supra* note 51, at 8.

⁹⁰ *See id.* at 4.

must take affirmative steps to provide relevant information to those affected individuals.⁹¹

B. Opponents to Deinstitutionalization – Repeat Defenders of Institutional Settings

Despite the current trend in favor of deinstitutionalization and even in the face of evidence that individuals with IDD actually do better in community-based settings,⁹² two groups that consistently oppose state plans to close institutional facilities across the country are some parents or other family members of individuals who have been institutionalized and some workers at state-run facilities.⁹³

Some families of IDD individuals argue that their loved ones are not suited for life in the community and that they need the all-encompassing care that only institutional facilities can provide.⁹⁴ They also claim that a popular alternative to institutions, group homes in the community, are even more dangerous and isolating and that it is more difficult to provide appropriate oversight for abuses compared with traditional institutional settings.⁹⁵

Institutional workers' unions typically argue that institutional facilities provide the optimal level of care for their residents and that deinstitutionalization is "nothing more than a conservative effort to cut public budgets and impose privatization at the expense of people who [are] poor and vulnerable."⁹⁶ The intentions of the unionized institution workers may not be completely benign. Closing down institutions leads to increased unemployment among institution workers. Therefore, if institution workers supported deinstitutionalization, they would be supporting a movement that

⁹¹ *Id.* at 4–5 (suggesting that public entities should provide information about the benefits of integrated settings and provide opportunities to visit such settings and speak to individuals with disabilities being served by those settings).

⁹² See Lakin et al., *Behavioral Outcomes of Deinstitutionalization for People with Intellectual and/or Developmental Disabilities: Third Decennial Review of U.S. Studies, 1977-2010*, POL'Y RES. BRIEF, 21 U. MINN. RES. & TRAINING CTR OF COMMUNITY LIVING 2 (2011) (Meta-analysis of 21 studies examining the relative benefits of moving IDD individuals from institutions to community settings has provided strong and consistent evidence for improved adaptive behavior skills. It has also challenged the assertion that institutions are still needed for IDD individuals with challenging behavior.).

⁹³ See Bagenstos, *supra* note 64, at 16.

⁹⁴ *Id.* at 19.

⁹⁵ *Id.*

⁹⁶ *Id.*

hurts their fellow workers and union members.⁹⁷ In addition, support for deinstitutionalization by institution workers could be interpreted as a statement that the care that they and their fellow workers currently provide in institutional settings is inadequate.⁹⁸

C. Recent Civil Actions Stemming from Olmstead

The current trend towards deinstitutionalization has been met with some opposition. A number of civil suits have been brought in recent years involving states' compliance with the demands of *Olmstead*.

D. U.S. v. Virginia – 3:12CV059 – (E.D. Va. 2012)

Before discussing the issue in *U.S. v. Virginia*, it is important to give a brief overview of Virginia's treatment of IDD individuals. Virginia's five "Training Centers" were constructed during the course of the Twentieth Century for the purpose of housing and caring for disabled individuals.⁹⁹ The Commonwealth originally encouraged people to place their IDD family members in the Training Centers so that their disabled loved ones could live in a safe environment suited to their needs.¹⁰⁰ These large hospital-like facilities, funded and operated by the Commonwealth of Virginia, provide their residents with housing, meals, supported work options and recreation.¹⁰¹ Although the residents of the Training Centers are taken on some trips outside of the confines of the facilities, the residents spend most of their time with other disabled people within the Training Centers.¹⁰²

As the trends for treating those with intellectual and developmental disabilities has moved away from institutionalization and toward more community-based services, the Virginia Department of Behavioral Health and Developmental Services instructed the Training Centers to accept fewer residents and to discharge several residents for more community-based

⁹⁷ See *id.* at 19–21 (also noting that jobs in state institutions are typically unionized while jobs in community-based programs are not).

⁹⁸ See *id.* at 19 (referring to institutions as "caring, supportive environments").

⁹⁹ See Settlement Agreement at 1, *United States v. Virginia*, 282 F.R.D. 403 (E.D. Va. 2012) (No. 312-CV-00059-JAG); Larson et al., *supra* note 7, at 33–34, Table 1.12 (2013) (providing that the Central Virginia Training Center was opened in 1911, the Northern Virginia Training Center was opened in 1973, the Southeastern Virginia Training Center was opened in 1975, the Southside Virginia Training Center was opened in 1939 and the Southwestern Virginia Training Center was opened in 1976).

¹⁰⁰ See Order Approving Consent Decree, *supra* note 9, at 4.

¹⁰¹ See *id.* at 3–4.

¹⁰² *Id.*

services.¹⁰³ In recent years, this led to a decline in the number of Training Center residents from approximately 6,000 to less than 1,000.¹⁰⁴

In August 2008, pursuant to CRIPA, the DOJ initiated an investigation of Central Virginia Training Center, the oldest of the five Training Centers.¹⁰⁵ By April 2010, the DOJ had notified the Commonwealth that the investigation had been broadened to examine the Commonwealth's general compliance with the ADA's integration mandate as interpreted by *Olmstead*.¹⁰⁶ On February 10, 2011, the DOJ issued a report concluding that the Commonwealth's system of Training Centers denied members of the IDD community "the right to be part of the broader community" and therefore failed to provide services in the most integrated settings appropriate.¹⁰⁷ As mentioned, even before the DOJ had initiated its investigation, the Commonwealth had already begun working to reduce the population of the Training Centers because it essentially agreed with the DOJ's goal of community-based services.¹⁰⁸ Perhaps one reason for the Commonwealth's realization that care for its IDD population would need to be transitioned from the Training Centers to the community was the economic reality that the cost per person in a state institution was more than triple the cost for services within the community.¹⁰⁹

On January 26, 2012, the DOJ filed a complaint in the U.S. District Court for the Eastern District of Virginia alleging that the Commonwealth had violated the ADA.¹¹⁰ At the same time, a consent decree was filed for the Court's consideration.¹¹¹ Prior to the formal filing of the lawsuit, the

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.*

¹⁰⁵ Settlement Agreement, *supra* note 99, at 1. *See also History*, CENTRAL VA. TRAINING CTR., <http://www.cvtc.dbhds.virginia.gov/feedback.htm> (last modified Jan. 13, 2014).

¹⁰⁶ Settlement Agreement, *supra* note 99, at 1.

¹⁰⁷ Order Approving Consent Decree, *supra* note 9, at 5; Settlement Agreement, *supra* note 99, at 2.

¹⁰⁸ *See* Order Approving Consent Decree, *supra* note 9, at 5.

¹⁰⁹ *See* Press Release, The ARC of Virginia, "A New Day for Virginia": Statement of the ARC of Virginia on the U.S. v. Virginia Consent Decree (Aug. 24, 2012) [hereinafter The ARC of Virginia], *available at* http://www.thearcofva.org/docs/Statement_The_Arc_VA_US_v_VA_Consent_Decree.pdf (mentioning that the cost per person in a state institution was \$225,000 per year and the cost per person for community-based services was \$69,000 per year).

¹¹⁰ *See* Complaint, United States v. Virginia, 282 F.R.D. 403 (E.D. Va 2012) (No. 312-CV-00059-JAG).

¹¹¹ *See* Order Approving Consent Decree, *supra* note 9, at 1–2.

two sides had already worked together on a Settlement Agreement (the Agreement) that would aim to achieve their goals of dramatically changing the way the Commonwealth of Virginia provided services to its IDD populations.¹¹² During the course of the lengthy negotiations between the Commonwealth and the DOJ, it also became apparent that “Virginia ha[d] long waiting lists of disabled people who [were] not receiving appropriate services.”¹¹³

However, not everyone was happy that the DOJ and the Commonwealth had been working together. “[A] group of disabled [individuals and their families] moved to intervene to oppose the settlement.”¹¹⁴ They believed that the terms of the agreement were unfair to residents of Virginia’s five Training Centers who may not be suited to life outside the Training Centers or simply who did not want to be deinstitutionalized.¹¹⁵ In particular, the interveners claimed that the Agreement was illegal to the extent that it required the eviction of Training Center residents.¹¹⁶ They relied on language in the *Olmstead* decision that stated that there is no “federal requirement that community-based treatment be imposed on patients who do not desire it.”¹¹⁷

Before ruling on the Agreement, the Court did its own investigation. The Court, “accompanied by counsel and the Commissioner of Behavioral Health and Departmental Services,” visited a number of facilities (including both residential facilities and sites for supported day activities) that provide services to disabled individuals across Virginia.¹¹⁸ “The Court also held a fairness hearing . . . [in order to give the DOJ,] the Commonwealth, . . . and the Interveners [the opportunity] to put on evidence supporting their positions.”¹¹⁹

The Agreement was ultimately approved by an Order of the Court on August 23, 2012.¹²⁰ “The court order . . . point[ed] out that moving towards a community-based system will enable the Commonwealth to not only serve more people, but to serve them better.”¹²¹

¹¹² *Id.* at 2.

¹¹³ *Id.* at 5.

¹¹⁴ *Id.* at 2.

¹¹⁵ *See id.* at 2, 8.

¹¹⁶ *Id.* at 8.

¹¹⁷ *Id.*; 527 U.S. 581, 602 (1999).

¹¹⁸ Order Approving Consent Decree, *supra* note 9, at 2.

¹¹⁹ *Id.* at 3.

¹²⁰ *Id.* at 1.

¹²¹ The ARC of Virginia, *supra* note 109, at 1.

In addressing the Interveners' contention that the Agreement was unlawful, the Court emphasized that the DOJ did not insist that the Commonwealth close any of its Training Centers.¹²² Although the Court recognized that the Virginia Department of Behavioral Health and Developmental Services was trending away from the use of Training Centers, "the ultimate decision whether to close any Training Center lies not with the Department, but with the legislature."¹²³ In fact, the Agreement acknowledges that Virginia had a plan to deinstitutionalize its IDD population prior to the federal involvement.¹²⁴

The Commonwealth has made public its long-standing goal and policy, independent of and adopted prior to this Agreement or the Department of Justice's findings, of transitioning from an institutional model of care to a community-based system that meets the needs of all individuals with ID/DD, including those with the most complex needs, and of using its limited resources to serve effectively the greatest number of individuals with ID/DD.¹²⁵

Furthermore, the Court noted that the Interveners' position overlooked an important provision of Virginia state law that prevents anyone from being forcibly evicted from a Training Center.¹²⁶ In addition, the *Olmstead* decision has been said to stand for ensuring that the IDD population as the right to appropriate treatment within the community, not for guaranteeing that a particular state institution or treatment facility will be forever maintained.¹²⁷

The Agreement, which now has the force of law, set standards for the care of all of the Commonwealth's IDD population with a graduated timetable for meeting certain goals. It is stipulated that by the end of the Commonwealth's 2021 fiscal year, all provisions of the Agreement are to be

¹²² Order Approving Consent Decree, *supra* note 9, at 8–9.

¹²³ *Id.* at 9.

¹²⁴ See Settlement Agreement, *supra* note 99, at 12.

¹²⁵ *Id.*

¹²⁶ Order Approving Consent Decree, *supra* note 9, at 9. The Court also noted that if that provision of state law is repealed, the fairness of the Order could be revisited. *Id.* See also Va. Code § 37.2-837(A)(3).

¹²⁷ See Brief for The ARC of Virginia, et al. as Amici Curiae Opposing Proposed Interveners at 17, *United States v. Virginia*, 282 F.R.D. 403 (E.D. Va 2012) (No. 312-CV-00059-JAG).

met.¹²⁸ The Commonwealth's progress in implementing the benchmarks of the Agreement is to be reviewed semi-annually by an independent party that will prepare a report.¹²⁹ Although the precise details of the Agreement are beyond the scope of this Article, a number of the key provisions are summarized below.

The Agreement acknowledges that Virginia was in the process of planning to close four of its five Training Centers as part of its larger goal of providing its IDD services in a more integrated community-based system.¹³⁰ Many provisions of the Agreement were intended to facilitate the transition process by assisting those who would be at the highest risk of being institutionalized, those who would be in a position to transition out of the Training Centers, and all of their families who would be providing secondary support.

A total of 4,170 new waiver slots are to be added to the Commonwealth's HCBS Waiver program.¹³¹ These new waivers are allocated to various segments of the IDD population based on what the assessed need was determined to be.¹³² Two thousand nine hundred fifteen of the new waivers are to be set-aside for individuals with intellectual disabilities who are not currently being served by the Training Centers, specifically for those who would otherwise have been on the "urgent waitlist" for a waiver and for younger individuals who are otherwise residing in private facilities.¹³³ Four hundred fifty of the new waivers are to be set-aside for individuals with developmental disabilities who are not currently being served by the Training Centers, again, for those who would otherwise have been on the waitlist for a waiver and for younger individuals who are otherwise residing in private facilities.¹³⁴ The remaining 805 new waivers

¹²⁸ Settlement Agreement, *supra* note 99, at 31.

¹²⁹ *Id.* at 27–30. The First Independent Reviewer's Report was issued on December 7, 2012, the Second Independent Reviewer's Report was issued on June 11, 2013, and the Third Independent Reviewer's Report was issued on December 6, 2013. These reports, which were filed with the Court, are also available to the public at the Department of Justice's website. *United States v. Commonwealth of Virginia*, U.S. DEP'T OF JUSTICE, available at <http://www.justice.gov/crt/about/spl/virginia-ada.php> (last visited Apr. 8, 2015).

¹³⁰ Settlement Agreement, *supra* note 99, at 11.

¹³¹ *Id.* at 4.

¹³² *Id.* at 4–6.

¹³³ *Id.* at 4.

¹³⁴ *Id.* at 5.

are to be set aside for individuals who will be transitioning from institutional living in the Training Centers to life in the community.¹³⁵

The Commonwealth will also be providing additional services to support the goal of deinstitutionalization, including more comprehensive discharge planning for those who choose to transition out of the Training Centers,¹³⁶ as well as continued case management for all individuals who receive HCBS Waiver services under the Agreement.¹³⁷ The Agreement also requires Virginia to expand its integrated day activities, including supported employment, volunteer activities and recreational opportunities.¹³⁸ The Commonwealth must also develop a plan to increase the availability of independent living options to individuals with IDD who want to live in the community.¹³⁹ The Agreement stipulates that the Commonwealth will no longer be able to place an individual in any facility in which five or more people reside unless that individual chooses to live under such circumstances.¹⁴⁰

The Commonwealth is also required to establish a 24-hour-a-day, seven-days-a-week crisis response system.¹⁴¹ Included in that system will be a crisis hotline that will provide “information about and referrals to local resources,” mobile crisis response teams that can be sent out to individuals at their homes or other community settings, and “crisis stabilization programs” which will serve as alternatives to institutionalizing or hospitalizing individuals in need of inpatient stabilization services.¹⁴²

E. Sciarrillo ex rel. St. Amand v. Christie – 2:13-cv-03478-SRC-CLW – (D.N.J. 2013)

In New Jersey, the Department of Human Services is responsible for operating and maintaining the State’s seven developmental centers.¹⁴³

¹³⁵ *Id.* at 4.

¹³⁶ *Id.* at 15–22.

¹³⁷ *Id.* at 6–7, 20–26. Those at higher risk and those who have recently transitioned out of a Training Center are to receive an enhanced level of case management services, including face-to-face visits at least once a month. *Id.* at 24–25.

¹³⁸ *Id.* at 9–10.

¹³⁹ *Id.* at 11–13. The Settlement Agreement specifically provides for an \$800,000 fund to be established to provide and administer rental assistance. *Id.* at 12.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 7–9.

¹⁴² *Id.*

¹⁴³ TASK FORCE ON THE CLOSURE OF STATE DEVELOPMENTAL CTRS, FINAL REPORT AS SUBMITTED TO GOVERNOR CHRIS CHRISTIE AND THE NEW JERSEY LEGISLATURE, 5 (2012)

During the past decade, the number of individuals in the developmental centers has steadily decreased and it has become evident to the State that a number of its centers can now be closed.¹⁴⁴

In response to the *Olmstead* decision, the New Jersey Department of Human Services' Division of Developmental Disabilities instituted its own plan for transitioning 1,850 individuals with IDD out of its developmental centers and into the community over the course of an eight year period.¹⁴⁵ This *Olmstead* Plan was formally set-out in a document titled "Path to Progress," which was released in May 2007.¹⁴⁶ Since that time, the Division of Developmental Disabilities has been appropriated funds in each fiscal year to advance its Path to Progress, which has included the expansion of community services and residential opportunities for individuals with IDD.¹⁴⁷

The Path to Progress both provides for expanded services for IDD individuals within the community and outlines a process for allowing developmental center residents and their families to learn about and choose from various housing and service options in the community.¹⁴⁸ The Division of Developmental Services maintains that it takes between twelve and fifteen months to develop the supports necessary for an individual to successfully transition from a developmental center to life in the community.¹⁴⁹ After that individual has been moved to the community, the Division continues to monitor his or her progress via staff visits and is there

[hereinafter TASK FORCE REPORT], *available at* www.state.nj.us/humanservices/news/hottopics/Final_Task_Force_Report.pdf. The seven developmental centers are: Green Brook Regional Center (Somerset County), Hunterdon Developmental Center (Hunterdon County), New Lisbon Developmental Center (Burlington County), North Jersey Developmental Center (Passaic County), Vineland Developmental Center (Cumberland County), Woodbine Developmental Center (Cape May County) and Woodbridge Developmental Center (Middlesex County). *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Olmstead*, STATE OF N.J. DEP'T OF HUMAN SERVS., DIV. OF DEVELOPMENTAL DISABILITIES, www.state.nj.us/humanservices/ddd/programs/olmstead/ (last visited Apr. 8, 2015).

¹⁴⁶ STATE OF N.J. DEP'T OF HUMAN SERVS., DIV. OF DEVELOPMENTAL DISABILITIES, PATH TO PROGRESS (2007) [hereinafter PATH TO PROGRESS], *available at* <http://www.state.nj.us/humanservices/ddd/documents/Documents%20for%20Web/Olmstead/JSOlmPlanFinal.pdf>.

¹⁴⁷ TASK FORCE REPORT, *supra* note 143, at 5.

¹⁴⁸ PATH TO PROGRESS, *supra* note 146, at 12–13.

¹⁴⁹ STATE OF N.J. DEP'T OF HUMAN SERVS., DIV. OF DEVELOPMENTAL DISABILITIES, *supra* note 145.

to assist in times of emergency by way of a crisis response team.¹⁵⁰ Of the 204 individuals transitioned from New Jersey's developmental centers to the community between January 2009 and December 2011, 94% remained successfully in the community.¹⁵¹

In May 2011, the Division of Developmental Services incorporated a plan to close one of the State's developmental centers, the Vineland Developmental Center, into its Path to Progress.¹⁵² The plan called for the closure of the Center by June 30, 2013.¹⁵³ However, the plans to close Vineland Developmental Center were met with strong opposition by some families, legislators and employees of the center.¹⁵⁴ Ultimately, legislation was signed into law on December 14, 2011, which called for the establishment of a five person Task Force to perform a comprehensive evaluation of New Jersey's seven developmental centers and to provide binding recommendations to the State regarding the closure of one or more of the centers.¹⁵⁵

The Task Force was quickly formed and then began its designated purpose.¹⁵⁶ During the six-month evaluation period, Task Force members toured the seven developmental centers and community residences¹⁵⁷ and held nine public hearings¹⁵⁸ before deliberating independently and collectively on the information received.¹⁵⁹ The Task Force was given very specific criteria to be used in its evaluation of the seven centers and its ultimate determination as to which of them should be closed.¹⁶⁰

¹⁵⁰ PATH TO PROGRESS, *supra* note 146, at 36–37.

¹⁵¹ TASK FORCE REPORT, *supra* note 143, at 5.

¹⁵² *Id.*

¹⁵³ *Id.* (Taking the plans into account, “[t]he Governor’s proposed Fiscal Year (FY) 2012 budget contained language identifying Vineland Developmental Center (VDC) for closure by June 30, 2013.”).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 5–6. P.L. 2011, c. 143 received nearly unanimous bipartisan support from both houses of the New Jersey Legislature. *Id.*

¹⁵⁶ *See id.* at 6–7.

¹⁵⁷ *Id.* at 7.

¹⁵⁸ *Id.* at 6. At the nine public hearings, the Task Force was presented with information and perspectives from “families, self-advocates, expert witnesses, interested stakeholders, relevant Department representatives, and advocacy organizations” and the general public. *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 7. Pursuant to P.L. 2001, c. 143, the Task Force was supposed to evaluate the seven developmental centers based on the following five criteria (in order of importance):

In a Final Report submitted to Governor Chris Christie and the New Jersey Legislature on August 1, 2012, the Task Force presented its binding recommendation that the Department of Human Services should “develop and implement a plan to close” two of the seven centers, North Jersey Developmental Center and Woodbridge Developmental Center, within the next five years.¹⁶¹ At the time of the report, these two developmental centers housed approximately 700 residents and provided jobs for more than 2,600 people.¹⁶²

Contrary to the previous plans by the Division of Developmental Services, the Task Force recommended that Vineland Developmental Center should not be closed in the foreseeable future.¹⁶³ The Final Report also included a number of non-binding recommendations about ensuring a smooth transition for each individual moving from a developmental center into the community and honoring the rights of all developmental center

[(1)] the number of individuals with developmental disabilities residing in a developmental center who want or do not oppose, or if applicable, whose guardians want or do not oppose, community placement and whose interdisciplinary team have recommended such a placement; [(2)] the present capacity of the community to provide and or develop specialized services and supports to individuals with developmental disabilities or the time required to allow for the development of capacity to provide such specialized services; [(3)] the operational needs of the Department of Human Services in meeting the range of needs and preferences of all affected individuals served by the Division of Developmental Disabilities in the Department of Human Services; [(4)] the economic impact on the community in which the developmental center is located if that center were to close; and [(5)] the projected repair and maintenance costs of the developmental center as estimated by the Department of Human Services.

Id.

¹⁶¹ *Id.* at 8. The five year window was intended to allow for a plan that would take into account the needs of the developmental center’s residents and operational needs of the centers and the added community services that would come into effect. *Id.* In fact, the Report states that the Department of Human Services should be able to move residents and staff from the two closing centers to the other centers that will remain open. *Id.*

¹⁶² See Susan K. Livio, *N.J. Task Force Ordering Closure of Two State Institutions for Disabled People Posts Report Online*, NJ.COM, (Aug. 4, 2012), http://www.nj.com/news/index.ssf/2012/08/nj_task_force_ordering_closure.html.

¹⁶³ See TASK FORCE REPORT, *supra* note 143, at 3.

residents to choose whether they would like to move out into the community or to continue to live in a developmental center.¹⁶⁴

The Final Report immediately “elicited a union protest and a vow to sue by some families of disabled people” who lived in the two centers which were bound for closure.¹⁶⁵ By June 2013, a class action lawsuit had been filed on behalf of thirty-five IDD individuals who resided at the North Jersey and Woodbridge Developmental Centers seeking to prevent the State from closing the two developmental centers and moving them to other facilities.¹⁶⁶

In their complaint, the Plaintiffs alleged that by offering them the choice between a placement within the community and moving to a different developmental center “located over one hundred miles away,” the state was denying them “access to their current high level of treatment and services” and that the decision to close the two developmental centers will expose them to a “significant risk of harm.”¹⁶⁷ The Plaintiffs claimed that this action by the State amounted to a violation of the ADA as interpreted by the *Olmstead* decision.¹⁶⁸

In September 2013, the DOJ filed a Statement of Interest in the lawsuit articulating its position that the ADA does not create a right to remain in a particular institution, despite the language in *Olmstead* which states “that there is no federal requirement that community-based services be imposed upon those who do not desire them.”¹⁶⁹ The Statement of Interest explained that the ADA, as interpreted by *Olmstead*, does not require a person to be

¹⁶⁴ *Id.* at 8–9.

¹⁶⁵ Livio, *supra* note 162.

¹⁶⁶ See Sciarrillo ex rel. St. Amand v. Christie, No. 13-03478 (SRC), slip.op., 2013 WL 6586569 (D.N.J. Dec. 13, 2013), *appeal docketed*, No. 14-1082 (3d Cir. Jan. 15, 2014); Susan K. Livio, *Families of Disabled Sue N.J. to Block Developmental Center Closings*, NJ.COM (June 5, 2013), http://www.nj.com/politics/index.ssf/2013/06/families_of_disabled_sue_state.html.

¹⁶⁷ *Sciarrillo*, 2013 WL 6586569, at *1 (citations omitted).

¹⁶⁸ *Id.* The Plaintiffs also asserted causes of action under two other federal statutes, the Rehabilitation Act and the Social Security Act, and a § 1983 constitutional due process claim. *Id.* at *2.

¹⁶⁹ Statement of Interest of the United States of America at 8, No. 13-03478 (SRC), slip.op., 2013 WL 6586569 (D.N.J. Dec. 13, 2013), *appeal docketed*, No. 14-1082 (3d Cir. Jan. 15, 2014) (citing to *Olmstead*, 527 U.S. 581, 602 (1999)) (citations omitted). The Statement of Interest also emphasizes that courts have repeatedly found that it does not violate federal law for a state to close its institutions. *Id.* at 9.

placed in a community setting if he or she opposes such a placement.¹⁷⁰ However, *Olmstead* cannot be read to create a federal right to institutionalization.¹⁷¹

After the State of New Jersey moved to dismiss the claims, the Court dismissed the Complaint with prejudice on December 13, 2013.¹⁷² In its opinion, the Court stated that:

Plaintiffs' interpretation of *Olmstead* is untenable. . . . It may be a bad medical decision, or poor policy, but it is not discrimination based on disability. This Court will therefore join the numerous other federal courts have rejected similar "obverse *Olmstead*" arguments in circumstances where a State has decided to close treatment facilities for the developmentally disabled or relocate such disabled individuals to community settings.¹⁷³

Still, there are vocal opponents to the plans to close any of the State's developmental centers and they are likely to fight the process each step of the way.¹⁷⁴

V. CONCLUSION

There are currently several public developmental centers for the intellectually and developmentally disabled being shut down or scheduled to be shut down in various states across the country.¹⁷⁵ Each closing may have its own unique story, but they all share some common elements, in particular, federal support.¹⁷⁶ Looking at the facts and the current trends, it is unlikely that opponents to the closures will find much success.¹⁷⁷

¹⁷⁰ *Id.* at 8.

¹⁷¹ *Id.* at 9.

¹⁷² *Sciarrillo*, 2013 WL 6586569, at *1.

¹⁷³ *Id.* at *4 (citations omitted).

¹⁷⁴ See, e.g., SAVE RESIDENTS' HOMES AT DEVELOPMENTAL CTRS., <http://saveourddcenters.org/index.php> (last visited Apr. 8, 2015) ("[A] coalition of families, friends and caregivers of the residents of New Jersey's Developmental Centers" with the "mission is to keep all of New Jersey's Developmental Centers open as a life-saving choice for our most severely intellectually disabled individuals and their families.").

¹⁷⁵ See *supra* Part II.

¹⁷⁶ See *supra* Part IV.

¹⁷⁷ See *supra* Part II, IV-V.

Some states have introduced their own plans to deinstitutionalize and others have been or will be compelled to do so by outside forces.¹⁷⁸ Ultimately, these federally mandated *Olmstead* plans will all likely include the closure of one or more developmental centers.¹⁷⁹ Although certain groups are likely to fight the planned closures, it is unlikely they will be able to prevent them.¹⁸⁰ To the extent that a state does not institute sufficient community-based services or there is a challenge to a state's efforts to deinstitutionalize its intellectually and developmentally disabled population, the Department of Justice will get involved.¹⁸¹ Although the Department of Justice will not explicitly order the closure of a developmental center, its insistence on an *Olmstead* plan, in conjunction with the economics of the situation will inevitably lead to closures.¹⁸²

¹⁷⁸ See *supra* Part III–V.

¹⁷⁹ See *supra* Part IV.A.

¹⁸⁰ See *supra* Part IV.B, V.

¹⁸¹ See *supra* Part IV.

¹⁸² See *supra* Part IV.A, V.