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Reasonable Modification or Fundamental Alteration? Recent Developments in ADA Caselaw and Implications for Behavioral Health Policy

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Executive Summary

This issue brief examines the concept of fundamental alteration under the Americans with Disabilities Act (ADA); specifically it considers when proposed modifications of public programs under Title II of the ADA will be considered to amount to the type of fundamental alteration that lies beyond judicial power to compel. The issue of when a program change constitutes a fundamental alteration is important in state community integration planning efforts, since these types of changes will require legislative action.

The ADA does not define the terms "reasonable modification" or "fundamental alteration" or "undue financial and administrative burden" in monolithic style to be applied across all cases and in all situations. The terms are contextual and depend in part on the specific programs and activities to which they apply and thus can be understood only in the context of their application, by carefully weighing the evidence.

Fundamental alteration caselaw since the United States Supreme Court's 1999 decision in *Olmstead v L.C.* suggests that courts are likely to closely scrutinize a fundamental alteration defense raised by a

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state once plaintiffs have made a showing of medically unnecessary institutionalization. At the same time, courts will classify a proposed change as fundamental in nature in those cases in which evidence is presented that a public program's requirements and design are indispensable to its essential nature. When a state is shown to have a history of waiving its own requirements and program rules, courts will find the proposed modification reasonable and not of a fundamental nature.

The implications of this standard for behavioral health policy are important. Many of the program changes needed by qualified persons with disabilities related to behavioral health are ones that require what courts view as basic alteration in program design, including across-the-board changes in Medicaid coverage limits. In the case of other programs and services, individuals may require changes in eligibility rules applicable to community health, housing, and support services, as well as greater levels of investment into community-based service alternatives.

Identifying modifications that amount to a fundamental alteration should be a feature of all post-*Olmstead* planning activities, particularly in the case of persons with disabilities whose unnecessary institutionalization is relatively common, such as persons with mental disabilities. To be considered "effectively working" as required by the *Olmstead* decision, state plans presumably should identify those broader investments that are required to achieve community integration, that require "fundamental alterations" in public programs, and a timetable for achieving such change.

The goal of the ADA is to promote community integration. To achieve this goal the law identifies two levels of necessary changes: reasonable modifications in programs and fundamental alterations. The former is within the purview of courts to order as a remedial matter, while the latter lies within the purview of the legislative process and is therefore particularly germane to long term process of creating "effectively working plans."

Cases decided under the ADA and its predecessor statute §504 of the 1973 Rehabilitation Act, suggest that a finding of medically unreasonable exclusion and segregation will trigger closer scrutiny by courts and that funding alone will not deter a reasonable modification order. However, effectuating changes in insurance coverage, particularly Medicaid, is viewed as a matter of fundamental alteration. In deciding the issue, courts will take a contextual approach, examining the needs of all persons with disabilities, not merely the subgroup for whom community residence is appropriate.

What this means for persons with mental disabilities is that essential changes in insurance coverage, the creation of alternative community residential placements, and other investments that make community residences possible, are the types of changes that courts probably would consider fundamental. Of particular importance may better coverage of outpatient rehabilitation and clinical services, greater access to personal attendant services in the case of persons who need an attendant or support with mental health needs only, and targeted case management to ensure support for behavioral-related disabilities. Because these changes are considered fundamental, the *Olmstead* planning process to develop long-term investments becomes critical. Federal supports such as the New Freedom Initiative can promote this type of change and investment and presumably will spur the types of deeper changes that lie beyond the purview of judicial orders.

Introduction

This issue brief examines the requirement in Title II of the 1990 Americans with Disabilities Act (ADA) that persons with disabilities (including persons with mental illness and addiction disorders (MI/AD) be provided health care and related support services in the most integrated settings when medically appropriate. It further examines how the ADA's concepts of "reasonable modification" and "fundamental alteration" may affect a public agency's community integration obligations under the law. These intertwined legal principles of community integration, reasonable modification, and fundamental alteration lie at the heart of the ADA.

In its landmark 1999 decision, the U.S. Supreme Court in *Olmstead v. L.C.,*[1] a case involving two women in Georgia with mental disabilities who were inappropriately institutionalized in an inpatient psychiatric unit, the Court held that under Title II of the ADA, States are required to provide persons with mental disabilities with community-based treatment rather than placement 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 State and the needs of others with mental disabilities.

These requirements, as articulated in *Olmstead*, serve to measure the extent of public agencies' duties under the ADA, yet the ADA statute, its implementing regulations, and related caselaw offer few guideposts for understanding them. Despite this limited guidance, certain judicial principles are beginning to emerge and are the focus of this analysis.

As States engage in comprehensive planning and implementation efforts to comply with the ADA community integration mandates outlined in the *Olmstead* decision,[2] stakeholders who contribute to these efforts need to have thorough and timely information about the ADA's underlying principles. How various courts have interpreted the meaning and scope of reasonable modification and fundamental alteration, and the judicial perspectives they have taken, serve to illuminate and inform the choices that face State lawmakers, State agency directors, persons with disabilities and their advocates, and the providers who serve persons with disabilities. It may be that changes that are determined by stakeholders to amount to fundamental alterations can be identified as candidates for long-term reform efforts and prioritization. On the other hand, those changes that have the characteristics of reasonable modifications may be more readily accomplished within a relatively short time frame through either formal or informal public agency action, depending on the scope of administrative powers granted an agency by a State legislature. The purpose of this issue brief is to provide readers with critical information derived from relevant ADA-related caselaw that will assist in making these distinctions.

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[1] 119 S. Ct. 2176 (1999).

[2] Rosenbaum, S. Issue Brief #17: "*Olmstead v L.C.*: Federal Implementation Guidelines and an Analysis of Recent Cases Regarding Medicaid Coverage of Long Term Care Services for Persons with Disabilities." Prepared for the Substance Abuse and Mental Health Services Administration. October 2001. Available at http://www.samhsa.gov/omc.

This issue brief begins with a brief review of the ADA, including an overview of the law and provisions relevant to community integration, fundamental alteration and reasonable modification. It also summarizes the specific provisions of the ADA that relate to persons with mental illness and addiction disorder disabilities. The issue brief then reviews the Supreme Court's decision in *Olmstead* and describes the principles that the decision sets forth for applying ADA community integration requirements to public programs. It then reviews community integration cases decided since *Olmstead* and discusses and synthesizes these decisions and their implications for post-*Olmstead* planning related to community based services for persons with MI/AD conditions.

The accompanying Appendix contains short summaries of each of referenced case, highlighting the relevant claims and defenses relating to reasonable modifications, fundamental alteration, and the ADA's community integration mandate.

Background and Overview

Brief Review of the ADA and Pertinent Definitions

The ADA, enacted in 1990, is a remedial law that built upon earlier legislative efforts to end the discrimination and segregation that characterized public and private treatment of persons with disabilities. The ADA consists of several titles reaching discrimination in both public and private settings.[3] The ADA represented a far-reaching expansion of the 1973 Rehabilitation Act by articulating Congress' awareness of the historical inequities of discriminatory policies and practices against persons with disabilities, and its intent to address them by imposing duties on public entities to ensure that such policies and practices be eliminated. As stated in the ADA's Final Rule:

> Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do. Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status.[4]

Title II of the ADA[5] applies to public program and tracks its predecessor law (§504 of the Rehabilitation Act of 1973[6]). Title II sets forth certain basic requirements regarding treatment of persons with disabilities by programs and activities operated by public entities. Figure 1 summarizes these requirements, including the ADA's treatment of persons with MI/AD as qualified persons.

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[3] Rand Rosenblatt, Sara Rosenbaum and David Frankford, *Law and the American Health Care System* (2001-2002 Supplement) Foundation Press, NY, NY.

[4] Final Rule implementing 28 C.F.R. § 35.130.

[5] 42 U.S.C. § 12132. The ADA also comprises Title I, which prohibits discrimination in employment and employer-sponsored benefits and Title III, which prohibits discrimination in access to places of public accommodation, and other Titles not addressed by this issue brief.

[6] 29 U.S.C. 794.

Figure 1. Key Elements of Title II of the ADA

TERM	DEFINITION
Responsibilities of public entities	[N]o 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.
Public entity	[…]any State or local government or any department, agency, special purpose district, or any other instrumentality of a State or States or local government.[7]
Qualified individual with a disability	[…] an individual who, with or without reasonable modifications to rules, policies, or practices […] meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[8]
Disability	[…] physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment.[9]
Specific MI/AD conditions that are considered to be disabling	[A]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[10] [Included are] […] mental retardation, emotional illness, specific learning disabilities, […] drug addiction, and alcoholism.[11] The following conditions are not included in the definition of disability: homosexuality, bisexuality, transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, or pyromania, or psychoactive substance use disorders resulting from *current illegal use of drugs.*[12] [emphasis added]

Final regulations implementing Title II clarified the exclusion of persons engaged in the "current illegal use of drugs" from ADA protections. The Preamble made clear that the exclusion is intended to permit program exclusions based on current illegal drug use but not as a basis for denying ADA protections to persons with addiction disorders:

> Addiction is a disability, and addicts are individuals with disabilities protected by the Act. The protection, however, does not extend to actions based on the illegal use of the substance. In other words, an addict cannot use the fact of his or her addiction as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs. […] Paragraph (b) […] prohibits denial of health services, or services provided in connection with drug rehabilitation to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to services. […] [B]ut, once an individual has been admitted to a program, abstention may be a necessary and appropriate condition to continued participation. The final rule therefore provides that a drug rehabilitation or

[7] 42 U.S.C. §§ 12131(1)(A)-(B) (1994 & Supp. V 1999.) State and local governments and their agencies operate a variety of services and programs for persons with MI/AD disabilities, including institutional, residential, and ambulatory care. As such, they are considered covered entities for purposes of Title II.
[8] 42 U.S.C. § 12131(2).
[9] 42 U.S. C. § 12102(2). "Major life activities" includes "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 35.104 (2001).
[10] 28 C.F.R. § 35.104(2001).
[11] *Id.*
[12] 42 U.S.C. § 12211.

> treatment program may prohibit illegal use of drugs by individuals while they are participating in the program[13]

The ADA Concepts of Integrated Setting, Reasonable Modification, and Fundamental Alteration

Federal regulations implementing Title II of the ADA require that public entities administer their programs in "the most integrated setting appropriate to the needs of" a "qualified individual with a disability".

> […] [T]he public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, i.e., in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, and that persons with disabilities must be provided the option of declining to accept a particular accommodation."[14]

In order to achieve this objective, the rules also require that a covered entity make "reasonable modifications" in its programs and activities in order to avoid discrimination, unless it can show that making the modification would "fundamentally alter" the nature of its service, program or activity:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.[15] […] [I]n meeting the program's accessibility requirement, a public entity is not required to take any action that would result in a fundamental alteration in the nature of its service, program, or activity or in undue financial and administrative burdens. […] This paragraph does not establish an absolute defense; it does not relieve a public entity of all obligations to individuals with disabilities. Although a public entity is not required to take actions that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity. […] In determining whether financial and administrative burdens are undue, all public entity resources available for use in the funding and operation of the service, program, or activity should be considered. The burden of proving that compliance with paragraph (a) of § 35.150 would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens rests with the public entity.[16]

The statute and regulations do not define the terms "reasonable modification" or "fundamental alteration" or "undue financial and administrative burden" in monolithic terms to be applied across all cases and in all situations. This reflects Congress' awareness of the wide, state-by-state variation in programs and services for persons with physical and mental disabilities and indicates

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[13].28 C.F.R. § 35.131. "Nondiscrimination on the Basis of Disability in State and Local Government Services." Final Rule. U.S. Department of Justice, Office of the Attorney General. January 26, 1992. Available at http://www.usdoj.gov/crt/ada/reg2.html. Accessed February 7, 2002.

[14] 28 C.F.R. § 35.130(d).

[15] 28 C.F.R. § 35.130(b)(7).

[16] Final Rule implementing 28 C.F.R. §35.135(a)(3).

Congressional desire that these terms be interpreted contextually in specific circumstances through the weighing of evidence. Fact specific terms and measures, coupled with a private right of action to enforce the guarantee of non-discrimination, mean that litigation under the ADA has become quite common. When litigation does arise, the duty of the courts is to determine whether a proposed change in a public program sought by a person with a disability is simply a reasonable modification in program administration or a fundamental alteration in program structure or design.

The *Olmstead* case, discussed below, offers an example of changes that were viewed by the Court as simply a reasonable modification in state practices, since the relief sought by plaintiffs (two Medicaid eligible women with mental illness) was the right to one of the state's federally approved Medicaid home and community care slots in lieu of medically inappropriate institutional care. Although it did not reach the issue on its merits, the majority opinion's analysis of the women's circumstances suggested at least that it did not view the state's failure to fully fund its approved home and community care program as the basis for a fundamental alteration defense.

But often the problem is far more complex than having an approved Medicaid plan that is not fully funded, not only a potential violation of the ADA but of the Medicaid program itself.[17] Take for example an institutionalized person for whom medical care is appropriate but who is on a waiting list for an approved community placement, not because the state's approved program is underfunded but because even at fully funded levels, the state's program is not capable of meeting community placement needs. Under the ADA the burden will be on the plaintiff to prove that a modification (in this case an actual expansion of the home care program) is reasonable. (Some courts, however, have extended the claimants' obligation to also prove that the modification does not amount to a fundamental alteration.)[18] If the court finds *prima facie* evidence of reasonableness, then it will be up to the defendants to show why in fact the proposal amounts to a fundamental alteration of the program.

Regardless of how the burdens of proof are allocated, once a court concludes based on the evidence that the modification a plaintiff claims is reasonable is actually a fundamental alteration of the program or activity in question, the public agency has a total affirmative defense. Even if the practice or policy has been shown to be discriminatory, the modifications required of the public entity are deemed to be so great or so financially and/or administratively burdensome that they exceed what the ADA requires the public entity to reasonably do. In effect, the issue becomes a matter for the political, rather than the judicial, process. For this reason, the point at which a proposed modification becomes a fundamental alteration is critical in understanding the scope and reach of the ADA. The following section discusses how the courts have assessed this "tipping point" and the implications this has for treatment of persons with disabilities in integrated community-based settings.

Olmstead v. L.C. and the Concept of Reasonable Modification and Fundamental Alteration

[17] Alabama Nursing Home Assoc. v Harris

[18] Smith, J. and Calandrillo, S. "Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits after *Olmstead v. L.C.*," 24 *Harvard Journal of Law & Public Policy* 695-727 (Summer 2001).

The 1999 *Olmstead* decision is considered a legal landmark for two important reasons. First, it established that medically unnecessary institutionalization constitutes discrimination under the ADA. Second, the decision provided additional, although ambiguous, standards for measuring when public agencies have satisfied their obligations toward persons with disabilities under the ADA's community integration mandate.

Prior to *Olmstead*, community integration was commonly understood as a legal obligation that required public entities to accord equal treatment between qualified persons with disabilities and those without a disability. As long as a program or service did not discriminate against persons with disabilities as a whole (as compared to persons without disabilities as a whole), it was assumed to meet ADA requirements. This "equal treatment" standard was thought to be the case even if within the group of qualified disabled persons, certain subgroup were treated differently.

The majority opinion in *Olmstead* effectively rejected this "disability versus non-disability" view and held instead that the community integration obligation prohibits discrimination by public entities within the overall class of persons with disabilities.[19] The Court determined that Georgia officials violated the ADA by continuing to unnecessarily institutionalize persons with MI/AD disabilities while simultaneously withholding funds for approved community placement slots. Thus, treating persons with schizophrenia differently than persons with developmental disabilities (both of which fall within the scope of the definition of an MI/AD disability) might not have been interpreted as amounting to discrimination.

In considering the reach of the ADA in the context of discrimination in institutionalization, the majority opinion explored the inherent tension underlying community integration between the concepts of reasonable modification on one hand and fundamental alteration on the other:

> The State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of "reasonable modification" to avoid discrimination, and allows States to resist modifications that entail a "fundamental alteration" of the State's services and programs. […] Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.
>
> In evaluating a State's fundamental-alteration defense, [lower courts] must consider, in view of the resources available to the State, not only the cost of providing community-based care

[19] *See, e.g., Johnson v. Kmart*, 273F. 3d 1035 (11th Cir. 2001). In recent years this concept of fair treatment for all subclasses of persons with disabilities has been extended to employers and employee benefit plans that single out certain disabilities for more limited benefits and coverage. In this context, the "insurance safe harbor" provision in the ADA would appear to shield employee health and disability benefit plans from liability for all but the most overtly and intentionally discriminatory efforts to limit coverage on the basis of disability. Whether this safe harbor applies to state Medicaid programs appears to be an open question. It is not yet clear how *Olmstead*'s prohibition against differential treatment in the provision of public benefits based on disability will affect state discretion over Medicaid benefit design choices that limit coverage based on disability.

> to the litigants, but also the range of services the state provides others with mental disabilities, and the state's obligation to mete out those services equitably.[20]

The majority opinion also established certain parameters to a public agency's obligations under the ADA:

- First, the Court clarified that the decision to furnish public services *at all* is a matter of State discretion.

- Second, the Court rejected the framework articulated by lower courts and found that in determining the level and scope of obligations owed any particular person with an MI/AD disability, a State can weigh the potential effects of the requested modification against the potential effects of all persons with such disabilities. In other words, the majority established that the issue is not merely whether any single person can be served in the community for the same or less money than in an institution, but how such a move into the community will affect the entire group of persons with MI/AD disabilities, including person with what professionals characterize on the basis of reasonable evidence as institutional-level needs. Thus, State officials might be able to successfully defend against a request for services or program modification if they can show that accommodating this request would involve a potentially harmful reduction in services to other equally needy persons in the group. For example, a state might be able to defend against modifications in current programs for persons with MI/AD on the ground that such modifications would reduce necessary services to persons in need of institutional care. The burden of proof presumably would lie with the state, but the defense would be acceptable.

- Third, the Court strongly suggested that if a State were to develop an effective "comprehensive plan" to transfer persons with MI/AD disabilities out of unnecessary institutional care into the community, the State could successfully defend itself against a claim that it violated the community integration mandate:

> If […] 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.[21]

By suggesting this idea of an effective State plan, the Court appeared to signal that it assumed that State officials would engage in ongoing identification of persons with disabilities who can live in integrated settings and for whom institutional care is medically unnecessary. Where immediate integration can be achieved through "reasonable modification" such changes should be forthcoming. Where the changes involve a more "fundamental alteration" they should be pursued through the development of "effectively working plans" that identify the more significant changes that are required and set forth a timetable for their development.[22]

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[20] *Olmstead* at 597.

[21] *Id.* at 603-06.

[22] In July 2000, The Arc of the United States, an advocacy organization for persons with mental retardation and developmental disabilities, surveyed States regarding progress made toward developing *Olmstead* plans. It found that 20 States had an *Olmstead* plan or were in the process of developing one. The Arc's conclusion from its survey results was

that States, in general, had made little progress in developing plans to implement the *Olmstead* decision, although it stated that there may have not been adequate time since the 1999 court decision for measurable progress to have been made. Available at http://www.thearc.org/olmstead_report.htm. Accessed February 7, 2002. In addition, since 2000, the Centers for Medicare and Medicaid Services (CMS) has issued several guidelines to State officials to assist them in the development of their plans. *See* Rosenbaum, S. (2001). "Issue Brief 17: *Olmstead v. L.C.*: Federal Implementation Guidelines …" op. cit.; *and* "Under Court Order: What the Community Integration Mandate Means for People with Mental Illness: The Supreme Court Ruling in *Olmstead v. L. C.*" Bazelon Center for Mental Health Law. 1999. Available at http://www.bazelon.org. Accessed February 8, 2002. *See also* Rosenbaum S, Teitelbaum J, and Stewart A. "*Olmstead v. L.C.*: Implications for Medicaid and Other Publicly Funded Health Services." *Health Matrix.* (forthcoming, 2002).

Cases That Address Community Integration and Fundamental Alteration

Although the concept of fundamental alteration has received significant attention, the concept first arose under litigation to enforce ADA Title II's predecessor, §504 of the Rehabilitation Act of 1973. In 1979, the U.S. Supreme Court decided *Southeastern Community College v. Davis*[23] a §504 lawsuit which involved a nursing student who was profoundly deaf and who had requested that her federally assisted nursing school make changes to its programs to accommodate her disability. The Court held that the ability to hear was so basic to nursing that to require the college to alter its program would amount to a change in the "essential nature" of nursing and nurse training. As a result, the modifications the student asked for lay beyond the outer limits of the college's legal obligations under the Rehabilitation Act. The fact that her proposed modifications changed the essential nature of nursing and nurse training made her request unreasonable according to the Court, and she was not able to obtain the legal remedy she sought (*i.e.*, an adapted nursing program). *Davis* thus established the rule that changes to the essential nature of a public entity's program constitute a fundamental alteration and are not remedially required under federal disability law.

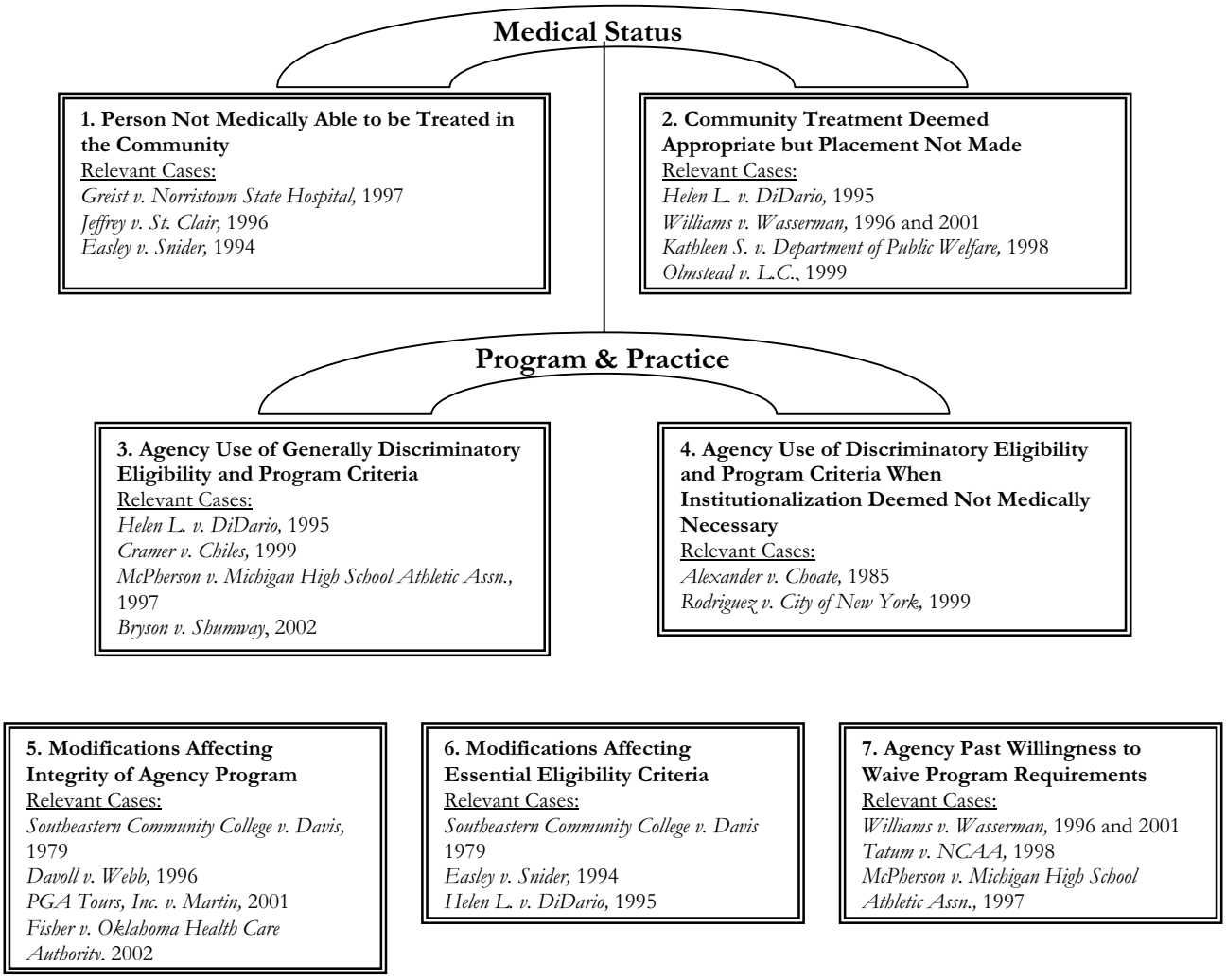
Other pre-ADA cases also have explored the limits of reasonable modifications in a §504 context. Most notably, in *Alexander v Choate*,[24] the Supreme Court ruled in 1985 that a State Medicaid agency was not obligated to modify the design of its State Medicaid plan by removing a 14-day annual cap on hospital inpatient services in order to ensure a level of coverage for persons with disabilities that would better reflect their greater need for services.

Since the enactment of the ADA and the codification of its community integration and fundamental alteration principles, a number of cases in addition to *Olmstead* have examined how far a public entity must go to modify its existing programs and practices to achieve community integration for persons with physical and mental disabilities. In deciding these cases, courts have taken several different vantage points to analyze the claims and defenses and have adhered to the earlier precedent of §504. Understanding these vantage points and caselaw trends is important to understanding the types of proposed changes that might trigger a legal obligation under the ADA.

Figure 2, below, sets forth and groups the various cases that have dealt with the issue of fundamental alteration and reasonable modification.

[23] 442 U.S. 397 (1979).
[24] 442 U.S. 287 (1986).

Figure 2. – Community Integration and Fundamental Alteration Caselaw



Discussion of Emerging Caselaw Principles

Taken together, the cases identify a series of basic vantage points from which the courts begin their analyses. Vantage Points 1 and 2 above can be thought of as patient-specific; that is, the court primarily considers the status of the qualified person with a disability, particularly the extent to which institutional care is not necessary and placement in a community-based residential setting is appropriate. Vantage Points 3 through 7, by contrast, are cases that focus on the program for which modification claims have been made. These cases are concerned primarily with how a public entity program is structured and managed, *i.e.*, its essential nature, its criteria for participation, and the manner in which the public entity governs access to and utilization of its services. To the extent that *Olmstead* linked a finding of discrimination to a state's failure to make reasonable modifications, the bulk of the caselaw since *Olmstead* has centered on vantage points 3 through 7. A discussion of each of these trends in caselaw perspectives regarding the community integration mandate follows.

1. **Courts are unlikely to require States to provide community-based services for persons with disabilities for whom State medical professionals have provided credible evidence that they are not medically able to be treated in the community**. When a person with a disability is found to be not medically able to be treated in the community, it would be a fundamental alteration to the essential purposes of both institutional and community services to require the State to arrange community services.[25] Similarly, State agencies have been found to have no obligation to make modifications in programs where the claimants have been shown to have mental disabilities that render them unable to live in a community-based setting.[26] These types of cases hinge, of course, on a court's acceptance of evidence that the State's procedures for making placement determinations regarding the medical appropriateness of community residence meet minimum legal standards of fairness and due process.

2. **In contrast however, once there is sufficient medical evidence that community-based care is appropriate for the person(s) with disabilities filing claims, courts are likely to require States to make reasonable modifications for release or community residence and reject cost as a defense.** This is among the most common situations presented by a series of ADA cases, in which a State asserts in its defense that providing the requested service or modification (even though medically justifiable) would be too costly. Most notable in these cases are court rulings that a State cannot use as a valid defense the fact that its legislature failed to appropriate sufficient funds, or that it failed to adequately allocate funds between institutional and community residency programs in its budget.[27] This rejection of cost as a defense is particularly striking when Medicaid is the source of funding, and the only necessary modification the State needs to make is to increase the level of financing for covered services (either by funding its already approved home and community-based waiver slots or through greater levels of non-waivered State plan services).[28] Failing to initiate community placement activities for persons determined capable of living in the community, while simultaneously taking steps to close an institution, has been found to be a violation of the integrated service obligation. In this situation, courts have concluded that requiring a State to fund community services is not a fundamental alteration of a State's programs.[29] This suggests that once a State, through its own planning efforts, puts its community transition program designs and expenditure arrangements into play, a court will step in and order further modifications to ensure that the results of the redesign are not discriminatory.

3. **When States claim that changing the eligibility requirements for a program or service would result in a fundamental alteration, courts will scrutinize the eligibility criteria for evidence of discrimination.** The evidence does not have to show that the State specifically intended to exclude certain persons from its program, but rather that the

[25] *Greist v. Norristown State Hospital*, No. Civ. A. 96-CV-8495, 1997 WL 661097 (E.D. Pa.); *Jeffrey v. St. Clair*, 933 F. Supp. 963 (D.Haw. 1996).
[26] *Easley v. Snider*, 36 F. 3d 297 (3d Cir. 1994).
[27] *Helen L. v DiDario*, 46 F. 3d 325 (3d Cir. 1995).
[28] *Williams v Wasserman*, 937 F. Supp. 524 (D. Md. 1996) and *Williams v. Wasserman*, 164 F. Supp. 2d 591; 2001 U.S. Dist.
[29] *Kathleen S. v. Department of Public Welfare* 10 F. Supp. 2d 460; 1998 U.S. Dist.

eligibility criteria for admission to the program have the *effect* of discriminating. Federal regulations clearly stipulate that criteria that have "the effect of subjecting qualified individuals with disabilities to discrimination on the basis of a disability" are unlawful.[30] Courts will examine evidence of discriminatory funding patterns on the part of a State (*e.g.*, failing to appropriate funds for programs for persons with disabilities or failing to fully fund home and community-based service waiver slots).[31] The key question in these situations is to what extent a State will be able to persuade the court that what may appear at first blush to seem discriminatory is in fact a criterion or practice that is grounded in reasonable concerns such as safety, program integrity, or promoting patient care.[32] A State would have to provide credible evidence to show the reasonableness of these concerns. A public entity would have to demonstrate, for example, that past efforts to use less restrictive criteria have led to documented problems or adverse outcomes.

4. **Courts will pay special attention to evidence of a State's use of discriminatory criteria in cases in which there has been an actual finding that institutional care is not medically necessary.** Clearly the most challenging situation for a State agency's fundamental alteration defense is one in which the agency's own experts have determined that a community placement is appropriate. In these situations a State faces the possibility that any criteria which it uses to restrict entry into available community programs will be considered unreasonable and unlawful by virtue of their exclusion of persons for whom community residence is, by the State's own admission, completely appropriate. There is perhaps only one point at which a court would not compel a State to make changes in its programs as a matter of reasonable accommodation. This would occur when the State could show that the program modification would amount to affirmative action to customize the design of a program in order to make it work better for persons with disabilities. Based on past cases, a court might interpret this argument in such a way as to convert a reasonable accommodation into a fundamental alteration. This argument has tended to work in cases in which the changes sought by the plaintiff involve material modifications in insurance coverage, where the defendant can argue that changes are being sought to customize a benefit that otherwise is exactly the same (or equally unavailable) for all insured persons.[33]

5. **Courts generally will not require a State to modify a program in such a way that it changes the essential nature of the program, but it may require changes that affect more peripheral aspects. Modifications of insurance programs are considered fundamental when they alter benefits or create coverage where there was none**. Alterations that are found to alter the kind of program offered (as opposed to altering the degree of the program) have been found to amount to fundamental alterations. This essentially is what Southeastern Community College was able to demonstrate in the *Davis* case (*i.e.*, that allowing deaf students into its nurse training program would change the essential nature of nursing and nurse training). By way of other examples, allowing blind

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[30] 28 C.F.R. §35, 130(b)(3).

[31] *Helen L. v. DiDario*, 46 F. 3d 325 (3d Cir. 1995); *Cramer v. Chiles*, 33 F. Supp. 2d 1342 (S.D.Fla. 1999).

[32] Smith and Candrillo, *supra* note 16, at 746.

[33] *Alexander v. Choate*, 469 U.S. 287; *Rodriguez v. City of New York*, 197 F.3d 611 (1999) (the latter involving a proposed modification of New York home care program to require "safety monitoring" services for a class of Medicaid beneficiaries with mental disabilities).

patrons to touch artwork in a museum or hiring a police officer who cannot make a forcible arrest have both been identified as changes that would affect the essential nature of museums (protecting art)[34] and police forces (protecting public safety).[35] The best known "integrity" case is *PGA Tours, Inc. v. Martin*,[36] in which the Supreme Court found that allowing a professionally qualified golfer with a physical disability to use a cart during a PGA tournament would not affect the integrity of the game of golf by so altering its nature that it would no longer be the same game. Key to the *Martin* decision were certain facts: golfing officials already permitted carts in the early rounds of their tournaments; the PGA's argument that walking in the later rounds was essential to ensuring comparable levels of competition was refuted with evidence that Martin's disability caused at least as great, if not greater, levels of exhaustion; and the singular nature of the plaintiff's predicament as a qualified golfer with a disability whose needs could be accommodated as a unique matter.

At the same time, courts appear to consistently reject claims that modifications in Medicaid coverage design are reasonable and will not require states to change the design of their Medicaid program by adding coverage procedures (*Rodriguez v City of New York),* relaxing coverage limits (*Alexander v Choate)* or seeking additional coverage in the case of home and community based waiver programs *(Bryson v Shumway)*. In order to prevail on a Medicaid claim the plaintiff essentially would need to show that the coverage is already available under the design of the state benefit plan but that the plan is being administered in a manner that deprives the claimant of equal access.

6. **Courts generally will not order a State to change a program's eligibility requirements once there is sufficient evidence that such requirements are indispensable to the essential nature of the program, unless there is evidence that community-based care is medically appropriate.** When a public agency is able to demonstrate that certain eligibility requirements related to community programs are essential to the nature of the program, a request to modify the eligibility requirements would be considered to amount to a fundamental alteration. For example, in a Pennsylvania case, the court accepted the State's argument that mental alertness (*i.e.*, the ability hire, supervise, or fire a personal care attendant or self-manage legal and financial affairs) was an essential and reasonable requirement for eligibility in a particular community service program. Thus, the State was not obligated to accept into its attendant care program persons who were not mentally alert as a result of their disabilities, but who could live in the community with the aid of persons who could act as surrogate decision-makers on their behalf.[37] However, once a State has determined that the person can in fact live in the community, then its arguments regarding the fundamental nature of proposed modifications will be given higher scrutiny.

7. **Courts are likely to deem modifications reasonable when a State has a history of waiving its own eligibility requirements and program rules.** When a public agency has a history of creating exceptions to its own eligibility requirements, this may be evidence that a proposed modification that corresponds to the agency's past decisions is reasonable. In

[34] 28 C.F.R. §36 App. B. 643.
[35] *Davoll v. Webb*, 943 F. Supp. 1289 (D. Colo. 1996). *See* Smith and Calandrillo, *supra* note 16, at 731.
[36] 121 S.Ct. 1879 (2001).
[37] *Easley v Snider*, 36 F. 3d 297 (3d Cir. 1994).

essence, the past waivers provide evidence that the eligibility requirement or program rule is not essential or fundamental to the nature of the program. Therefore, if an agency already has conceded that even though certain plaintiffs are technically ineligible under agency rules to participate in a program, but that in the past these rules were waived in similar circumstances, a court is likely to find that the requested program modification is reasonable and does not constitute a fundamental alteration.[38] At the same time, however, a State may be able to argue that evidence of isolated examples of waiving the rules should not be used to overturn the rules because of a potential flood of waiver requests that would overwhelm administrative capacity and unreasonably increase the cost of the program. A State may also be able to argue that the case-by-case weighing of waivers is in and of itself an essential feature of the program. A State could also argue that its process of evaluating cases on an individual basis and making exceptions when it felt appropriate is in and of itself an essential feature of the program. If the court concurs, the proposed modifications would be considered fundamental alterations the State would not be required to make.[39]

Discussion

The goal of the ADA is to promote community integration. To achieve this goal the law identifies two levels of necessary changes: reasonable modifications in programs and fundamental alterations. The former is within the purview of courts to order as a remedial matter, while the latter lies within the purview of the legislative process and is therefore particularly germane to long term process of creating "effectively working plans."

Cases decided under the ADA and its predecessor statute §504 of the 1973 Rehabilitation Act, suggest that a finding of medically unreasonable exclusion and segregation will trigger closer scrutiny by courts and that funding alone will not deter a reasonable modification order. However, effectuating changes in insurance coverage, particularly Medicaid, is viewed as a matter of fundamental alteration. In deciding the issue, courts will take a contextual approach, examining the needs of all persons with disabilities, not merely the subgroup for whom community residence is appropriate.

What this means for persons with mental disabilities is that essential changes in insurance coverage, the creation of alternative community residential placements, and other investments that make community residences possible, are the types of changes that courts probably would consider fundamental. Of particular importance may better coverage of outpatient rehabilitation and clinical services, greater access to personal attendant services in the case of persons who need an attendant for support with mental health needs only, and targeted case management to ensure support for behavioral-related disabilities. Because these changes are considered fundamental, the *Olmstead* planning process to develop long term investments becomes critical. Federal supports such as the New Freedom Initiative can promote this type of change and investment and presumably will spur the types of deeper changes that lie beyond the purview of judicial orders.

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[38] Smith and Calandrillo, *supra* note 16, at 739-740; *Williams v. Wasserman*, 937 F. Supp. 524 (D. Md. 1996); *Tatum v. NCAA*, 992 F. Supp. 1114 (E.D. Mo. 1998).

[39] *McPherson v Michigan High School Athletic Association*, 119 F. 3d 453 (6th Cir. 1997).

APPENDIX

Summaries of Cited Cases

These summaries, arranged chronologically, focus specifically on the aspects of cited cases dealing with claims of discrimination on the basis of disability, claims for reasonable modifications, and fundamental alteration defenses. The cases also involved other issues, such as due process rights, which are not summarized here. To read the cases in full, the reader should refer to LEXIS-NEXIS or other legal database retrieval information systems.

Cases Decided Prior to the 1990 Enactment of the ADA:

Southeastern Community College v. Davis 442 U.S. 397; 99 S. Ct. 2361; 60 L. Ed. 2d 980; **1979** U.S. LEXIS 38

The plaintiff, who had a serious hearing impairment, asked Southeastern Community College to modify its nurse training program to accommodate her disability. The college determined that she could not safely participate in normal clinical training and that ultimately it would be unsafe for her to practice as a nurse. The plaintiff sued in the U.S. District Court for the Eastern District of North Carolina, alleging a violation of Section 504 of the 1973 Rehabilitation Act, which prohibits discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap." The court found in favor of the defendant.

After the case was overturned on appeal, the U.S. Supreme Court heard the case. In a unanimous decision, the Court held that (1) Section 504 does not limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program, and accordingly the college could, consistent with Section 504, conclude that Davis did not qualify for admission to its nursing program, and (2) since Section 504 imposes no requirement upon an educational institution to lower or effect substantial modifications of its standards in order to accommodate handicapped persons, the institution's unwillingness to make major adjustments in its nursing program to accommodate Davis did not constitute unlawful discrimination.

Alexander v. Choate 469 U.S. 287; 105 S. Ct. 712; 83 L. Ed. 2d 661; **1985** U.S. LEXIS 39

This class action suit was filed in 1980 by a group of Medicaid recipients alleging that Tennessee's proposal to cut from 20 to 14 the number of days which the State Medicaid program would pay hospitals on behalf of Medicaid recipients would not only have a disproportionate effect on persons with disabilities, but also, given their special needs for medical care, was likely to disadvantage them disproportionately. Furthermore, they alleged that the proposed 14-day limitation was discriminatory in violation of Section 504 of the Rehabilitation Act of 1973.

Although the State prevailed in District Court, the U.S. Court of Appeals for the Sixth Circuit ruled in favor of the plaintiffs' claims. The U.S. Supreme Court then reversed the Appeals Court decision. In a unanimous opinion the Court ruled that, assuming that Section 504 or its implementing

regulations did reach some claims of disparate-impact discrimination, the effect of Tennessee's reduction in annual inpatient coverage was not among them, since it applied equally to both people with disabilities and those without them. In addition, the Court stated that to require the State to evaluate the effect on persons with disabilities of every proposed program change "could lead to a wholly unwieldy administrative and adjudicative burden."

Cases Decided After the 1990 Enactment of the ADA:

Easley v. Snider, 36 F.3d 297; **1994** U.S. App. LEXIS 26394

The plaintiffs were two women, one with a physical disability and the other with both a physical and mental disability, who needed surrogate decision-makers to manage their financial and legal affairs in order to live in the community. Both plaintiffs were denied personal care attendant services authorized under the 1986 Pennsylvania Attendant Care Services Act. The State determined that they were ineligible to receive services under the Act since they were not "mentally alert." The plaintiffs sued, alleging that the "mental alertness" requirement of the Care Act violated the ADA. The District Court found in favor of the plaintiffs and enjoined the State from excluding them from receiving attendant care services.

The Appeals Court reversed, deciding that for this particular program, the use of surrogates would fundamentally change the focus of the program by shifting it "from the provision of attendant care and its societal objectives for the physically disabled to personal care services to the many thousands of physically disabled who are often served by other specially designed State programs. The proposed alteration would create a program that the State never envisioned when it enacted the Care Act. The modification would create an undue and perhaps impossible burden on the State, possibly jeopardizing the whole program, by forcing it to provide attendant care services to all physically disabled individuals, whether or not mentally alert." Thus, the requested modification was determined to not be reasonable and, if accommodated, a fundamental alteration not required by the ADA.

Helen L. v. DiDario, 46 F.3d 325; **1995** U.S. App. LEXIS 2233.

The plaintiff, a physically disabled nursing home resident, alleged that Pennsylvania violated the ADA by requiring that she receive care services in the segregated setting of a nursing home rather than in an integrated residential setting through the State's attendant care program. The plaintiff had been evaluated and it was determined that while she was not fully capable of caring for herself, she was not so incapacitated that she needed the custodial care of a nursing home.

In its defense in District Court, the State agreed that the plaintiff was qualified for residential treatment with attendant care services but that it had not placed her in such care due to funding constraints. It contended that it was not constitutionally authorized to shift funds already appropriated by the State legislature from the nursing care budget line to the attendant care line. To do so would amount to a fundamental alteration of its program. On appeal, the Appeals Court disagreed. It found that the plaintiff was not asking the State to alter its eligibility requirements for

admission to the program, nor was her request an unreasonable modification resulting in a fundamental alteration of the program. In the Appeals Court's view, the plaintiff's request "merely require[d] [the State] to fulfill its own obligations under State law."

Jeffrey v. St. Clair, 933 F. Supp. 963 (D.Haw. **1996**).

The plaintiffs were in the custody of the Hawaii State Hospital after being acquitted of various criminal charges. They received treatment in an experimental program in the Cooke Building, a more open residential environment that was designed to create a therapeutic environment in the least restrictive setting. In 1995 the hospital decided to close the Cooke Building after determining it did not meet fire, life, and safety standards for patients, and the plaintiffs were moved to another building. The plaintiffs filed suit requesting a restraining order to prevent the hospital from closing the Cooke Building. They alleged that the treatment in the second building did not meet their needs; that the transfer could affect their ability to apply for future conditional release to the community; and that they had suffered emotional distress.

The Court denied the plaintiffs' request. It determined that the costs associated with renovating the Cooke Building to bring it up to safety standards would require an extensive investment of resources and could result in duplication of existing services at the expense of other hospital programs and patients. The Court stated that the public's interests were better served by judicial deference to the decisions of qualified professionals and that the move to the other building was consistent with professional judgment.

Davoll v. Webb, 943 F. Supp. 1289; **1996** U.S. Dist. LEXIS 15257

The plaintiffs were Denver Police Department patrol officers who had sustained work-related injuries that prevented them from performing the essential police duties of making a forcible arrest and firing a weapon. Following temporary assignments to light duty work and an offer for permanent assignments to light duty positions (since a medical determination was made that they could not return to full duty), all three plaintiffs sought and received occupational disability retirements. The plaintiffs filed suit against the city on the grounds that: 1) they were "otherwise qualified individuals" within the meaning of the ADA; 2) the city failed to provide reasonable accommodations by not offering them permanent light duty positions and/or by not reassigning them to other positions within the city; 3) the city had failed to implement policies and procedures to facilitate implementation of the ADA; 4) the city engaged in disparate treatment of police officers with disabilities, since some remained employed at full salary and others were required to retire; and 5) the city had inconsistently applied the essential job functions criteria in violation of the ADA.

The city contended that the ability to make a forcible arrest and to fire a weapon were essential job functions of a police officer. Further, the city contended that a police officer who could not perform these functions represented a danger to himself or herself, to other officers, and to the public. They argued that the ADA states that a disabled individual is not "qualified" if he or she poses a direct threat to the health and safety of others that reasonable accommodations will not eliminate. The Court agreed with the city, noting that eliminating these two essential functions

would not be possible without fundamentally altering the nature of the job of a police officer. However, the Court then examined what other reasonable accommodations the city would be required to make. The Court decided that the city failed to show that the plaintiffs were not qualified individuals with a disability and that the ADA's reasonable accommodation requirement includes reassignment and imposes a duty on employers to consider that alternative.

Greist v. Norristown State Hospital, No. Civ. A. 96-CV-8495, **1997** WL 661097 (E.D. Pa.)

The plaintiff was found not guilty by reason of insanity in a murder case and was committed to Norristown State Hospital in Pennsylvania. The Chester County Court ruled that he was severely mentally disabled and posed a "clear and present danger to others." The plaintiff sued the hospital in 1996, alleging that its failure to treat his dyslexia in an outpatient setting was a violation of Title II of the ADA's integration mandate. The hospital asserted that he was not qualified for outpatient services because of the danger he posed to others because of his mental illness; and in any case, the hospital did not provide outpatient treatment for dyslexia to any of its patients.

The Court ruled that the plaintiff did not meet the ADA's definition of "qualified person with a disability" since the Chester County Court had already determined that he did not meet the stated requirement for release (*i.e.*, non-dangerousness). Further, the Court stated that it was difficult to conceive of an accommodation by which highly dangerous insanity acquittees could be adequately supervised to prevent harm to others on an outpatient basis. Thus, providing him outpatient treatment would constitute a fundamental alteration of the State's involuntary commitment program by making an essential purpose of the program -- protecting the community -- impossible to accomplish. The Court determined that the hospital did not discriminate against the plaintiff by not treating his dyslexia on an outpatient basis, since nothing in the ADA would require the hospital to provide such treatment to him if it did not provide it to anyone in the first place.

McPherson v. Michigan High School Athletic Association, 119 F.3d 453; **1997** U.S. App. LEXIS 18826

The plaintiff, a high school student diagnosed as having Attention Deficit Hyperactivity Disorder (ADHD), a seizure disorder, and a learning disability wished to play basketball; however, this was his ninth semester enrolled at the school. Michigan High School Athletic Association (MHSAA) regulations prohibited athletes from playing beyond eight semesters, although the rule could be waived under certain conditions based on a case-by-case review. The plaintiff asked for a waiver of the eight-semester rule. The MHSAA denied the request, raising the issue of "red-shirting," the practice whereby athletes are intentionally held back from competition for one or more semesters solely to allow them to develop more maturity and athletic ability. The plaintiff sued, alleging that his rights under Title II of the ADA had been violated. The district court, concluding that the plaintiff had a reasonable likelihood of success on the merits of his claims, granted an injunction.

The Appeals Court reversed. It noted that the plaintiff failed to demonstrate that the eight-semester rule was constructed or motivated by desires to bar students with learning disabilities from playing. It was a neutral rule that applied to all students, regardless of their disability status. The Court found

that a complete waiver was not a reasonable accommodation and would constitute a fundamental alteration of the MHSAA's policies and program. The MHSAA, according to the Court, would be subjected to an "immense financial and administrative burden" as a result of a "floodgate" of waiver requests. Finally, the Court stated that permitting this waiver would jeopardize one of the fundamental purposes of the MHSAA rule, namely to prevent the practice of red-shirting.

Tatum v. NCAA, 992 F. Supp. 1114 (E.D. Mo. **1998**).

The plaintiff, who had been offered a full collegiate athletic scholarship, was diagnosed with a generalized anxiety disorder and a specific phobia relating to test taking. The scholarship offer was contingent on attaining "qualifier" status with the National Collegiate Athletic Association (NCAA), which required that he achieve a certain score on the American College Test (ACT). A psychologist recommended that he be allowed to take the ACT in a nonstandard fashion. After three tries under the nonstandard conditions he achieved a high enough score to meet the NCAA requirements, provided that it recognized the scores from nonstandard test administration. The NCAA's policy was to accept scores achieved during nonstandard administrations for "learning-disabled or handicapped students." The NCAA concluded that the plaintiff did not meet either criteria and did not certify him as a qualifier. He sued, alleging that the NCAA's failure to recognize these scores constituted discrimination on the basis of disability in public accommodations, a violation of Title III of the ADA.

The NCAA argued that allowing Tatum to compete when he was "clearly ineligible" would fundamentally alter the NCAA's ability to enforce its academic standards for student athletes. The Court found that Tatum did not meet the definition of a qualified person with a disability, due to a series of conflicting diagnoses that raised questions as to the nature of his condition. Since the plaintiff failed to meet the definition, the Court did not address the question of reasonable accommodation. It stated, however, that untimed tests were not an unreasonable accommodation when requests were properly substantiated and that acceptance of them would not fundamentally alter the nature of the NCAA eligibility criteria in the case of a person with a confirmed disability with a history of accommodations. The plaintiff's request for a preliminary injunction against the NCAA was denied.

Kathleen S. v. Department of Public Welfare 10 F. Supp. 2d 460; **1998** U.S. Dist. LEXIS 9558

This class action suit was brought by a group of persons with mental illness disabilities who were patients at Haverford State Hospital in Pennsylvania, slated for closure in 1998. The plaintiffs alleged three violations of the ADA: 1) the class members were not provided with services in the most integrated setting appropriate to their needs; 2) the State utilized discriminatory methods of administration by failing to appropriately plan for the development of community services; and 3) past methods of administration subjected class members to continued, unnecessary segregation in an institution. The plaintiffs requested the State provide them with community-based services at dates earlier than those planned. The State claimed that the Plaintiff class was seeking large-scale deinstitutionalization, which is not required in the ADA. It contended that the reasonable modifications sought by the plaintiffs constituted a fundamental alteration of the State's policies, practices, and procedures.

The Court found in favor of the plaintiffs, noting the history of mental health legislation in Pennsylvania emphasized that in treating persons with mental disabilities, "in every case the least restrictions consistent with adequate treatment shall be employed." Thus the plaintiffs were merely requesting that the State fulfill its own obligations under State law, which was not "unreasonable."

The Court noted: "The denial of community placements to individuals with disabilities such as the members of the Plaintiff class in this action is precisely the kind of segregation that Congress sought to eliminate. [The State] has violated the core principles underlying the ADA's integration mandate."

Olmstead v. L.C. 527 U.S. 581; 119 S. Ct. 2176; 144 L. Ed. 2d 540; **1999** U.S. LEXIS 4368

The plaintiffs, two women with mental disabilities, were patients in an inpatient psychiatric unit. Although treatment professionals concluded that each of the women could be cared for appropriately in a community-based program, the women remained institutionalized at the hospital. The women filed suit, alleging that Georgia had violated Title II of the ADA by failing to place them in a community-based program once their treating professionals had determined that such placement was appropriate. The State argued that inadequate funding, not discrimination on the basis of disability, was the reason why the plaintiffs remained at the hospital, an argument which the District Court rejected. The Court concluded that under Title II unnecessary institutional segregation of persons with disabilities constituted discrimination *per se* and could not be justified by lack of funding. The State argued that requiring immediate transfers to residential placements would constitute a fundamental alteration of its programs and policies and thus was not required by the ADA. The Court rejected this argument and the plaintiffs were discharged to community-based treatment settings. On appeal, the U.S. Court of Appeals affirmed the District Court's decision and remanded the case for consideration of whether the additional cost of treating the plaintiffs in the community was reasonable in light of the demands on the State's mental health budget

The Supreme Court held that under Title II of the ADA, States are required to provide persons with mental disabilities with community-based treatment rather than placement 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 State and the needs of others with mental disabilities.

Rodriguez v. City of New York 197 F.3d 611; **1999** U.S. App. LEXIS 24935

The plaintiffs, a group of New York Medicaid-eligible persons with mental disabilities, all required assistance with activities of daily living and were receiving personal care services based on their needs as determined by New York's "task-based assessment" (TBA) programs, which did not include safety monitoring services. The plaintiffs alleged that without those services, the personal care services they did receive were inadequate to meet their needs and to allow them to continue living in their homes. They claimed that this omission constituted unlawful discrimination against otherwise eligible, mentally disabled patients in violation of the ADA.

The Appeals Court noted that New York provided identical services to both mentally and physically disabled Medicaid recipients. Safety monitoring services were not provided to either group. It stated, "Thus, New York cannot have unlawfully discriminated against appellees by denying a benefit it provides to no one." The Court further noted that in *Olmstead v. L.C.*, the ruling was that

while States must adhere to the ADA's nondiscrimination requirement, nothing in the ADA compels States to provide new benefits, only that benefits be offered and administered without discrimination.

Cramer v. Chiles 33 F. Supp. 2d 1342; **1999** U.S. Dist. LEXIS 1066

This class action suit was brought on behalf of 2,176 persons with developmental disabilities residing in private intermediate care facilities against the State of Florida in 1996. At issue was whether the State of Florida, by legislation, could summarily deny an eligible person with a developmental disability a choice between an intensive care facility or the Home and Community-Based Waiver program ("HCBW") for support and services.

The plaintiffs alleged that the State engaged in a discriminatory manner in violation of Title II of the ADA in its proposed elimination of private Intermediate Care Facilities for the Developmentally Disabled ("ICF/DD") and moving them to State-operated Developmental Service Institutes ("DSIs"). The Court stated that segregation is a form of discrimination prohibited by the ADA; as a matter of law integration is affirmatively required. Further, the Court stated that underfunding of the Home and Community-Based Waiver program "compelled institutionalization, thus negating a meaningful choice." The Court ordered the State to begin transition planning for the plaintiffs. Although the State claimed that decision would force significant departure from past practices and would create administrative havoc in the absence of adequate funding and sufficient time for program structuring, "the issues presented, as convincingly shown by credible expert testimony, are all too frequently matters of life and death for ICF-DDs beneficiaries. For that reason delays must be minimal."

PGA Tours, Inc. v. Martin 532 U.S. 661; 121 S. Ct. 1879; 149 L. Ed. 2d 904; **2001** U.S. LEXIS 4115

The plaintiff, a professional golfer with a degenerative circulatory disorder in one leg, asked the Professional Golfers Association (PGA) for permission to use a golf cart in the final round of its qualifying tournament. Under the PGA rules, golfers are allowed to use carts in the first two rounds but not in the final round. The PGA refused to waive its "no carts" rule. The plaintiff filed suit alleging a violation of the public accommodations provisions of Title III of the ADA The PGA argued that: (1) it was not a place of public accommodation; and (2) allowing Martin to use a cart would fundamentally alter the nature of the golf competition.

After a trial, both the District Court and an Appeals Court ruled in favor of the plaintiff stating that permitting the plaintiff to use a cart during the tournaments would not fundamentally alter the nature of the tournaments. The U.S. Supreme Court affirmed, holding that the game of golf was fundamentally about making shots and putts, not about traveling from one hole to the next; thus, allowing the plaintiff to use a cart was a reasonable accommodation that did not fundamentally alter the nature of the game.

Johnson v. K Mart No. 99-14563, D.C. Docket No. 98-02383-CV-T-25E (November **2001**)

The plaintiff retired from K Mart with long-term disability benefits based on a mental illness diagnosis. Under K Mart's plan, employees who are disabled due to mental illness may receive salary-replacement benefits for a period of two years, whereas employees who retire with physical disabilities may receive these benefits until age 65. Johnson filed suit, claiming that the cap on mental health-related disability benefits violated Title I of the ADA. K Mart claimed that providing different levels of long-term disability benefits to individuals with mental and physical disabilities did not constitute discrimination within the meaning of the ADA.

The Appeals Court addressed for the first time whether distinguishing between physical and mental disabilities in the context of long-term disability benefits was permissible. Citing *Olmstead v. L.C.* and other caselaw, the Court concluded that K Mart's plan appeared to violate Title I as a *prima facie* case of discrimination. The Court examined the ADA's provisions for the safe harbor exemption that addresses the use of a subterfuge. The Appeals Court concluded that the subterfuge exception to the safe harbor provision requires that a plaintiff show that the employer specifically intended to discriminate based on disability, regardless whether the discrimination was aimed at fringe-benefit or non-fringe-benefit aspects of the employment relationship. It reversed the District Court's decision to grant K Mart's motion to dismiss and remanded the case for further proceedings consistent with the Appeals Court opinion.

Williams v. Wasserman, 164 F. Supp. 2d 591; **2001** U.S. Dist. LEXIS 15287

The plaintiffs were patients with traumatic brain injuries (TBI) or diagnosed as nonretarded developmentally disabled (NRDD) who were being treated in Maryland State psychiatric hospitals. The plaintiffs claimed that the State violated their rights under the Americans with Disabilities Act by failing to provide them community treatment rather than institutional care. The State argued that hospital environments are "at least as 'integrated' as community placement, if not more so." The Court rejected this argument with virtually no discussion, noting that there was little caselaw or evidence on the record to support it. The Court ruled that the plaintiffs, based on *Olmstead v. L.C.*, had been discriminated against on the basis of their disabilities by showing that they remained unjustifiably institutionalized despite their eligibility for community-based treatment.

The State contended that accommodating the plaintiffs would result in a fundamental alteration to the existing program because it would be unmanageably expensive to accelerate the process of finding or creating community placements for TBI/NRDD patients beyond the efforts already being made. The Court concluded that the State had made significant progress in reducing inappropriate institutionalizations through its policy and programmatic activities and that it had a waiting list that was moving at a reasonable pace. The Court determined that the modification the plaintiffs requested would require the State to move faster than it was reasonable to expect, would incur undue financial burdens, and would result in a fundamental alteration of the State's provision of services.

Bryson v. Shumway, No. 02-1059, **2002** U.S. App. LEXIS 21492

The State had appealed a decision of the District Court for the District of New Hampshire that found for the plaintiffs, holding that the Medicaid waiver program must include 200 slots. The Court of Appeals overturned the grant of summary judgment to plaintiffs on this issue.

The plaintiffs were individuals with acquired brain disorders attempting to obtain medical services by obtaining a slot in the State's model Medicaid waiver program without having to remain on a long waiting list. The plaintiffs argued that the waiver program was required to have at least as many slots as the number of applicants, up to a limit of 200, and that the available slots were not filled within a reasonable time. The plaintiffs alleged among other charges, a violation of the "reasonable promptness" portion of the Medicaid statute.

The Court of Appeals found that the statutory language governs only the Secretary's ability to deny approval of waiver plans, but failed to govern the behavior of the states, or the contents of the waiver plans themselves. The Court reasoned that States are not required to develop optional waiver programs of a designated size, because to do so could discourage the State from creating optional programs at all.

Fisher v. Oklahoma Health Care Authority, No. 02CV-762P(C) Order signed **October 31, 2002**. Defendants' Motion for Summary Judgment granted.

The plaintiffs were individuals with various unidentified disabilities, who lived in their own homes, and received services through a Medicaid home and community-based waiver program. The plaintiffs claimed that the State's new policy regarding prescriptions would inappropriately require them to move into institutions, in violation of the ADA. They requested that the State provide reasonable accommodations in order to receive needed medical services.

The State health care agency had changed the program services so that all beneficiaries would be limited to five prescriptions per month as long as they remained in the community. However, all residents of institutions would continue to receive unlimited prescriptions.

The Court held that the requested modification of permitting unlimited prescriptions to waiver program beneficiaries would cause a fundamental alteration of the State's services and programs, and permitted a cost-based defense. The Court accepted the State's explanation that it had experienced a shortfall in collected revenue, and all agencies were forced to cut budgets. These budget cuts required the prescription limits. Since the waiver program was an option, the State could reasonably reduce benefits rather than choose to eliminate the entire program. Individuals residing in institutions would continue to receive unlimited prescriptions because of the mandatory nature of the care.