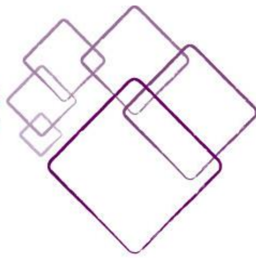
TASC Training & Advocacy Support Center 

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Q&A
***Olmstead* Update: A Review of Recent Cases**

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Q: There were two significant appellate *Olmstead* decisions in the past year. Can you discuss them?[1]

A: The Sixth Circuit issued a largely positive decision in *Waskul v. Washtenaw County Community Mental Health.* In the Seventh Circuit, issued a somewhat narrowing decision in *Vaughn v. Walthall*. These two cases and the implications for other *Olmstead* cases are discussed below along with an appendix of other *Olmstead* community integration cases decided last year.

Discussion

*Waskul v. Washtenaw County Community Mental Health***,** 979 F.3d 426 (6th Cir. 2020)

In *Waskul,* the Plaintiffs challenged changes to the budgeting methodology for self-directed services in a § 1915(c) waiver. The Plaintiffs framed their claims around both the budget and the methodology it was created under. The issue was whether that methodology allowed their plans of care, which identified the medically necessary services to provide community integration, to be implemented.[2] Before the change that prompted the case, budgets were created by multiplying the hours needed by a given rate and then allowing other add-on services like transportation and staff training to be added as separate line items. The new methodology required all of the add-on services to come out of the rate. This new methodology effectively forced individuals to choose between not receiving services so they could pay staff or lowering the rate paid to staff. Plaintiffs alleged this decreased their community integration and put them at risk of institutionalization because they could not find providers. The case had been dismissed at the District Court level, but the Sixth Circuit found that the Plaintiffs had sufficiently alleged their claims to survive the motion to dismiss and reversed.

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[1] *Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581 (1999).

[2] The Court also found this framing of the issue relevant to finding that the Plaintiff association had standing for the Medicaid and *Olmstead* claims as the court found that the harm from the methodology was ongoing. *Waskul v. Washtenaw Cnty, Cmty. Mental Health*, 979 F.3d 426, 442-43 (6th Cir. 2020).

Along with many Medicaid claims, the Plaintiffs raised *Olmstead* claims that they were at serious risk of institutionalization and that they had effectively been institutionalized in their own homes. The District Court had found the Plaintiffs had not sufficiently alleged the risk of institutionalization claim because they all remained at home three years after the action was filed. The Sixth Circuit, disagreed, and said,

> But while perhaps true, this fact says nothing about whether Plaintiffs have been compelled to forgo necessary medical services in order to remain in the community during that time. Nor does it reflect on the actual imminence of the Plaintiffs' institutionalization—indeed, that could happen at any moment that Plaintiffs are unable to sustain their own care.

Waskul, 979 F.3d at 461.

The court found that the complaint had sufficiently alleged risk of institutionalization because it described how the budget methodology had caused the Plaintiffs to substantially rely on family members incapable of providing sustained, long-term care. It also noted other allegations in the complaint about the impact on the Plaintiffs' health and welfare and the tenuousness of their support systems.

Waskul is also the first instance that the Sixth Circuit recognized confinement at home can also violate the integration mandate, adopting the Seventh Circuit's analysis in *Steimel v. Wernert* and finding the *Waskul* plaintiffs' sufficiently alleged this claim.[3] The court noted that the *Waskul* plaintiffs had not alleged the same limited hours in the community as the *Steimel* plaintiffs, but said that "there is no numeric threshold that distinguishes the 'most integrated setting' from a less integrated one."[4] The decision provides the helpful distinction between a "standard of care" or "level of benefits" question, and whether, as here, "Plaintiffs are provided services in the setting 'that enables [them] to interact with non-disabled persons to the fullest extent possible.'"[5] This language should help in defeating the common defense that *Olmstead* claims are inappropriate requests for a certain level of benefits.

Importantly, *Waskul* begins to tackle the issue of compelled natural supports. The regulations for § 1915(c) waivers require that unpaid supports be provided voluntarily and this was reflected in the State's provider manual.[6] The complaint alleged the various ways in which the family were providing the supports under duress or to their own detriment, such as the mother who fell behind on taxes because she was paying to

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[3] *Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016). The Court overturned the District Court's finding that the complaint did not sufficiently allege this claim, instead finding sufficient the Plaintiffs' description of the decreased hours and inability to find providers, and the subsequent impacts on their ability to go into the community.
[4] *Waskul*, 979 F.3d at 463.
[5] *Id.* (citing *Olmstead,* 527 U.S. at 592). The *Waskul* court did note that the more hours provided outside the home, the harder it would be to show a violation of the integration mandate.
[6] 42 C.F.R. §§ 441.301(b)(1)(i), (c)(2)(v).

supplement her son's care after the budget methodology change.[7] Although the court did not explicitly denounce the Defendants' repeated reliance on the use of natural supports, it recognized that the Plaintiffs' claims based in not receiving the services in their plan of care was not defeated because they had received those services from natural supports.[8] The court found that the person managed to receive services through some method outside of Medicaid did not relieve the State of its obligations. This is important not only for Medicaid claims, but also for *Olmstead* claims. However, it should be noted that the Sixth Circuit only found that the allegations were enough to state a plausible claim and noted that plaintiffs may not be able to succeed on the claim at later stages.[9]

The Sixth Circuit also corrected the District Court's narrow analysis of the Defendant's responsibility to set the budget and this broad authority. Instead the court distinguished the Plaintiffs' challenge as one to the appropriateness of the budget, but did indicate that the Defendant may be able to show that the current methodology achieves the goals of the waiver program as best possible.

As noted in other cases discussed in this Q&A, the question of fundamental alteration is not typically one addressed at the initial pleadings stage. However, the *Waskul* court found that the Defendants had not carried their burden on the fundamental alteration defense and partially relied on Plaintiffs' allegations to do so. The Defendants stated that returning to the prior methodology would force them to operate at a deficit, the court found persuasive that the Plaintiffs' complaint indicated that an alteration to the budget methodology was well within the Defendants' capacity to provide given current spending under the waiver and that returning to the previous budget method was not the only remedy. Although pre-emptively defending a fundamental alteration defense is not the Plaintiffs' burden, it is helpful to keep the State's potential arguments in mind when building the case and identifying the remedy.

Outside of its relevance for *Olmstead* cases, the *Waskul* decision includes helpful holdings on the Plaintiffs' Medicaid claims.[10] Plaintiffs could enforce § 1396a(a)(8), § 1396a(a)(10), § 1396n(c)(2)(A) & (C).[11] However, it is worth noting that the court

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[7] *Waskul,* 979 F.3d at 452.
[8] *Id.* at 451-52.
[9] "The potential availability of county providers, the potential that Plaintiffs could modify their budgets to ensure necessary medical coverage is available, and the potential that Plaintiffs' reliance on natural supports is within the scope of their IPOSs all suggest that Plaintiffs may not be able to succeed on this claim at later stages of their litigation. This said, at this juncture, Plaintiffs' allegations suffice to state a plausible claim that they are being denied sufficient necessary medical services." *Id.* at 452.
[10] The case also has a few other interesting nuggets, including a holding that the MCO defendants were not operating as an arm of the State and thus could not avoid liability through Eleventh Amendment immunity; and the Court refused to consider the response to the motion to dismiss or any of the other pleadings outside of the complaint.
[11] For more on enforceability of Medicaid provisions under § 1983, *see* Jane Perkins, *Private Enforcement of the Medicaid Act Under 42 U.S.C. § 1983* (Mar. 5, 2021), https://www.tascnow.com/wp-content/uploads/2021/03/Fact-Sheet-Medicaid-Private-

"assumed without deciding" that § 1396a(a)(10)(B) establishes sufficiency of the services requirements. The court also followed other circuits in finding that the Plaintiffs do not have to exhaust administrative remedies before filing a suit for Medicaid Act claims under § 1983.[12] And, the decision includes a fairly comprehensive discussion of the obligations of a state regarding a § 1915(c) waiver.

The court reinforced that § 1396n(c)(2)(C) encompassed two explicit rights: (1) to be informed of the alternatives to institutional care; and (2) the right to choose among those alternatives and that this choice must be meaningful. It held that the Plaintiffs must have "meaningful" alternatives to institutional care and that this means a choice that is actually available and that fulfills individuals' medical needs, which the Plaintiffs had successfully alleged the budget methodology had not.

The court spent some time discussing the Plaintiffs' claims regarding their medically necessary services, which the District Court found they had not shown they were missing.[13] The *Waskul* decision found that the complaint's listing of the hours the plaintiffs were not able to use, the services not received from their plans of care, and the inability to find providers for certain hours and that they had to stay home were sufficient to show the failure to provide the medically necessary services in their plans. However, it also noted that if it were true that the Plaintiffs could access agency based providers rather than self-directed providers, they would not be able to show a violation of §§ 1396a(a)(8) and (10). Whether this is an accurate interpretation given that the services in question are specifically self-directed services, this court clearly indicated that the Plaintiffs claims regarding access to providers could be in trouble at the summary judgment or trial stage if they could not prove that agency providers were either not available or not suitable. However, the court did find that if Plaintiffs were able to show they are compelled to use agency providers, this may demonstrate they do not have sufficient choice among providers, which would be relevant to their § 1396n(c)(2)(A)

Enforcement-under-Sect-1983-Update-Jan-Feb-2021-FINAL.pdf. Also worth noting is that the Court found that services sought clearly fell within the "medical assistance" that must be paid for or provided by the State with relative promptness. The dissent would not have found § 1396n(c)(2)(C) enforceable.

[12] The Court noted that t was following other circuits on this issue, citing *Romano v. Greenstein*, 721 F.3d 373, 376 (5th Cir. 2013); *Roach v. Morse*, 440 F.3d 53, 56–58 (2d Cir. 2006) (Sotomayor, J.); *Houghton ex rel. Houghton v. Reinertson*, 382 F.3d 1162, 1167 n.3 (10th Cir. 2004); *Alacare, Inc.-North v. Baggiano*, 785 F.2d 963, 967–69 (11th Cir. 1986). *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d at 445.

[13] The District Court found that the Plaintiffs claims merely referred in general terms to the Plaintiffs' guardians paying out of pocket for community activities and transportation expenses, and that only Plaintiff Waskul's claims had come close by alleging that he "goes three weekdays (Monday through Wednesday) without his normal community routine and is confined to his home on those days." *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, No. 16-10936, 2019 WL 1281957, at *6 (E.D. Mich. Mar. 20, 2019), *rev'd and remanded,* 979 F.3d 426 (6th Cir. 2020). The District Court had also concluded that the Plaintiffs could identify the hours they were not receiving and ask to supplement their hours through the person-centered planning process, but the Sixth Circuit found that the complaint explained how this would not likely occur under the budget methodology in question. *Waskul*, 979 F.3 at 451.

claims. This interesting interpretation of these Medicaid provisions and the application of underlying facts is something to watch both as this case moves forward and as other cases rely on the *Waskul* reasoning.

*Vaughn v. Walthall***,** 968 F.3d 814 (7th Cir. 2020)

The Seventh Circuit's decision in *Vaughn* created some confusion regarding the extent of a state's obligation to change its Medicaid program in response to an *Olmstead* claim. However, defendants will likely try to use it much more broadly than the actual narrow confines of the decision.

Ms. Vaughn had lived in the community with quadriplegia for over 40 years and at the time of filing the case needed over 20 hours of nursing services per day and was in a nursing facility because she could not find nursing providers. She had requested several reasonable accommodations to return home, including being allowed to self-direct nursing services, to delegate nursing tasks to non-nurses, to use the state-funded program established to supplement existing services to maintain people in the community, and for the state to otherwise change its policies such that she could return home with the necessary care. The District Court granted summary judgment and a permanent injunction in favor of Ms. Vaughn, requiring the State to "do whatever is necessary to achieve the result" of living at home with services. The State had not been able to arrange services under its Medicaid program; repeatedly calling nursing agencies asking them to staff her case under current policies was ineffective. To comply with the injunction, the State was paying a nursing agency more than the Medicaid rate for her care using state funds. Shortly after oral argument of the appeal, the federal agency granted the State's amendment to the 1915(c) waiver used by Ms. Vaughn to allow the State to pilot a program allowing self-direction and delegation of nursing tasks.

Notably, prior to *Vaughn,* in *Steimel v. Wernert,* the Seventh Circuit held that a state could not simply point to the Medicaid program it designed and then claim it could go no further than the program's limits to meet its *Olmstead* obligations. In *Steimel*, the Plaintiffs were transferred from one waiver to another and in the process went from about 40 hours to 10-12 hours of community services per week due to authorization limits and budget caps in the waiver. They were also impacted by limits on what types of services could be used. The Plaintiffs sought services that existed and were provided to others. The *Steimel* court held a state could not "avoid the integration mandate by painting itself into a corner and then lamenting the view" or by "binding its hands in its own red tape."[14] In *Steimel,* the State had also failed to prove that the changes would fundamentally alter their programs as they had simply contended it was not reasonable to demand the State alter the eligibility criteria for the waiver or otherwise change it and the Plaintiffs' request to re-apportion the types of services they had was not unreasonable. These were all feasible changes within a waiver.

In comparison, Ms. Vaughn requested variations on services and the court found there were questions as to whether those accommodations were allowed. The State raised

[14] *Steimel,* 823 F.3d at 917-918.

arguments against some of the proposed accommodations, saying that self-direction would be a new service and outside its obligations and allowing delegation of tasks to non-nurses would be a fundamental alteration to the program because those unlicensed providers would not be qualified. The *Vaughn* panel, which shared members with the *Steimel* panel, held that "only if the accommodations comport with federal requirements for Medicaid service approval and funding must it offer them…[if] federal requirements preclude the changes...[the state] need not go outside its approved programs and relinquish federal reimbursement."[15]

While Ms. Vaughn's requests were not requests for wholly new or different services, many of her proposed accommodations would be changes to the services as currently designed. And the State had questions in the appeal about whether those changes were permitted, and the court interpreted the injunction as requiring the State to depart from what had been approved.[16] The *Vaughn* court found that the question of whether nursing tasks could lawfully be delegated, whether federal Medicaid requirements would permit the changes, and whether it was simply an Indiana policy preference could not be answered based on the record. The court also had other questions about whether other accommodation requests would work, and thus found the granting of summary judgment to be premature and remanded the case back to the District Court. The impact of the newly approved pilot program for self-direction of nursing tasks was also to be examined. In *Steimel,* the question was more about service limits and which services the Plaintiffs could use and where. However, the issue of federal approval for waiver changes that would likely have to occur for the *Steimel* plaintiffs to access services in the way they desired was not a major issue in that decision. But the *Steimel* court did not raise issues of what Medicaid would permit, that were the focus in the *Vaughn* opinion.

While the reasoning about the limitations of a state to meet its obligations within the constraints of federal law will likely appear in many defense arguments to *Olmstead* and Medicaid claims, this language must be taken in the context of the decision itself and with that of other Seventh Circuit case law, which *Vaughn* did not directly contravene. In *Vaughn*, the panel found there were unanswered questions about what the State could and could not do within the confines of federal law, not their own policy choices. Therefore, the strong language in *Steimel* about a state making policy choices and then saying nothing can be done to address community integration issues is still a very useful decision in *Olmstead* cases. In designing a case, it is important to keep in mind what is within a state's control, what is allowed under the Medicaid program generally (not just within a state), and how to clearly allege that what is being challenged is not merely the Medicaid program but a state's broad obligation under *Olmstead,* of which Medicaid may be a tool.

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[15] *Vaughn v. Walthall,* 968 F.3d 814, 824 (7th Cir. 2020).

[16] The court's questions about whether Ms. Vaughn's requests could be met within the confines of federal law extended to her Medicaid claim that her services were not provided to her with reasonable promptness. The court found that summary judgment was inappropriate without proof the state could achieve the Plaintiff's goals in a manner consistent with federal law.

The *Vaughn* court took an unusually narrow view of the case, finding that it was about what the Medicaid program required as opposed to considering the State's broader obligation under *Olmstead*. In fact, it made statements contrary to DOJ guidance in finding that the state did not have to "use funds outside the Medicaid program to comply with a rule about accommodation within the program."[17] Both DOJ and HHS guidance clearly say that while a state may not be required to do something under Medicaid, it may be required to do so under other laws, such as the ADA.[18] Other cases have followed this guidance and issued holdings that align.[19] However, a recent case out of Florida, *Alexander v. Mayhew*, similarly found that a state does not have to go outside the existing Medicaid program.[20] It will likely be helpful to cite DOJ and HHS guidance early in a case to try to forestall such arguments and to be careful about how an *Olmstead* case is framed when involving Medicaid services.

To the extent Defendants cite the narrow *Vaughn* holdings, the panel's framing of the case as a question of what Medicaid allows under federal law should be used to rebut wide application of the court's opinion. Taken together with *Steimel* and *Radaszewski*, which clearly obligate a state to make accommodations in its Medicaid programs to comply with *Olmstead*, *Vaughn* is asking the question of not what can a state reasonably do under its own policies but what would be allowed under federal law—in this case, under Medicaid. The *Vaughn* court found that those questions were unanswered and thus summary judgment was inappropriate, remanding for further consideration. While the actual case brought by Ms. Vaughn was broader, the decision frames the question being answered by the court as whether based on the record before them she was entitled to the services requested under Indiana's Medicaid program as it was structured before the adoption of the pilot program. But together with *Steimel,* this is not a question of what is reasonable under the current design of the program, but what the state could reasonably do within the confines of Medicaid, which has a world of possibilities. Whether all those possibilities would pass the fundamental alteration question may be a different question and still, as always, should be thoughtfully considered in designing an *Olmstead* case.

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[17] *Id.* at 827 (7th Cir. 2020). *But see* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* at q. 13, https://www.ada.gov/olmstead/q&a_olmstead.htm#_ftnref14. ("A state's obligations under the ADA are independent from the requirements of the Medicaid program," and "states may be required to provide "services beyond what a state currently provides under Medicaid."); Ltr. from Timothy M. Westmoreland, Dir. Ctr. for Medicaid & State Operations Health Care Financing Admin. to State Medicaid Dirs. 4 (Jan. 10, 2001) ("Olmstead Ltr. 4"),https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/smd011001a.pdf (while a state may not have an obligation under Medicaid law, other laws, e.g. the ADA, may require the state to do so and whether the State chooses to avail itself of possible Federal funding is a matter of the State's discretion).

[18] *Id.*

[19] *See, e.g., Davis v. Shah,* 821 F.3d 231, 264 (2d Cir. 2016)

[20] *See* discussion in Appendix A of *Alexander v. Mayhew.*

Other Cases of Interest

The past year or so has included other *Olmstead* cases of interest. Some, like *Waskul* at the District Court*,* were dismissed because the judge found that the plaintiffs had not alleged viable claims.[21] In those cases, there is a trend towards a closer examination of the allegations as to whether they were pled with particularity to the Plaintiffs situation rather than a recitation of the elements of the cause of action. As shown by the Sixth Circuit decision in *Waskul*, a different reader may find allegations sufficient but these decisions are a helpful to review when drafting a complaint to avoid similar issues.

Other recent *Olmstead* cases reinforced existing good case law, such as not needing to be at risk of institutionalization to raise a community integration claim.[22] Courts have also continued to be dismissive of defenses claiming the plaintiff must exhaust Medicaid appeals and that states are not being responsible for the actions of a managed care plan.[23] There have also been decisions dismissing the "right to institutionalization" arguments made by those who oppose deinstitutionalization.[24] A few cases over the last year also involved issues that are seen less frequently in *Olmstead* cases, such as associational discrimination claims for caregivers impacted by alleged community integration violations and the role of role of *Olmstead* in guardianship.[25]

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[21] *See* in Appendix A*, E.B. ex rel. M.B. v. Cuomo*; *Disability Right California v. Cnty. of Alameda*; *Alexander v. Mayhew. But see S.J. v. Tidball*, No. 2:20-CV-04036-MDH, 2020 WL 5440510 (W.D. Mo. Sept. 10, 2020) (finding in case regarding Medicaid funded in-home nursing services for children that plaintiffs had adequately pled ADA and Rehabilitation Act claims).
[22] *See* in Appendix A, *E.B. ex rel. M.B. v. Cuomo*; *Waskul*
[23] *See, e.g., Waskul, Doxzon v. Dep't Human Servs.*
[24] *See* in Appendix A, *Roll v. Howard*; *see also Phyllis Ball v. John Kasich,* No. 2:16-CV-282, 2021 WL 821842, at *9 (S.D. Ohio Feb. 17, 2021).
[25] *See* in Appendix A, E.B. ex rel. M.B. v. Cuomo, *Siino v City of New York.*

Appendix A
Quick Summaries of Recent *Olmstead* Cases

The following case summaries are a selection of cases that involve *Olmstead* community integration claims. It is not a complete list, but should reflect the cases over the past year or so that would likely be of interest to *Olmstead* advocates.

E.B. ex rel. M.B. v. Cuomo, No. 16-CV-375, 2020 WL 3893928 (W.D.N.Y. July 11, 2020)

Both individuals with disabilities and their caregivers brought suit because of the lack of available of community-based residential placements in New York's program for people with developmental disabilities. The State prioritized residential placements for those that were losing home-based placements or their caregivers. The court found that the individuals had insufficiently pled their claims under the community integration mandate. Importantly, the Court recognized that the individuals did not have to be at risk of institutionalization to have a credible community integration claim and acknowledged that a claim of unjustified segregation would work. However, it found that their allegations regarding risk of institutionalization were too speculative to establish standing because they didn't show that the State's failure to provide them with residential placements now would likely result in institutionalization in the future.

In the discussion of whether the family home could be a more restrictive placement than appropriate to the individual's needs, the Court found that this was an individual inquiry. However, the Court found that the plaintiffs with disabilities' claims as pled in the complaint were insufficient to meet this inquiry. It found the allegations that forcing individuals to live with their caregivers rather than in the community with peers, that unjustified isolation constituted discrimination based on disability, and that excluding plaintiffs from residential placement effectively segregated them from the community were legal conclusions couched as factual allegations and were merely "a formulaic recitation of the elements of [the] cause of action."[26] The court dismissed with leave to refile, specifically suggesting that the individuals should show how their home placements segregate them, referring to the DOJ guidance, and that they should clarify the choice faced by their caregivers and what would happen if they simply voluntarily refused to provide care for the plaintiffs.

The Court also dismissed the discrimination claims that alleged the Defendants had treated them differently from others with disabilities in providing those without caregivers residential placements, and not offering the service to those with willing caregivers. While the Court did not appear completely convinced this type of claim would never have merit, it found that the facts of this situation would not support those claims because the State was not treating people differently because of their disabilities, but because of their caregiver situation. Therefore, it dismissed those claims with

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[26] *E.B. ex rel. M.B. v. Cuomo*, No. 16-CV-735, 2020 WL 3893928, at *11 (W.D.N.Y. July 11, 2020) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007))

prejudice.[27]

The caregiver plaintiffs' claims for associational discrimination was recognized as a feasible claim, but because the individual plaintiffs with disabilities claims were dismissed, the associational claims also failed and were dismissed without prejudice. However, the Court made important findings that the caregivers' injuries were distinct and that they could have associational claims on the failure to integrate. Court recognized that an "*Olmstead* claim inherently alleges disparate treatment vis-à-vis individuals without disabilities and thus satisfies the requirement than individual demonstration exclusion 'by reason of [her] disability.'"[28] It also clearly noted that the Plaintiffs are under no obligation to allege facts addressing any possible fundamental alteration defense, such as showing that their needs could be reasonably accommodated, as that was an affirmative defense for the State to raise and it was not an argument properly considered at the pleadings stage.

Although the court in this case does not seem to have the antipathy towards *Olmstead* claims as in some of the other recent *Olmstead* dismissals, the decision does exhibit an increased scrutiny of the allegations. Courts seem to be looking for more specific allegations to demonstrate how a plaintiff is impacted and how they meet the elements of the claims.

Disability Rights California v. County of Alameda, 2021 WL 212900 (N.D. Ca. Jan. 21, 2021)

Disability Rights California and others alleged that individuals were being unnecessarily institutionalized, held in bad conditions, institutionalized beyond when they no longer met medical necessity criteria for inpatient psychiatric services, released without appropriate community-based services in place, and repeatedly re-institutionalized due to a lack of community-based services. In this case the court tightly applied the framework of *Townsend v. Quasim* that the relevant question was not whether the services will be provided, but where they are provided.[29] This focus on the services rather than institutionalization and isolation from the community led to dismissal with leave to amend. For example, the court found that the plaintiffs had not plausibly alleged that the failure to provide individualized treatment plans created a risk of unnecessary institutionalization and that to do so, they would have to allege a specific service was missing that could be received in the community and that worse outcomes were not equivalent to discrimination.[30] The judge also found that Hospital's failure to develop sufficiently individualized treatment and discharge plans does not constitute disability discrimination because that is more of a question of a standard of care than

[27] The Court discusses the existing case law regarding intra-class discrimination and generally seems to indicate that these claims are possible. *Id.* at n.7.
[28] *Id.* at *11.
[29] *Townsend v. Quasim,* 328 F.3d 511, 517 (9th Cir. 2003) (holding that *Olmstead* controls when the question is not whether the services will be provided, but where the location of the services).
[30] *Disability Rts. California v. Cnty. of Alameda,* No. 20-CV-05256-CRB, 2021 WL 212900, at *10 (N.D. Cal. Jan. 21, 2021).

whether the services are provided in the most integrated setting appropriate. The allegations regarding individuals being held at the hospital for longer than necessary also failed because there were not allegations that treatment professionals had found them eligible for community placement and DRC had failed to allege the specific services provided during those stays that could be provided in the community. AHS's motion to dismiss was granted with leave to amend for DRC to state claims with more detailed allegation that fit within the court's framework for *Olmstead* and its progeny.

The judge also dismissed claims against the County Defendants, finding that DRC had not stated a claim for which relief may be granted. The court interpreted DRC's request that existing services be expanded to prevent needless institutionalization as broadening *Olmstead* to require state to deliver services that could reduce institutionalization and that would be the "level of benefits" that *Olmstead* rejected.[31] The court again focused on what services the plaintiffs were alleging were being provided in a facility and were not being provided in the community. The judge also cited the need to plausibly allege the other *Olmstead* factors. The plaintiffs' complaint was interpreted as alleging the Defendants' shortcomings in reducing institutionalization as opposed to one that described unnecessary institutionalization due to a lack of provision of community based services.

The court took a very narrow view of the *Olmstead* framework and what would plausibly allege an *Olmstead* claim. There has been some increasing scrutiny from courts about *Olmstead* claims, whether plaintiffs are pleading with sufficient particularity, and whether the remedies sought are overly broad, all of which is worth taking into account when crafting a complaint. However, this judge seemed to have drawn a very small box around what an *Olmstead* claim could encompass.

Alexander v. Mayhew (multiple decisions)

Although it would be nice to think of the DRC case as a recent anomaly, it is not totally alone. In the Florida case of *Alexander v. Mayhew,* the judge also took a very narrow view of *Olmstead* claims.[32] In a series of decisions, largely against the Plaintiffs who are adults with physical disabilities seeking community-based services, the court found that the State could not be compelled under the ADA to increase or exceed the cap on its existing long-term-care waiver, to establish a new program outside the Medicaid

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[31] *Olmstead,* 527 U.S. at 603 n. 14
[32] *Alexander v. Mayhew*, 451 F.Supp.3d 1293 (N.D. Fla. Mar. 31, 2020) (State did not have to go outside existing programs); *Alexander v. Mayhew,* 334 F.R.D. 626 (N.D. Fla. Mar. 31, 2020) (denying class certification finding it was too late in the process and would prejudice the defendants and that it failed on the merits because the plaintiffs had failed to clearly articulate a claim and proposed relief); *Alexander v. Mayhew*, No. 4:18cv569-RH-MJF, 2020 WL 1545738 (N.D. Fla. Mar. 31, 2020) (granting summary judgment in part to dismiss the class wide claims); *see also Alexander v. Mayhew*, 2019 WL 5677948 (N.D. Fla. Oct. 27, 2019) (declining to certify class after finding a "fatal flaw" that the class, because it had claims regarding how the waitlist operated, had in internal irreconcilable conflict because if some won on those claims and moved up, others in the class on the waitlist would lose out).

system, or to otherwise provide additional services. However, the judge did leave room for success for the Plaintiffs if they could show that they were entitled to relief under the *existing* waiver or other state programs outside the Medicaid system.

Other Cases of Interest:

Doxzon v. Dep't Human Servs., 2020 WL 3989651 (M.D. Penn. July 15, 2020)
In *Doxzon,* a 21-year old woman who had successfully lived in a community setting for over a year prior was placed in a large nursing facility--a setting to which she objected and severely impacted her mental health--filed suit for a community placement. A temporary restraining order was issued to prevent Ms. Doxzon from being discharged from the hospital to an institutional setting, ordering her to a community placement and the decision focuses on the request for a preliminary injunction, which the Court granted.

The Defendants relied on the relatively common defense that the plaintiffs sought a "level of benefits" and therefore the case was the type that *Olmstead* said were not allowed. But the Court differentiated Ms. Doxzon's claims from a level of benefits claim because she was asking for services that the State purported to provide through its Medicaid program, especially its waiver program. Among other holdings, the Court found that she was not restricted to litigating only the services included in her plan of care and that the lack of a current plan did not restrict her claims.[33]

The Defendants were found not to have sufficiently raised a fundamental alteration defense through broad claims that the waiver program in question would be unmanageable if all waiver participants brought such suits. The decision also indicates that the Defendants tried to distract the Court with the need for housing or other non-Medicaid supports for Ms. Doxzon. This court was not persuaded, but the theory has found traction in other courts and is something to be aware of when crafting a case.

Roll v. Howard, 2020 WL 7292506 (Kan. Ct. App. Dec. 11, 2020)

In *Roll,* the court found that a person's opposition to community placement does not deprive the institution of the power to place a person in a more integrated environment. The case, brought by the guardians of an individual who had been institutionalized since she was a teenager in 1970 sought to prevent the State from moving the individual to a community placement despite the objections and lack of consent from the guardians. The Court found there is no right under the ADA to demand institutional treatment when more integrated, community-based services are adequate to meet the individual's needs. The Court also found the free choice provision in Section 1915(c) enforceable,

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[33] Other holdings of note from this case include: the availability of a Medicaid administrative appeal process does prevent a Plaintiff from enforce her rights under the Medicaid Act in a Federal court; the Plaintiff is the master of her own complaint and gets to frame her own claims; a state does not escape Medicaid requirements, such as providing services with reasonable promptness, through the use of a 1915(c) waiver; and a state cannot escape liability through the use of managed care.

but that it had not been violated as it had been determined that the individual did not require facility level of care.[34] However, the decision also notes that it had not been decided where the individual would be moving to in the community and what services she would use, including whether she would use 1915(c) services. Thus it is not clear from the decision whether she would still meet the institutional level of care to receive 1915(c) services, but just did not need the institution's level of care. That factual uncertainty seemingly should have impacted the court's reasoning as she may have met institutional level of care, but the state institution was not the appropriate level of care.

Similarly, in a recent decision in ***Ball v. Kasich**,* the court dismissed the intervener Guardians' claims regarding "the right to institutionalization", finding that failing to provide institutional settings cannot constitute discrimination based on disability. However, also in this decision the Court found the Guardians properly had sufficiently alleged enforceable rights under the reasonable promptness and the 1915(c) waiver free choice provisions because the Defendants had failed to ensure individuals were able to obtain institutional medically necessary services with reasonable promptness and had not been properly informed of institutional options. However, the Court found that the law does not allow the Guardians to direct how the State provides information about ICF choice, stating that if it is shown that the Defendants are providing information about ICFs and there are ICF beds that are empty by choice of those individuals who qualify for services, then the claims have no merit.[35]

Siino v City of New York, 2020 WL 3807451 (E.D.N.Y. Feb. 27, 2020)
In this *pro se* case, the plaintiff made a variety of claims, including integration mandate claims under *Olmstead* that covered a wide range of actions by the City, including that they failed to help her maintain a community placement and instead steered her towards institutional options, including guardianship. The Court granted summary judgment to the Defendants, but did discuss the appropriateness of the APS' service plan, which included guardianship, through the lens of the integration mandate. While this theory has appeared in law review articles and elsewhere, whether guardianship is appropriate through the lens of *Olmstead* and the integration mandate is fairly novel in case law.[36]

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[34] 42 U.S.C. § 1396n(c)(2)
[35] *Phyllis Ball v. John Kasich,* No. 2:16-CV-282, 2021 WL 821842, at *9 (S.D. Ohio Feb. 17, 2021).
[36] *See, e.g.,* Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making As a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act,* 81 U. COL. L. REV. 157 (2010), https://lawreview-dev.cu.law/wp-content/uploads/2013/11/10Salzman-FINAL_s.pdf.