Test RAW NOTES ON OLMSTEAD SUIT

I solicited feedback from attorneys at the Treatment Advocacy Center. They know a lot about state mental illness treatment systems and laws, but not half as much about Olmstead as you do. They simply haven't had a need to look at it. They were all impressed by what you wrote. I tried to summarize their comments. I am passing it along, not because I believe any of them are right (or even understand some of them), but in case their thought processes are of any value to you. (My additional comments are in ital.)

Plaintiff in Inpatient Commitment

(Brian) Unless I'm missing something, the only treatment setting MORE restrictive than AOT is INPATIENT commitment. Ergo, to bring this case you would need a plaintiff who:

- is currently under an inpatient commitment;
- can't get out of the hospital because he is considered too dangerous for release;
- resides in a state that is otherwise complying with Olmstead (i.e., has community services in place to ensure that nobody is being warehoused in the hospital simply because there are no community-based services to offer); and
- would NOT be too dangerous for release, if only those amply available community-based services could be offered via an AOT program. (In other words, the person is only being hospitalized because he can't adhere to outpatient treatment on a voluntary basis)

(Brian) I have serious doubts that such plaintiffs exist. I do not believe there are people stuck in hospitals who could be liberated, if only AOT were available. The very possibility seems to go against everything we know about the dysfunctional public mental health system. The few people who are currently being hospitalized long-term do not fit this profile. They are the most profoundly ill.

(DJ) States and Olmstead decisions are already pushing seriously mentally ill out. A suit like this could either create an appropriate place to put those people (into AOT) or be another excuse to kick people out. All my experience shows it will be the later. States are already declaring dangerous people ready for release. This will allow them to do more of that.

Frequently Hospitalized Plaintiff

(John) I think you could definitely have someone who had been hospitalized multiple times in a state with a bifurcated standard (one that's different for inpatient and outpatient commitment) that could say, but/for their ignoring the standard, "I would have gotten treatment in the community and earlier." Then they wouldn't have to be currently inpatient, but they would have capable of repetition but evading review fact pattern that the court could consider. [Brian disagreed: The people who stand to benefit from AOT are currently getting released from short-term hospitalizations over and over. When they are out in the community, they couldn't possibly be Olmstead plaintiffs because they are not currently in a treatment setting with ANY restrictions at all! Their rights under the ADA are not being violated.]

Plaintiff On Guardianship

(Betsey)An argument can be made that guardianship is more restrictive than AOT. Perhaps a court could look at whether AOT should be ordered as a least restrictive alternative to guardianship provided the community has appropriate treatment services in place. To which someone else responded, "I would not want to set up AOT as an "alternative" to guardianship. They are both potentially useful tools, and lots of people will benefit most by having both in place."

DJ: To the best of my knowledge, Guardianship is frequently used in CA, but not NY. I don't know much about it. But they accomplish the same thing.

Convicted Plaintiff

There is no Olmstead arg to be made with respect to people who have been convicted of crimes. The ADA does not come into play. They are being confined as perfectly legitimate punishment, however much we may decry it.

NGRI Plaintiff

(John) In terms of choosing litigants, I think NGRI is probably a difficult group to start with, just from the court practicality perspective. I think they make sense from an intellectual place, but I am guessing the reality is that a court would be more likely to take up another group's points. Someone else added: Whatever I think of the legal theory behind it, it strikes me as disastrous for political reasons. Do we really want to put ourselves in the position of arguing for the early release (under a toothless civil program) of people who have committed violent crimes? And incur the wrath of the victims, and potential FUTURE victims? No way!

DJ: I am not worried about the political issue. In fact, I think making such a politically incorrect case, that NGRIs should be in the community, is a great way to publicize everything we try to publicize (violence is an issue for SMI, Treatment prevents violence, etc.)

Jailed, unconvicted plaintiff

(Frankie) They do not have to be NGRI, do they? What about all the people who are in jail and being treated/not being treated? I think there may be leverage there- there is a big gray area of SMI people in jails. Worth looking into. Lots of pitfalls if we lose that kind of suit. I have always looked at this from a lens of treating people on an AOT order instead of treating them in jail (who would otherwise not be treated or receive less appropriate and helpful treatment); for many people it is by definition both the least restrictive AND more appropriate compared to jail. I think it can have real legs there, even if the arguments are less strong in a hospital setting

Frankie : What/who is Olmstead directly restricted to? I don't see how that is true that the analysis for people who are charged but have not been convicted is the same. They have not yet been convicted of any crimes. They have not been sentenced. They are, usually after 2 weeks receiving some kind of treatment if they are identified as SMI. These are oftentimes nonviolent crimes due to illness. There may be opportunities there for intervention and a lawsuit.

Brian: Under the broadest possible interpretation, the implications of Olmstead are limited to those whose liberty is being restrained for purposes of treating or controlling their illness or disability. Pre-trial detainees in the criminal justice system are having their liberty restrained for reasons related to the administration of criminal justice. The fact that it would not be happening if not for SMI, and the fact that that they are simultaneously getting treatment for that SMI, is beside the point. The ADA could never be interpreted to require a person's release from jail, because the person is not being jailed for the purpose of treatment.So what would be the alternative legal theory? What statutory or constitutional right would we allege has been violated?

Frankie: Look at it this way: let's say you had a pre-trial detainee with SMI but no anosognosia and no difficulty adhering to treatment on a voluntary basis. But his crappy city never made available the services he needed, and it led him to commit the crime for which he is now accused. Now, in jail, he is finally getting treatment. Can he argue that despite his inability to make bail, and despite the reasonableness of the bail imposed, the ADA requires his immediate release to receive voluntary services in the community until such time as he is convicted of a crime?

Brian: If that argument made sense, Disability Rights or Bazelon would have tried it by now.