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HEADLINE: Integration of the Mentally Ill a Decade After 'Olmstead';
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BODY:

In September 2009, Judge Nicholas Garaufis decided DAI v. Paterson, 653 F.Supp.2d 184 (2009), a New York case, regarding integrated services for the mentally ill in adult homes. The seminal case in this area is the Supreme Court's decision in Olmstead v. Zimring, 527 U.S. 581 (1999). This article will analyze DAI v. Paterson in light of Olmstead v. Zimring, its impact on the mentally ill residing in adult homes, and its prospects on appeal.

New York State provides services through its public mental health system, serving 600,000 New Yorkers with mental illness through approximately 2,500 licensed mental health programs.[1] In 2002, when the case was commenced, there were 12,586 recipients of mental health services residing in adult homes statewide,[2] approximately 4,000 in New York City alone.[3] The Office of Mental Health currently provides 29,050 units of supported housing beds with plans for 9,800 more.[4] There are presently 3,111 people living on New York City Streets and 38,000 people living in shelters.[5]

The American with Disabilities Act and Rehabilitation Act, as interpreted by the Supreme Court in Olmstead, require that each qualified disabled person receive his services in the most integrated setting appropriate for him. The most integrated setting is that in which the disabled receives the most interaction with those who are not disabled.

The issue posited in the DAI case was whether the mentally ill in adult homes in New York are in the most integrated setting appropriate for them. New York asserted a defense that adult homes in New York are considered integrated housing and that those who are residents in adult homes, many of whom came from psychiatric centers, are in the most integrated setting appropriate for them.

An essential sub-issue in the case was the definition of supported housing. The old model of supported housing had services attached to the housing. Housing A had services for the severely ill and there were a certain number of beds that were available for them. Housing B had services for those who could be more independent, and as a person became more adept at independent living, he would move from building to building.

The modern day approach to supported housing is to unbundle the housing from the services, assess each patient as to the type of housing appropriate, e.g., psychiatric center, adult home, supported housing, and then assess the services he requires.

New York's defense at best, used alternative arguments. At worst, it used contradictory arguments. Its first position was that adult homes were part of the continuum of supported housing. When the court rejected the defense, New York stated that the adult homes were the most appropriate settings for the residents living there. The judge disagreed with this position as well.

Plaintiff, and ultimately New York's own witnesses, testified that New York already had a supported housing model even for those who were severely mentally ill. Once that testimony was revealed, New York responded "we already have reasonably accommodated the mentally ill by placing them in supported housing."

Not so fast said Judge Garaufis, because although you have the infrastructure in place, you have no process in place to transition adult home residents from their placement into the less restrictive supported housing. Therefore, while New York has reasonably accommodated other mentally ill patients, it has not accommodated those who are in adult homes.

Judge Garaufis interpreted the reasonable accommodations regulations and the state defense of fundamental alteration as requiring first a showing that the state reasonably accommodated the mentally ill, and once there is that showing, then the state asserts its fundamental alteration defense, that any further accommodation would cost more and take away from funds available to other mentally ill.

Plaintiff's weakness in this case, was its failure to have professionals assess each of its litigants. Instead, over a million dollars was spent sending professionals in to talk to some of the litigants and come up with surveys and conclusions based on "random sampling." It appears that this did not bother Judge Garaufis.

Plaintiff produced evidence of the savings to New York by placing the residents in supported housing. New York stated that it could not anticipate its cost to place litigants in supported housing when there was merely an estimate of the number of people impacted and no knowledge of what each would require in support services.

The Supreme Court required personal assessments of those who are to be impacted by a move:

For the reasons stated, we conclude that, under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when:

1. the State's treatment professionals determine that such placement is appropriate;

2. the affected persons do not oppose such treatment; and

3. the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[6]

The judge rejected New York's argument stating that plaintiffs estimates were acceptable, there was evidence that those already in supported housing were similar in needs to those in adult homes and therefore there can be an educated estimate as to costs for the 4,300 litigants.

Plaintiffs and Judge Garaufis agreed that part of the cost savings will come when the adult homes can be closed, if New York doesn't backfill the beds.

Analysis

There are several issues that must be reviewed in the DAI case in light of Olmstead and the reality of the facts with which New York State is dealing.

On a purely factual basis, presently, the United States is in a great recession, and New York is suffering huge budget deficits. This aside, with the statistics set forth above for the number of mentally ill New York has on its public roles, mental health spending must be allocated amongst the diverse mentally ill population. The plaintiff and Judge Garaufis considered as cost savings, the idea of closing adult homes after transitioning all of their residents to supported housing.

The question arises as to how it will be possible for New York to close the adult homes when the Supreme Court itself stated that these homes are necessary to care for acute patients:

There also may be patients for whom these adult homes are the least restrictive setting some individuals may need institutional care from time to time "to stabilize acute psychiatric symptoms." There may be times [when] a patient can be treated in the community, and others when an institutional placement is necessary For other individuals, no placement outside the institution may ever be appropriate. Olmstead at 605

It is difficult realistically to see the plaintiffs and Judge Garaufis' argument that the beds should not be backfilled when there are 3,111 people living on the street and 38,000 in shelters. The Supreme Court stated: "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." Olmstead at 604.

A simple reading of the Olmstead case would reveal that the fundamental alteration defense was meant to excuse states from accommodating the mentally ill where it would cause a fundamental alteration and negatively impact other mentally ill. With the number of mentally ill in New York State who are arguably in more dire straits, it appears that another reading of Olmstead on appeal might work in New York's favor.

The judge allowed plaintiffs to estimate the candidates for supported housing when there are almost 13,000 in adult homes. Judge Garaufis:

Given the facts of this case, to require determinations from treatment providers would indefinitely forestall adult home residents who are actually qualified to receive services in the community from access to the most integrated setting appropriate to their needs, simply because their own treatment providers have not bothered to assess them. DAI at 259

Justices Anthony Kennedy and Stephen Breyer in Olmstead, concurring, were clear in their requirement that those who are moved to less restrictive environments be assessed by a professional:

The opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference. It is a common phenomenon that a patient functions well with medication, yet, because of the mental illness itself, lacks the discipline or capacity to follow the regime the medication requires. This is illustrative of the factors a responsible physician will consider in recommending the appropriate setting or facility for treatment.

It appears Judge Garaufis in DAI feared that justice delayed might be justice denied. But forgoing the individual assessment of candidates is forewarned in Olmstead at 610:

For a substantial minority deinstitutionalization has been a psychiatric Titanic. Their lives are virtually devoid of "dignity" or "integrity of body, mind, and spirit." "Self-determination" often means merely that the person has a choice of soup kitchens. The "least restrictive setting" frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies. [E. Torrey, "Out of the Shadows," (1997)]

If it turns out that plaintiffs and Judge Garaufis are correct in determining that it is less expensive to place mentally ill in supported housing, and there isn't a requirement in place that a treating professional certify that the patient is capable of living in supported housing with supported services **as determined at that time in history**, because it is ever changing based on budget and the number of people served, the mentally ill might end up with what the Supreme Court feared:

If the principle of liability announced by the Court is not applied with caution and circumspection, States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition. This danger is in addition to the federalism costs inherent in referring state decisions regarding the administration of treatment programs and the allocation of resources to the reviewing authority of the federal courts. It is of central importance, then, that courts apply today's decision with great deference to the medical decisions of the responsible, treating physicians . Olmstead at 610.

Finally, I reiterate the Supreme Court's statement regarding interference in a state's allocation of its mental health funds. The court cannot emphasize enough the importance of having each candidate personally evaluated by a competent professional to determine his eligibility for supported housing. This safeguards the rights of those who may fall prey to the department of social services and city budgets.

With present budget constraints, with 600,000 mentally ill in New York State, with 3,111 homeless people and without individual assessment of each of the adult home litigants, I question whether Judge Garaufis' requirement that 4,500 beds be developed for adult home residents over the next three years will be upheld on appeal.

Lenore S. Davis

Endnotes:

1. DAI v. Paterson, 653 F.Supp.2d 184 at 298 (2009).

2. DAI v. Paterson, 653 F.Supp.2d 184 at 194 (2009).

3. DAI v. Paterson, 598 F.Supp.2d 289 at 296 (2009).

4. DAI v. Paterson, 598 F.Supp.2d 289 at 302 (2009).

5. New York Times, "Number of People Living on New York Street Soars," March 19, 2010.

6. Olmstead, at 602/3.

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