

Children's Juvenile Justice and the ADA

The DOJ, *Olmstead*, and what we can do to prevent
out of home placement.

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United States' Investigation of the West Virginia Children's Mental Health System Pursuant to the Americans with Disabilities Act - June 1, 2015 (attach with packet)

- ▶ West Virginia Over-Relies on Segregated Residential Facilities and Continues to Build More Segregated Programs
- ▶ West Virginia Fails to Provide In-home and Community-based Mental Health Services to Children Who Need Them
- ▶ West Virginia's Failure to Provide Essential Integrated Community Services Keeps Children Unnecessarily Institutionalized
- ▶ West Virginians Desire Increased Community-based Mental Health Services
- ▶ West Virginia Has Failed to Implement its Olmstead Plan or Expand Successful Pilot Projects and Initiatives to Serve All Children

Olmstead v. LC, 527 US 581 (1999),

- ▶ West Virginia Has Failed to Implement its Olmstead Plan or Expand Successful Pilot Projects and Initiatives to Serve All Children
- ▶ What is the Olmstead Decision?
- ▶ Olmstead v. L.C. (1999) is a landmark United States Supreme Court decision upholding the civil rights of people with disabilities to receive community-based services and supports. The case was filed on behalf of two women who had a developmental disability and co-occurring mental illness, and were residents of a Georgia state-operated psychiatric hospital. Both women wanted to leave the hospital to receive support in the community. The hospital's treatment professionals agreed that the needs of both women could be met in community-based settings.
- ▶ On June 22, 1999, the U.S. Supreme Court agreed that unjustified isolation and institutionalization is a form of discrimination prohibited by the ADA and Title II of the ADA. To correct unjustified institutionalization, states must adopt even-handed and equitable funding mechanisms for a range of services and supports for people with disabilities. Funding decisions regarding institutional and community based programs must be consistent with the ADA mandate that programs are administered in the most integrated setting appropriate. The Supreme Court does not interpret the ADA as requiring states to phase out institutions. However, no longer will states be permitted to make funding decisions based on endeavors to keep institutions fully populated.

WV's Olmstead Plan -- 2005

- ▶ (1) establishment of an Olmstead office and the position of Olmstead Coordinator;
- ▶ (2) establishment of an Olmstead Advisory Council; (
- ▶ 3) convening six public forums and a forty-five day public comment period to gather input from people with disabilities, families, advocates, providers, and State officials for the development of a comprehensive, effectively working plan to provide services to people with disabilities in West Virginia; and

Olmsteadrights.org; <http://www.ada.gov/olmstead/>

Recent Olmstead Litigation indicates that for a plan to be successful that is must include "measurable outcomes". In May , Minnesota's Olmstead plan was denied for failure to include such outcomes.

Further it has to prevent unnecessary hospitalization in an integrated community setting.

[United States vs. Rhode Island](#) (2014)

[U.S. vs. New York](#) (2013)

[United States vs. New Hampshire](#) (2014)

Where is our Olmstead plan deficient? It appears to be not the plan but the execution.

- ▶ Families across the state report that their children cannot access mental health care in the community because the State does not inform them how or where to access services; there are not enough services or qualified staff available; or services are not available unless the child is in DHHR custody. Predictable consequences of under-treated mental health conditions - acting out behaviors, problems at school, sexualized behaviors, and threats to self or others - become the primary issues that lead to placement. Parents report that their children could have remained in the home if they had been able to access needed mental health services in their community, if services had been available earlier, if they had access to qualified professionals, and if care had been better coordinated.

So What ADA report and Olmstead have to do with the IEP process?

- ▶ A. Implementation of the Individuals with Disabilities Education Act ("IDEA") (ADA Report pg 25)
 - ▶ Across the state, we learned that school-related incidents are frequently what led to children with mental health conditions being charged with status or delinquency offenses, and ultimately to placement in segregated residential treatment facilities or juvenile detention centers. In West Virginia, children with disabilities who require special education services are over represented among students referred to law enforcement, subjected to school related arrests, and suspended and expelled. During the 2009-2010 school year, children with disabilities represented 17% of the overall West Virginia student population. However, they represent a much higher number of the children punished for school misconduct. Students with disabilities represented 34% of school related arrests and 22% of referrals to law enforcement. Children with disabilities also represented 26% of students suspended out of school more than once and 27% of students expelled under zero tolerance policies.

Integrated Community resources are more cost effective and meet the goals of Olmstead?

- ▶ The State's 2006-2007 System of Care initiative survey of stakeholders concluded that the "overall deficiency of least restrictive, community-based services and supports trumps all other barriers" to the provision of a community-based system of care approach. The State's efforts since this study was issued have not significantly reduced the number of children unnecessarily placed in segregated residential treatment facilities.
- ▶ Children, their parents, and the courts want alternatives to segregated residential treatment facilities. Throughout the state, the families with whom we spoke tried to access community-based mental health treatment and faced significant barriers. They reported experiencing long waits for minimal services. For instance, we interviewed Johnny, a 17-year old youth with a mental health condition and his mother. Johnny and his family sought treatment at the Comprehensive Center, the safety net provider under state law,⁷ and could not get needed services. Their challenges to finding treatment have included long waiting lists for appointments, and once they received an appointment, the inability to receive consistent, intensive mental health supports. Because of the inability to receive community services, Johnny had been in psychiatric hospitals 16 times and in 2 segregated residential treatment facilities. (ADA Report pg 17)

Its called the schools to prison pipeline for a reason?

- ▶ Unnecessary confinement in a segregated residential treatment facility "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *See Olmstead*, 527 U.S. at 601. Jane and her mother have struggled to find the services that Jane needs. These services were lacking in the community. As a result, Jane spent seven months in a segregated residential treatment facility in another state. Jane's experience was distressing: in addition to being over four hours away from her family, she reported that she had to sleep on air mattresses on the floor and had to take cold showers every day. After this experience, she began to have severe anxiety and panic attacks. Johnny's and Jane's families, and all of the families we met, said that they would welcome community treatment options.
- ▶ At meetings we held across West Virginia, state officials, community leaders, advocates, parents, and children all decried the lack of in-home and community-based services. DHHR representatives acknowledged the need to expand and better coordinate community-based services. The judge who told us that he was "sick of not having options" other than segregated residential treatment as a disposition reportedly struggles to find mental health agencies that will provide needed mental health services. Similarly, the public defenders with whom we spoke also noted frustration at the lack of community-based mental health treatment options in the state. They told us that when a judge gives a child a deferred prosecution and refers him to mental (ADA Report pg 17)

What is FAPE and how does it apply to what we've just discussed?

- ▶ Free Appropriate Public Education (FAPE) is an educational right of children with disabilities in the United States that is guaranteed by the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA)
- ▶ Olmstead while not considered under IDEA does consider an education environment to be the most integrated setting for children of school age.

Where should we start? Information to Gather at the MDT (Applies equally to all member of the team)

- ▶ Does the child have an IEP or a 504 plan or otherwise qualify under Policy 2419. Did the school follow 4373 and 2419?
 - ▶ WV DOE Policy 4373 Section 4. Considerations for Students with Disabilities, Students not yet Determined Eligible for Special Education and Students with 504 Plans When considering exclusion from the bus or suspension or expulsion from school or the bus for students with disabilities, students not yet determined eligible for special education (i.e. students currently engaged in the eligibility process beginning with a Student Assistance Team referral) or students with 504 plans, refer to WVBE Policy 2419 - Regulations for the Education of Students with Exceptionalities , Chapter 7 for specific guidelines related to protections which may be warranted for these students. (126CSR99)

What qualifies a child for protections under policy 2419?

- ▶ These protections are afforded to students with disabilities and students not yet eligible, if the district has knowledge that the student is a student with a disability before the behavior that precipitated the disciplinary action occurred.
- ▶ The district is deemed to have knowledge if one or more of the following is true:
 - ▶ a. The parent/adult student has expressed concern to district professional personnel, that results in written documentation, that the student may need special education and related services.
 - ▶ b. The parent/adult student has requested in writing that the student be evaluated for special education.
 - ▶ c. The student's teacher or other district personnel have expressed concern about a pattern of behavior demonstrated by the student directly to the director of special education or to other district supervisory personnel in accordance with the district's established child find system and referral process.
 - ▶ Pursuant to Section 3.B of this chapter, these protections may apply if a request for an evaluation of a student who is not currently eligible for special education is made during the period in which the student is subject to disciplinary measures. (126 CSR 16)

Who does not qualify under Policy 2419?

- ▶ These protections are not afforded to students who:
 - ▶ 1. are solely eligible under the category of gifted, and
 - ▶ 2. when there is no basis of knowledge that a student has a disability because one or more of the following is true:
 - ▶ a. an evaluation was conducted and a determination was made that the student did not have a disability;
 - ▶ b. the parent/adult student did not give written consent for an evaluation; or
 - ▶ c. the parent/adult student refused special education services.

So I'm representing a child who qualifies under 2419, now what?

- ▶ Does everyone on the MDT team have a copy of the current IEP if there is one?
 - ▶ If it's a child who has been identified but currently doesn't have an IEP find out what records and documents exist and request an order from the Judge or a FERPA compliant release from the Parents.
 - ▶ If the district reports a crime, it will ensure that copies of the special education and disciplinary records of the student are provided to the appropriate law enforcement authorities for consideration, to the extent the release of records is permitted by the FERPA and WV Board of Education Policy 4350. Generally, the release of records requires parent or adult student consent. (WVDE Policy 2419)

So I've got the records what do I do with them?

- ▶ A manifestation determination is required if the district is considering removing a student with a disability from his or her current educational placement for disciplinary reasons beyond ten consecutive school days or more than ten cumulative school days when the district deems that a pattern exists. A manifestation determination is a review of the relationship between the student's disability and the behavior subject to disciplinary action.
- ▶ Whenever considering a disciplinary action that will result in a change of placement, the district must: 1. Provide same day written notice of the removal, PWN, and the procedural safeguards notice to the parent/adult student of the disciplinary action to be taken; and 2. Within ten school days of any decision to change placement, meet with the parent and relevant members of the IEP Team (as determined by the parent and district) to conduct a manifestation determination by reviewing all pertinent information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine: a. If the conduct in question was caused by, or had a direct and substantial relationship to the student's disability; or b. If the conduct in question was the direct result of the district's failure to implement the IEP. If the district, the parent and relevant members of the IEP Team determine that either of the conditions described in a. or b. is met, the conduct must be determined to be a manifestation of the student's disability, and the district must take immediate steps to remedy those deficiencies. A. District Actions When Conduct is Determined to Be a Manifestation of the Student's Disability

My client's behavior was determined to be a manifestation of the disability what does that mean?

- ▶ A. District Actions When Conduct is Determined to Be a Manifestation of the Student's Disability The IEP Team must:
 - ▶ 1. Conduct a functional behavior assessment (FBA), unless an FBA was conducted before the behavior, which resulted in the change of placement, occurred;
 - ▶ 2. Develop and implement a behavior intervention plan (BIP), or review the existing BIP and modify, as needed, to address the current behavior(s); and
 - ▶ 3. Return the student to the placement from which the student was removed, unless the parent and the district agree to a change of placement as part of the modification of the BIP.

What if the conduct wasn't determined to be a manifestation?

- ▶ School personnel may apply relevant disciplinary procedures in the same manner for the same duration as the procedures applicable to students without disabilities, except as provided below: 126CSR16 73 1.
- ▶ Convene the IEP Team to determine the educational services to be provided to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP; and 2. Provide, as appropriate, a functional behavioral assessment (FBA), and behavior intervention services and modifications that are designed to address the behavior violation so that it does not recur. C. District Actions When a Behavior Violation Involves Weapons,

So we know a little more than we did, what do we do?

DUE PROCESS MATTERS:

Learn the Rules; Make everyone follow the rules.

Don't accept the status quo- make sure referrals and follow ups happen

Make sure all the stakeholders are in the room- Education Officials and other referral sources need to be at the table

Hold others (and yourself) accountable--- make sure that you and others are Guardians of the Process for each and every child adjudicated.