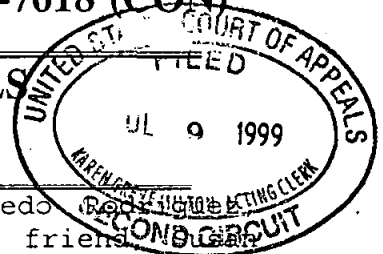


99-7572(L)

99-7586 (CON); 99-7588 (CON); 99-7604 (CON); 99-7618 (CON)

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT



JUANA RODRIGUEZ, by her son and next friend, Wilfredo  
AMELIA RUSSO; MARY WEINBLAD, by her daughter and next friend,  
Downes; CHRISTOS GOUVATSOS; and SIDONIE BENNETT, individually and on  
behalf of all others similarly situated,

*Plaintiffs-Appellees,*

MOLLIE PECKMAN, by her son and next friend, Alex Peckman,

*Intervenor-Plaintiff-Appellee,*

-against-

CITY OF NEW YORK, IRENE LAPIDEZ, Commissioner Of Nassau County  
Department Of Social Services, COMMISSIONER OF THE WESTCHESTER COUNTY  
DEPARTMENT OF SOCIAL SERVICES, NEW YORK CITY DEPARTMENT OF SOCIAL  
SERVICES, COMMISSIONER, SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES,  
and NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,

*Intervenors-Defendants-Appellants,*

DENNIS WHALEN, Commissioner of the New York State Department of  
Health, and BRIAN WING, Commissioner of the New York State Office of  
Temporary Disability Assistance,

*Defendants-Appellants.*

REPLY BRIEF FOR THE COMMISSIONER OF THE  
WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES

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# 99-7572(L)

99-7586 (CON); 99-7588 (CON); 99-7604 (CON); 99-7618 (CON)

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## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUANA RODRIGUEZ, by her son and next friend, Wilfredo Rodriguez;  
AMELIA RUSSO; MARY WEINBLAD, by her daughter and next friend, Susan  
Downes; CHRISTOS GOUVATSOS; and SIDONIE BENNETT, individually and on  
behalf of all others similarly situated,

*Plaintiffs-Appellees,*

MOLLIE PECKMAN, by her son and next friend, Alex Peckman,  
*Intervenor-Plaintiff-Appellee,*

-against-

CITY OF NEW YORK, IRENE LAPIDEZ, Commissioner Of Nassau County  
Department Of Social Services, COMMISSIONER OF THE WESTCHESTER COUNTY  
DEPARTMENT OF SOCIAL SERVICES, NEW YORK CITY DEPARTMENT OF SOCIAL  
SERVICES, COMMISSIONER, SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES,  
and NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,

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Health, and BRIAN WING, Commissioner of the New York State Office of  
Temporary Disability Assistance,

*Defendants-Appellants.*

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### REPLY BRIEF FOR THE COMMISSIONER OF THE WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES

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## REPLY ARGUMENT

### THE HOLDING IN OLMSTEAD REQUIRES EITHER A REVERSAL OR A REMAND OF THE DISTRICT COURT'S ORDER

Since filing of the brief by the Westchester County Appellants, the United States Supreme Court rendered a decision in *Olmstead et al., v. L.C., et al*, 1999 U.S. Lexis 4368 (June 22, 1999). An analysis of the facts and holding in *Olmstead* case is relevant for consideration in connection with the instant appeal.

*Olmstead* is a case involving two mentally retarded women, one diagnosed with schizophrenia and the other with a personality disorder. Both women had a history of treatment in institutions. The heart of the controversy arose when the women who were institutionalized were found to be eligible for a community based program, but were unable to participate in the community based programs for several years. A lawsuit was commenced on their behalf alleging, among other things, that they were not participating in the community based program that they were eligible for because of their mental disability.

In its holding, the Supreme Court determined that Congress, through the Americans with Disabilities Act, explicitly identified the unjustified isolation of persons with disabilities as a form of discrimination based on disability.

In addition, the Supreme Court recognized the

States' need to maintain a range of facilities for the care and treatment of persons **with diverse mental disabilities** and the States' obligation to administer services with an even hand... In evaluating a State's fundamental - alteration defense<sup>1</sup>, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care ... but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably. (emphasis added).

In other words, the Supreme Court recognized that there were varying degrees of mental disabilities requiring an array of services. Consequently, the requirement that a particular individual with a mental disability be eligible to receive a particular service is crucial. As the language of the Supreme Court indicates, only the *unjustified* isolation of an individual may be deemed a form of discrimination, thereby implying that the isolation of an individual may be justified, under certain circumstances. Consequently, it is only after an individual is found to be eligible for a particular service, that it necessary to evaluate the fundamental - alteration defense.

When this analysis of *Olmstead* is applied to the instant matter, either a reversal or a remand of the District Court's

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<sup>1</sup> The fundamental-alteration component of the reasonable-modifications regulations 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.

order is warranted. Unlike the plaintiffs in *Olmstead* who were eligible for the community based program, the plaintiffs in the instant case (who are requesting safety monitoring to be included as a separate task) are not otherwise eligible for the program in Westchester County if they are not self-directing or have an individual sufficiently available to assist with directing them. Notably, plaintiffs conceded that there are individuals with mental disabilities who are currently eligible for and receiving personal care services and are unable to illustrate a discriminatory application within Westchester County. In addition, some of those eligible individuals with mental disabilities throughout the State of New York do not require the relief the plaintiffs are requesting, *i.e.*, require the defendants assess a separate task of safety monitoring for their services. The separate task of safety monitoring only assists those individuals with mental disabilities that are otherwise ineligible for the personal care services program or those individuals who require additional services over and above those provided by the personal care services program. By granting the relief requested by the plaintiffs, the District Court has also, in effect, changed the qualifications for eligibility in the personal care program.

Even if this Honorable Court upholds the District Court's ruling that deems all individuals with mental disabilities are

eligible for the personal care services program, the range of facilities for the care and treatment of persons with diverse mental disabilities and the States' obligation to administer services with an even hand do not support the District Court's ruling. There are other services available in a community setting that would more appropriately serve the supervision needs of these individuals. The relief granted to the plaintiffs by the District Court is inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities. To include the task of safety monitoring changes the basic nature of the program to provide guardianship services - a service which is provided in other programs.

At a minimum, the instant matter must be remanded back to the District Court for further consideration in light of the holding in *Olmstead*. The District Court must consider the other resources available to the State, the range of services provided to others with mental disabilities, and the obligation to mete out those services equitably.




## CONCLUSION

For all of the reasons set forth in the Appellants' Brief and in this Reply Brief, the Westchester County Department of Social Services respectfully requests that an order be entered reversing the Order of the United States District Court for the Southern District of New York (Scheidlin, U.S.D.J.) dated April 19, 1999, and entered on May 13, 1999, insofar as it issued a permanent injunction and directed the all of the defendants, (including the Westchester County Department of Social Services) to include safety monitoring as a separate task on the TBA forms, assess the need for safety monitoring as a separate task and calculate any minutes allotted for safety monitoring as part of the total personal care services authorized for applicants and recipients. In the alternative, it is respectfully submitted that the matter be remanded back to the District Court for further evaluation of the resources available to the State, the range of services the State provides others with mental disabilities, and the State's obligation to mete out those

services equitably.

Dated: White Plains, New York  
July 8, 1999

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