Journal of Health Care Law and Policy

Volume 3 | Issue 2 Article 9

Olmstead v. Zimring, Unnecessary Institutionalization Constitutes Discrimination Under the Americans With Disabilities Act

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Notes

OLMSTEAD v. ZIMRING: UNNECESSARY INSTITUTIONALIZATION CONSTITUTES DISCRIMINATION UNDER THE AMERICANS WITH DISABILITIES ACT

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The question raised in *Olmstead v. Zimring*[1] was whether the Americans with Disabilities Act's (ADA) prohibition on discrimination against disabled persons requires a state to place mentally disabled patients in community-based treatment rather than in an institution.[2] The United States Supreme Court held that community placement of disabled individuals may be necessary under the ADA, but only after three conditions are satisfied: treating professionals have deemed such treatment appropriate for the given patients, the patients themselves desire community care, and placement in community-based programs is possible with reasonable accommodations.[3]

The district court granted partial summary judgment for the plaintiffs, holding that by not placing plaintiffs in community-based care, the State violated Title II of the ADA.[4] The Eleventh Circuit affirmed the district court's judgment but remanded for review of the State's "lack of funds" defense, which the district court had refused to consider.[5] The Supreme Court then granted certiorari to resolve the issue of whether unnecessary institutionalization of mentally disabled individuals constitutes discrimination under the ADA.[6]

This casenote discusses the Supreme Court's reasoning in *Olmstead* in terms of five issues. First, the standard the Court uses when

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1. 119 S. Ct. 2176 (1999).

2. *See id.* at 2181.

3. *See id.*

4. *See* Zimring v. Olmstead, 1997 WL 148674, 3-4 (N.D. Ga. 1997). The particular section at issue, § 12132, states that "no qualified individual with a disability" can be discriminated against, or denied access to or benefits of, any federally-funded program or service. 42 U.S.C. § 12132 (1994). A "qualified individual with a disability" is defined in section 12131(2) as, "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2).

5. *See* Zimring v. Olmstead, 138 F.3d 893, 905 (11th Cir. 1998).

6. *See Olmstead*, 119 S. Ct. at 2185.

analyzing discrimination under the ADA differs from that used in the past under § 504 of the Rehabilitation Act.[7] In addition, the Court cites little support or authority for the per se definition of discrimination it adopts in this case.[8] Fortunately, the Court prevents some of the confusion likely to result from its divergence from established precedent by countering its broad definition of discrimination with narrow definitions for other terms used in the provisions in question.[9] Next, the Court gives states some necessary leeway, after the first part of the opinion seems to place very strict requirements on the states, by declaring that the standard for reasonable modifications will be determined on a case-by-case basis.[10] Finally, the Court's holding in *Olmstead* has a possible negative application.[11]

I. THE CASE

The situation at hand in *Olmstead v. Zimring* began when two mentally disabled women, referred to as E.W. and L.C. to maintain their privacy, brought a claim seeking placement in community-based treatment, as opposed to institutionalized care.[12] Each remained institutionalized for at least one year after being deemed qualified for community care by psychiatric professionals.[13] L.C. filed suit in the United States District Court for the Northern District of Georgia, claiming that her continued institutionalization violated Title II of the ADA because she was not provided with care in the most integrated setting appropriate to her needs.[14] She requested placement in a community-based treatment facility.[15] E.W. then intervened in the suit, claiming the same violation and seeking the same remedy.[16]

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7. *See infra* notes 119-130 and accompanying text.

8. *See infra* notes 131-149 and accompanying text.

9. *See infra* notes 150-163 and accompanying text.

10. *See infra* notes 164-172 and accompanying text.

11. *See infra* notes 173-176 and accompanying text.

12. *See* Olmstead v. Zimring, 119 S. Ct. 2176, 2183 (1999).

13. *See id.*

14. *See* Zimring v. Olmstead, 138 F.3d 893, 895 (11th Cir. 1998) (citing 42 U.S.C. §§ 12131-12134 (1995) and 28 C.F.R. § 35.130 (1997) as the specific provisions claimed to have been violated). Plaintiff also raised a claim under the Due Process Clause of the Fourteenth Amendment, but the district court resolved the case solely on statutory grounds. As a result, neither the Eleventh Circuit nor the Supreme Court could consider the constitutional claim. *See id.* (citing Citro Florida, Inc. v. Citrovale, S.A., 760 F.2d 1231 (11th Cir. 1985)); *see also Olmstead*, 119 S. Ct. at 2181 (citing Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)).

15. *See Olmstead*, 119 S. Ct. at 2184.

16. *See id.*

L.C. and E.W. were granted partial summary judgment by the district court and awarded declaratory and injunctive relief.[17] The court held that the State (referring to all of the named defendants) violated the anti-discrimination mandate of Title II of the ADA by keeping the plaintiffs institutionalized instead of placing them in community care.[18] Enjoining the State from further impingement on the plaintiffs' rights, the court ordered that both be placed in community-based treatment centers and that the State provide the services necessary to maintain that placement.[19]

The court rejected the State's argument that its failure to place the plaintiffs in community care was based on a shortage of funding rather than discrimination, and ruled that unnecessary institutionalization, even without proof of inappropriate intent, constitutes discrimination per se under the ADA.[20] The State also asserted a "fundamental alteration" defense, claiming that the court's intervention would fundamentally alter its mental health treatment program in a financial sense.[21] But, after doing its own analysis of the State's financial situation, the court found little credibility to this argument.[22] As a result, the district court "found that the State's purported lack of funds to provide community-based services to L.C. and E.W. was insufficient as a matter of law to establish that providing community-based care to plaintiffs would constitute a fundamental alteration."[23]

The Eleventh Circuit affirmed the district court's holding that keeping the plaintiffs unnecessarily institutionalized constituted discrimination, but remanded the case for further analysis of the State's "fundamental alteration" defense.[24] On appeal, the State contended that a finding of discrimination required first a comparison of disabled individuals with their non-disabled counterparts.[25] The court's version of the State's argument was "that Title II of the ADA affords no protection to individuals with disabilities who receive public services designed only for individuals with disabilities,"[26] an interpretation of the ADA for which the State demonstrated no authority, and which

17. *See Zimring*, 138 F.3d at 895.

18. *See Olmstead*, 119 S. Ct. at 2184.

19. *See Zimring*, 138 F.3d at 895 (explaining that both plaintiffs had a history of repeated placement in and removal from institutional care).

20. *See Olmstead*, 119 S. Ct. at 2184.

21. *See id.*

22. *See id.*; *see also Zimring*, 138 F.3d at 904 (explaining that the district court found that the cost of community-based care was less than that of institutional care).

23. *Zimring*, 138 F.3d at 904.

24. *See id.* at 895.

25. *See id.* at 896.

26. *Id.*

the court therefore rejected.[27] After discussing the plain language of the statute, the legislative history of the ADA and its corresponding regulations, and the Congressional intent behind the legislation, the Eleventh Circuit concluded that, "where, as here, a disabled individual's treating professionals find that a community-based placement is appropriate for that individual, the ADA imposes a duty to provide treatment in a community setting — the most integrated setting appropriate to that patient's needs."[28]

The Eleventh Circuit reviewed the district court's outright dismissal of the State's "lack of funds" defense regarding the reasonable modifications sought by the plaintiffs and remanded this issue to the district court.[29] While the Eleventh Circuit emphasized that having to spend additional funds to provide non-discriminatory treatment is not a valid defense under the ADA, it admitted that if those additional expenditures are so unreasonable as to cause fundamental alterations in the mental health services provided state-wide, the State may have justification for continued institutionalization of the plaintiffs.[30] The presumption remains that the State is required to spend the additional money needed to provide mental health care that complies with the ADA's prohibition on discrimination, but it is possible for the State to rebut that presumption.[31] Since the district court did not even consider that possibility and "because of the complexity of the factual issues concerning the funding for mental health services in Georgia,"[32] the Eleventh Circuit remanded the case to the district court to determine whether the State could demonstrate a fundamental alteration in its mental health program because the additional expenditures being required were unreasonable.[33]

The United States Supreme Court granted certiorari to resolve the issue of whether unnecessary institutionalization of mentally disabled individuals constitutes discrimination under the ADA.[34]

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27. *See id.* (explaining that the goal of the ADA is to ensure equal opportunity for disabled individuals, which often requires providing services and accommodations to only those who are disabled so that they may be equals with their non-disabled counterparts).

28. *Id.* at 902.

29. *See Zimring*, 138 F.3d at 905.

30. *See id.* at 904-05.

31. *See id.*

32. *Id.*

33. *See id.*

34. *See* Olmstead v. Zimring, 119 S. Ct. 2176, 2185 (1999) (mentioning that after certiorari had been granted, the district court rejected, on remand, the State's fundamental alteration defense. However, the district court also declared that its decision on remand had no impact beyond the individual plaintiffs in the case.)

II. LEGAL BACKGROUND

A. *History of the ADA*

Congress enacted the ADA in 1990 in order to eradicate discrimination against individuals with disabilities.[35] The Rehabilitation Act of 1973[36] and the Developmentally Disabled Assistance and Bill of Rights Act of 1975[37] were predecessors to the ADA, and aspects of both pieces of legislation were incorporated in the enacted version of the ADA.[38]

The ADA consists of Titles I through III, which address, respectively, discrimination in employment,[39] public services funded by the federal government,[40] and public accommodations funded through the private sector.[41] Title II is the public services portion of the ADA and is the basis for the claim in *Olmstead*.[42] Under Congress' instruction, the Attorney General established regulations to implement sections of Title II, including section 12132.[43] In its instructions to the Attorney General, Congress ordered that the regulations implementing Title II be consistent with those regulations under § 504 of the Rehabilitation Act which applied to recipients of federal funds.[44]

The resulting regulations are found in 28 C.F.R. pt. 35, several of which are almost identical to the § 504 regulations.[45] The Third Circuit, in *Helen L. v. DiDario*, explained the significance of the relationship between § 504 and Title II regulations: "Because Congress

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35. *See id.* at 2182.
36. 29 U.S.C. § 701 (1976).
37. 42 U.S.C. § 6001 (1976).
38. *See Olmstead*, 119 S. Ct. at 2181, n.1.
39. *See* 42 U.S.C. §§ 12111-17 (1994).
40. *See* 42 U.S.C. §§ 12131-65 (1994).
41. *See* 42 U.S.C. §§ 12181-89 (1994).
42. *See Olmstead*, 119 S. Ct. at 2182.
43. *See id.* (explaining that § 12132, the specific section at issue in *Olmstead*, is a general ban on discrimination by public entities against disabled individuals). Section 12132 reads: "subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1994).
44. Section 504 states:

> no otherwise qualified individual with a disability in the United States, as defined in section 706(7) of this title, shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a) (1976).
45. *See Olmstead*, 119 S. Ct. at 2183.

mandated that the ADA regulations be patterned after the § 504 coordination regulations, the former regulations have the force of law."[46] One such § 504 regulation, which contributed to the conflict in *Olmstead*, is known as the integration regulation and requires services to be provided in "the most integrated setting appropriate" to persons with disabilities.[47]

B. Previous Decisions Affecting Disability Discrimination Law

Several important cases have been decided under § 504 of the Rehabilitation Act and the Developmentally Disabled Assistance and Bill of Rights Act of 1975. One recent Third Circuit case addressed § 12132 of Title II of the ADA.[48] The cases which serve as background for the Court's decision in *Olmstead* and which will be discussed *infra* are *Southeastern Community College v. Davis*,[49] *Alexander v. Choate*,[50] *Pennhurst State School and Hospital v. Halderman*,[51] and *DiDario*.[52]

The U.S. Supreme Court had to decide, in *Southeastern Community College v. Davis*, whether § 504 of the Rehabilitation Act required a clinical nursing college to modify its physical qualifications in order to grant a disabled individual admission.[53] The plaintiff was hearing impaired to such an extent that she could not understand spoken words and relied on lip-reading.[54] The nursing program directors determined her hearing impairment would prevent plaintiff from caring safely for patients and subsequently denied plaintiff admission to the program.[55] Plaintiff filed suit, claiming that her rights under § 504, which prohibits discrimination against an "otherwise qualified handicapped individual," had been violated.[56]

The district court found in favor of the defendant, concluding that the plaintiff was not a qualified individual under § 504 and therefore did not have a cause of action under that statute.[57] The Fourth

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46. Helen L. v. DiDario, 46 F.3d 325, 332 (3d Cir. 1995).

47. *See* Olmstead, 119 S. Ct. at 2183 (quoting 28 C.F.R. § 35.130(d) (1997), which reads, "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.").

48. *See infra* note 52.

49. 442 U.S. 397 (1979).

50. 469 U.S. 287 (1985).

51. 451 U.S. 1 (1981).

52. 46 F.3d 325 (3d Cir. 1995).

53. *See* Southeastern Comm. College v. Davis, 442 U.S. 397, 400 (1979).

54. *See id.* at 401.

55. *See id.* at 401-402.

56. *See id.* at 402.

57. *See* Davis v. Southeastern Community College, 424 F.Supp. 1341, 1345-46 (E.D.N.C. 1976) (explaining that in order to be "qualified" for the nursing program, an individual

Circuit reversed, finding that the district court erred when deciding whether the plaintiff was "otherwise qualified" for the nursing program,[58] and adding that § 504 may place an affirmative burden on the defendant to modify its program to accommodate disabled individuals who, discounting their disability, are qualified for admission.[59] The Supreme Court reversed the Fourth Circuit, agreeing with the district court.[60] The Court first found that, under § 504, "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[61] Further, the Court explained, "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds,"[62] thereby rejecting the Fourth Circuit's assertion that the defendant failed to satisfy the burden placed on it by § 504.[63] The Court limited its holding by adding, "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory."[64] Yet the Court concluded that this situation was not one which constituted the discrimination prohibited in § 504 of the Rehabilitation Act.[65]

In *Alexander v. Choate*,[66] a group of handicapped individuals brought a class action suit alleging that a proposed change in the Medicaid program to limit inpatient coverage violated § 504 of the Rehabilitation Act.[67] Such a change, according to the plaintiffs, would impermissibly discriminate against the disabled, since statistical evidence showed that a significantly higher percentage of handicapped patients stayed in the hospital for longer time periods than non-handicapped patients.[68] The district court held that § 504 had not been violated because the fourteen day limitation affected all Medicaid recipients equally, without regard to disability.[69] The Sixth Circuit reversed the district court and held that since Plaintiffs had

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must have the ability to hear spoken words), *rev'd*, 574 F.2d 1158 (4th Cir. 1978), *rev'd*, 442 U.S. 397 (1979).

58. *See* Davis v. Southeastern Community College, 574 F.2d 1158, 1161 (4th Cir. 1978), *rev'd*, 442 U.S. 397 (1979).

59. *See id.* at 1162.

60. *See* Southeastern Community College v. Davis, 442 U.S. 397, 404 (1979).

61. *Id.* at 406.

62. *Id.* at 411.

63. *See id.*

64. *Id.* at 412-13.

65. *See id.* at 413.

66. 469 U.S. 287 (1985).

67. *See id.* at 289-90.

68. *See id.*

69. *See* Jennings v. Alexander, 518 F.Supp. 877, 886 (D. Tenn. 1981), *rev'd*, 715 F.2d 1036 (6th Cir. 1983), *rev'd sub nom.* Alexander v. Choate, 469 U.S. 287 (1985).

established a prima facie case of discrimination and the State had failed to justify its adoption of a limitation with discriminatory effect, the State was in violation of § 504.[70]

After granting certiorari, the Supreme Court first ruled that discriminatory intent was not a prerequisite to a finding that § 504 had been violated.[71] The Court stated, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[72] On the other hand, the Court elaborated, "just as there is reason to question whether Congress intended § 504 to reach only intentional discrimination, there is similarly reason to question whether Congress intended § 504 to embrace all claims of disparate-impact discrimination."[73] And in this case, the Court concluded that the behavior in question, namely the State limiting inpatient coverage under Medicaid, does not deny Plaintiffs access to, nor exclude them from, Medicaid services, and therefore does not violate § 504 of the Rehabilitation Act.[74]

At issue in *Pennhurst State School and Hospital v. Halderman*[75] was the scope of the Developmentally Disabled Assistance and Bill of Rights Act of 1975[76] and, more specifically, whether that Act provided mentally disabled individuals the substantive right to appropriate treatment in the least restrictive environment possible.[77] The plaintiff, representing herself and a class of similarly situated individuals, brought suit against Pennhurst Hospital, alleging that conditions in the hospital were inhumane and claiming that her rights under the Act had been violated.[78] One of the remedies sought was closure of the hospital and provision of community-based care for all residents of the hospital.[79] Both the district court and the Third Circuit found that the Developmentally Disabled Assistance and Bill of Rights Act

70. *See* Jennings v. Alexander, 715 F.2d 1036, 1044-45 (6th Cir. 1983), *rev'd sub nom.* Alexander v. Choate, 469 U.S. 287 (1985).

71. *See* Alexander v. Choate, 469 U.S. 287, 296-97 (1985).

72. *Id.*

73. *Id.* at 299.

74. *See id.* at 302.

75. 451 U.S. 1 (1981).

76. 42 U.S.C. § 6001 (1976).

77. *See* Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 5 (1981). The particular provision in question was 42 U.S.C. § 6010, which is referred to as the bill of rights provision and reads in part, "(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty." *Id.* at 13.

78. *See id.* at 6.

79. *See id.*

created an enforceable right to habilitation in the least restrictive setting, and that Pennhurst had violated that right as related to the class in question.[80]

The U.S. Supreme Court, however, reversed both lower courts and held that the Act merely "establishes a national policy to provide better care and treatment to the retarded and creates funding incentives to induce the States to do so."[81] The Court discussed the legislative history of the Act, Congressional intent, and the language of the Act itself, and concluded that while the provisions at issue encouraged the states to provide treatment to mentally disabled individuals in an integrated environment, they did not require the states to establish such treatment programs.[82] The Court explained:

> [w]e are persuaded that § 6010, when read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment. It is simply a general statement of 'findings' and, as such, is too thin a reed to support the rights and obligations read into it by the court below.[83]

In sum, the Court refused to construe the Act as creating an affirmative burden on the states to create community-based treatment programs for mentally disabled individuals.[84]

In 1995, the Third Circuit interpreted the ADA while deciding *Helen L. v. DiDario.*[85] Plaintiff alleged that the Pennsylvania Department of Public Welfare discriminated against her on the basis of disability, thereby violating Title II of the ADA, by requiring that she receive treatment in a nursing home as opposed to attendant care services in her own home.[86] Both parties agreed that while plaintiff was not capable of independent living, institutionalization was not necessary because she was capable of functioning with assistance for only certain daily activities.[87] The district court held that the depart-

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80. *See* Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295, 1323-24 (E.D. Pa. 1978), *aff'd*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981); Halderman v. Pennhurst State School and Hospital, 612 F.2d 84, 107 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981).

81. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 31 (1981).

82. *See id.* at 27.

83. *Id.* at 19.

84. *See id.* at 27.

85. *See* Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995).

86. *See id.* at 327.

87. *See id.* at 328.

ment had denied plaintiff attendant services due to a lack of funds rather than discrimination, and therefore had not violated the ADA.[88]

The Third Circuit reversed the district court, holding that the department discriminated against the plaintiff by keeping her institutionalized unnecessarily, which violated Title II of the ADA.[89] The court emphasized the legislative history of the ADA, noting particularly how Title II of the ADA improved upon § 504 of the Rehabilitation Act by imposing stricter regulations to eliminate "pervasive" discrimination against disabled individuals.[90] However, the court also noted that the § 504 "integrated setting" aspect of its coordination regulations was incorporated into the ADA regulations.[91] The court concluded by stating, "[t]hus, the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled,"[92] meaning that the State violated the ADA by keeping an individual institutionalized when appropriate, community-based treatment programs were available.

III. SUMMARY OF COURT'S REASONING

The first question the Supreme Court addressed in *Olmstead* was whether undue institutionalization constitutes discrimination by reason of disability under Title II of the Americans with Disabilities Act.[93] Rather than engaging in an in-depth analysis of the standard necessary to sustain discrimination claims, as in Title VII claims under the Civil Rights Act of 1964,[94] the Court relied on the explicit language of the statute to conclude that unjustified segregation is discrimination per se under the ADA.[95] In doing so, the Court rejected the State's claim that liability for discrimination exists only once the alleged victims have demonstrated "'uneven treatment of similarly situated indi-

88. *See id.* at 329.

89. *See id.* at 332-33.

90. *See id.* at 330-33.

91. *See id.* at 331-32.

92. *Id.* at 333.

93. *See* Olmstead v. Zimring, 119 S. Ct. 2176, 2185 (1999). The specific statute at issue reads, "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1994).

94. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651 (1989).

95. *See Olmstead*, 119 S. Ct. at 2186. In the findings section of the ADA, Congress states that "historically, society had tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

viduals,' "[96] and explained that, "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA."[97] However, this definition of discrimination applies only to "qualified individuals" who are disabled.[98]

The Court's interpretation of a "qualified individual" is that first, the individual has been deemed capable of living in a community-based program by a professional and that second, the individual wants to participate in such program.[99] The Court states, "we emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings."[100] The Court continues, "nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it."[101]

The next issue the Court discussed was the reasonable modifications clause, which requires the State to make "reasonable modifications" to programs and services when necessary to avoid discriminating against disabled persons.[102] The Eleventh Circuit rejected the State's contention that placing the plaintiffs in community-based care would fundamentally alter the nature of services provided to all mental health patients due to the State's limited financial resources, and concluded that only in very limited circumstances would § 35.130(b)(7) allow a cost-based defense to reasonable modifications.[103] The Supreme Court found the Eleventh Circuit's interpretation of the regulation too narrow, and therefore unreasonable, because in comparing the cost of a particular individual's care to the entire mental health budget for the state, the State could never succeed in demonstrating a "fundamental alteration."[104] The Court explained,

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96. *Id.* at 2186 (quoting Brief for Petitioners at 21).

97. *Id.* (quoting Brief for Petitioners at 21).

98. *See* 42 U.S.C. § 12132 (1994) (defining qualified individuals as those disabled persons who, "with or without reasonable modifications . . . meet the essential eligibility requirements" of the program or service).

99. *See Olmstead*, 119 S. Ct. at 2188.

100. *Id.* at 2187-88.

101. *Id.*

102. The specific regulation is 28 C.F.R. § 35.130(b)(7) (1997), which reads, "a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Id.*

103. *See* Zimring v. Olmstead, 138 F.3d 893, 902 (11th Cir. 1998).

104. *See Olmstead*, 119 S. Ct. at 2188-89.

> 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.[105]

The Court characterized the District Court's cost comparison between community and institutional care as overly simple[106] and went on to describe the difficulties arising out of the practical applications of the Eleventh Circuit's strict reading of the reasonable modifications clause.[107] The majority concluded by outlining how the State could successfully defend itself against this claim and even listed specifically what the State would need to demonstrate in order to avoid an adverse judgment under Title II of the ADA.[108]

Justice Kennedy wrote a two-part concurring opinion in this case, and Justice Breyer joined the first part of that opinion.[109] Kennedy first emphasized the importance of relying on the judgment of mental health professionals while deciding if, and when, an individual is qualified for placement in community-based care, describing tragic outcomes of involuntary deinstitutionalization of mentally ill individuals.[110] He then discussed the possibility of plaintiffs succeeding on a discrimination claim under § 12132, maintaining that a decision cannot be made in the abstract, but rather, specific facts regarding treatment programs in Georgia must first be evaluated.[111] He concluded, "without additional information regarding the details of state-provided medical services in Georgia, we cannot address the issue in the way the statute [the ADA] demands,"[112] and therefore concured only with the majority's judgment to remand the case.[113]

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105. *Id.* at 2189.

106. *See id.*

107. *See id.* at 2189-90.

108. *See id.* (stating, "if, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.")

109. *See id.* at 2190-91 (Kennedy, J., concurring).

110. *See id.* at 2191-92 (Kennedy, J., concurring) (stating "it is of central importance, then, that courts apply today's decision with great deference to the medical decisions of the responsible, treating physicians and, as the Court makes clear, with appropriate deference to the program funding decisions of state policymakers.").

111. *See id.* at 2193-94 (Kennedy, J., concurring).

112. *Id.* at 2194 (Kennedy, J., concurring).

113. *See id.* (Kennedy, J., concurring).

Justice Thomas wrote the dissent, and the Chief Justice and Justice Scalia joined him.[114] The opinion primarily focused on disagreement with the majority's view that unjustified institutionalization is discrimination per se under the ADA. Thomas began with an in-depth discussion of the proper meaning of discrimination, citing examples under the Civil Rights Act, § 504 of the Rehabilitation Act, and sections of the ADA which supported his position.[115] He maintained that the correct standard to use is a classic definition of discrimination, requiring "a showing that a claimant received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic."[116] He then enumerated the federalism consequences that the majority's holding would have on the states, as well as contending that the states will face increased litigation as a result of the holding in this case.[117] Overall, Thomas argued § 12132 of the ADA, requiring discrimination "by reason of" an individual's disability, had not been violated: "Continued institutional treatment of persons who, though now deemed treatable in a community placement, must wait their turn for placement, does not establish that the denial of community placement occurred 'by reason of' their disability. Rather, it establishes no more than the fact that petitioners have limited resources."[118]

IV. ANALYSIS

The definition of discrimination under the ADA adopted by the Court in *Olmstead* was improper in light of the fact that it differs from previously established case law and that little authority exists to support the Court's per se definition. However, the Court correctly compensates for this over-broad definition by construing narrowly other modifying terms in the provisions at issue and by giving states discretion regarding required reasonable accommodations. Unfortunately, the Court's opinion leaves room for interpretations which could lead to negative practical applications in the states.

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114. *See id.* (Thomas, J., dissenting).

115. *See id.* at 2194-98 (Thomas, J., dissenting) (commenting that "until today, this Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the same protected class.").

116. *Id.* at 2194 (Thomas, J., dissenting).

117. *See id.* at 2198-99 (Thomas, J., dissenting).

118. *Id.* at 2199 (Thomas, J., dissenting).

A. Previous Definition of Discrimination Based on Disability

The Court's absence of reasoning on the issue of discrimination is in stark contrast to the in-depth discussions found in previous cases under the Rehabilitation Act[119] and the Civil Rights Act of 1964,[120] both of which have a purpose similar to that of the ADA.[121] Previous cases brought under § 504 of the Rehabilitation Act,[122] the predecessor to Title II of the ADA, have used the "commonly understood meaning of discrimination," which necessitates a showing that the action in question results in a disparate impact on disabled individuals.[123] In *Alexander*, while deciding whether a proposed change in Medicaid inpatient coverage violated § 504 of the Rehabilitation Act, the Supreme Court used a disparate-impact analysis: "while we reject the boundless notion that all disparate-impact showings constitute prima facie cases under § 504, we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped."[124] Earlier in that opinion, the Court indicated that the test for discrimination under the ADA may differ from that used in other civil rights cases because a finding of intentional discrimination is not a required prerequisite to sustaining a discrimination claim under the ADA.[125] However, the Court recognized that the facts of the case had to be analyzed under a disparate-impact standard to determine whether discrimination prohibited by the ADA had occurred.[126]

In allowing a prima facie showing of unnecessary institutionalization to suffice for maintaining a claim of discrimination, the majority in *Olmstead* comes to the opposite conclusion as in *Southeastern Community College v. Davis*.[127] In *Davis*, the Court held that § 504 of the Rehabilitation Act did not require the State to undertake "affirmative

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119. *See, e.g.*, Southeastern Comm. College v. Davis, 442 U.S. 397 (1979); Alexander v. Choate, 469 U.S. 287 (1985).

120. *See supra* note 94.

121. *See Olmstead v. Zimring*, 119 S. Ct. 2176, 2182 (1999).

122. Section 504 states: "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (1976).

123. *See Olmstead*, 119 S. Ct. at 2196 (Thomas, J., dissenting) (citing several cases in which plaintiffs needed to demonstrate that they were treated differently than non-disabled individuals due to their disability).

124. *Alexander*, 469 U.S. at 299.

125. *See id.* at 295-99.

126. *See id.* at 300-06.

127. *See* 442 U.S. 397 (1979).

efforts to overcome the disabilities caused by handicaps."[128] The dissent in *Olmstead* argues that the majority's opinion resurrects the burden on the states rejected by the *Davis* Court.[129] This may be an overstatement since the majority's opinion in *Olmstead* does not require affirmative action by the states in the sense of creating new programs. However, the majority's opinion does demonstrate that, at a minimum, a change in the general notion of discrimination against the disabled has changed with the passage of the ADA and courts' subsequent interpretations.[130]

B. Insufficient Support for Per Se Definition of Discrimination

The majority's explanation for the difference between reasoning used in cases such as *Alexander* and *Davis* and reasoning used today in *Olmstead* is that "the ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living."[131] While the Developmentally Disabled Assistance and Bill of Rights Act and the Rehabilitation Act both aimed at preventing discrimination against individuals with disabilities,[132] the ADA is the first piece of legislation in which segregation is explicitly named as a form of discrimination.[133] In a footnote, the majority opinion states that, "unlike the ADA, § 504 of the Rehabilitation Act contains no express recognition that isolation or segregation of persons with disabilities is a form of discrimination."[134] Since this change of language is the main reason the majority gives for diverging from precedent established through its own case law, this change ought to be discussed at length in the opinion, rather than merely mentioned in two footnotes.[135] Instead, the majority's opinion relies solely on the view that the express language of the ADA mandates considering unnecessary institutionalization discrimination, and since Congress and the Department of Justice both endorse that view, this

128. *Id.* at 410.

129. *See* Olmstead v. Zimring, 119 S. Ct. 2176, 2196 (1999) (Thomas, J., dissenting).

130. *Compare* Alexander v. Choate, 469 U.S. 287 (1985), and Southeastern Community College v. Davis, 442 U.S. 297 (1979), *with Olmstead*, 119 S. Ct. 2176, and Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995) (showing that the Court was less willing to impose a burden on the states by finding discrimination under § 504 of the Rehabilitation Act but recently, under Title II of the ADA, courts have been more willing to hold states in violation and order those states to make changes in services and benefits to the public).

131. *Olmstead*, 119 S. Ct. at 2186.

132. *See id.*

133. *See id.* at 2187.

134. *Id.*

135. *See id.* at 2181, 2186.

Court assumes no further reasoning is needed.[136] The majority's conclusory reasoning may lead to inconsistencies in future lower court decisions, since this opinion gives little guidance for determining when a particular situation should be considered unnecessary institutionalization, and therefore discrimination, under Title II of the ADA.

The Court avoids deciding under what test for discrimination to analyze the facts of this case by concluding that since Congress defined segregation as a form of discrimination,[137] unnecessary institutionalization is forbidden by Title II of the ADA.[138] The language on which the Court relies so heavily is found in 42 U.S.C. § 12101, the "findings and purpose" section of the ADA.[139] As Justice Thomas notes in his dissenting opinion, these findings should not be construed narrowly because, "when read in context, the findings instead suggest that terms such as 'segregation' were used in a more general sense."[140] The language of the findings section is general and descriptive;[141] and therefore it is difficult to view this section as establishing mandatory requirements.[142] The majority justifies its classification of unjustified institutionalization as discrimination by deferring to the Department of Justice's opinion that such segregation is itself discrimination under Title II of the ADA.[143] By using such conclusive reasoning, the majority avoids the difficult test used in discrimination cases: finding a class of similarly situated individuals with whom to compare the plaintiffs to show that disparate treatment on the basis of plaintiffs' disabilities has occurred.[144]

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136. *See id.* at 2186-87.

137. *See Olmstead*, 119 S. Ct. at 2186-87 (citing 42 U.S.C. § 12101(a)(2), (a)(5) (1994), which describe segregation as a form of discrimination faced by people with disabilities).

138. *See id.*

139. *See id.* at 2181, 2186-87; *see also supra* note 137 and accompanying text.

140. *Olmstead*, 119 S. Ct. at 2197 (Thomas, J., dissenting).

141. Section 12101(a) also states, "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem," and, "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society." 42 U.S.C. § 12101(a)(2), (a)(7) (1994).

142. For example, § 12101(a)(1) states that 43 million Americans are either physically or mentally disabled, and (a)(8) says, "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." *Id.* § 12101(a). However, interpreting these two passages as requirements would mean that unless 43 million people throughout all 50 states are employed and live on their own, the ADA has been violated. Such is clearly beyond Congress' intent in enacting the ADA.

143. *See Olmstead*, 119 S. Ct. at 2186.

144. *See id.*

In lieu of authority for its per se definition of discrimination, the majority explains how the practical consequences of unnecessary institutionalization support the notion that such institutionalization is a form of discrimination.[145] The majority comments, "[r]ecognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments,"[146] which are: (1) institutionalized individuals are often subject to negative stereotypes regarding their ability to participate in society, and (2) institutionalization restricts individuals' freedom in their everyday lives.[147] While both of these unfortunate consequences may result from undue institutionalization, they do not speak to the issue of whether unjustified institutionalization is itself a form of discrimination.[148] As Justice Thomas explains in his dissenting opinion, "we cannot expand the meaning of the term 'discrimination' in order to invalidate policies we may find unfortunate."[149] So while the negative outcomes of unnecessary institutionalization may lend support in an analysis of whether such act constitutes discrimination under the commonly used disparate-impact test, these consequences do not lead to the conclusion that unjustified institutionalization is per se discrimination.

C. Narrowing the Broad Per Se Definition of Discrimination

Although the Court's conclusion that unnecessary institutionalization is itself discrimination leaves a seemingly broad category in which many activities could be considered discriminatory, the Court limits this category by outlining two requirements for what constitutes unjustified institutionalization for those "qualified individuals with a disability" who may not "be subjected to discrimination."[150] First, the individual must be deemed qualified to live in a community-based treatment center by one of the State's professionals.[151] Otherwise, the Court explains, "it would be inappropriate to remove a patient from the more restrictive setting."[152] In his concurring opinion, Justice Kennedy emphasizes the importance of deferring to the professional's

145. *See id.* at 2187.

146. *Id.*

147. *See id.*

148. *See id.* at 2199 (Thomas, J., dissenting).

149. *Id.* at 2197 (Thomas, J., dissenting) (referring to NLRB v. Highland Park Manufacturing Co., 341 U.S. 322 (1951)).

150. *Id.* at 2187-88 (quoting 42 U.S.C. § 12132) (1994).

151. *See id.* at 2188.

152. *Id.*

opinion regarding the appropriateness of community-based care for any given patient.[153] He warns,

> it would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision.[154]

The majority's emphasis on the importance of a professional opinion before an individual is removed from an institution should prevent future courts from sustaining frivolous claims of discrimination due to segregation.

To counter the possibility of the State placing all patients in community-based treatment in order to avoid ADA discrimination lawsuits, the Court added the second requirement that an individual must want to leave the institution for community-based care.[155] The Court is justified in establishing this pre-requisite since there is not a "federal requirement that community-based treatment be imposed on patients who do not desire it."[156] Once a disabled individual has met the two requirements, if the State refuses to place the individual in a community-based treatment center, the State has discriminated against that individual, according to this Court's interpretation of Title II of the ADA.[157]

The Court mentions in passing that dissimilar treatment, a commonly required element in discrimination suits, may exist in the present situation.[158] The Court explains that mentally disabled individuals, in order to obtain necessary medical services, must "relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice."[159] Justice Kennedy's concurring opinion elaborates on this point by outlining the possible ways in which a case of discrimination under a disparate-impact, similarly-situated comparison test may be found to exist.[160] He maintains that it is an issue that should be decided on

153. *See id.* at 2191-92 (Kennedy, J., concurring).
154. *Id.* at 2191 (Kennedy, J., concurring).
155. *See id.* at 2188.
156. *Id.*
157. *See id.*
158. *See id.* at 2187.
159. *Id.*
160. *See id.* at 2192-93 (Kennedy, J., concurring).

remand to the district court, as opposed to dismissing it outright as the majority does.[161] The dissent comments that the dissimilar treatment mentioned by the majority "results merely from the fact that different classes of persons receive different services — not from 'discrimination' as traditionally defined."[162] However, the majority does not rely on, nor even develop, this concept of discrimination, since its conclusion that undue institutionalization is a form of discrimination in and of itself eliminates the need for further analysis.[163]

D. Relaxed Reasonable Modifications Standard

After disposing of the discrimination issue, the Court addresses the "reasonable modifications" regulations.[164] These regulations require states to make reasonable modifications to avoid discriminating against individuals on the basis of disability, unless such modifications would "fundamentally alter the nature of the service, program, or activity."[165] The Eleventh Circuit's interpretation of these regulations was very strict, allowing the State to use a financially over-burdened defense only on rare occasions.[166] Given the Supreme Court's conclusion that unnecessary institutionalization is discrimination under the ADA, such an interpretation would require the State to allocate a substantial portion of its budget to community-care services in order to place all qualified individuals in such care, yet at the same time maintain institutions for those disabled individuals in need of institutionalized care.[167] The majority states, "the Court of Appeals' [Eleventh Circuit's] construction of the reasonable-modifications regulation is unacceptable for it would leave the State virtually defenseless once it is shown that the plaintiff is qualified for the service or program she

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161. *See id.* at 2193-94 (Kennedy, J., concurring) (explaining that "the issue whether respondents have been discriminated under § 12132 by institutionalized treatment cannot be decided in the abstract, divorced from the facts surrounding treatment programs in their States.")

162. *Id.* at 2199 (Thomas, J., dissenting).

163. The Third Circuit dealt with this same issue in *DiDario* and when discussing the part of 42 U.S.C. § 12101(a)(3) that describes institutionalization as discrimination, that court stated, "if Congress were only concerned about disparate treatment of the disabled as compared to their non-disabled counterparts, this statement [§12101(a)(3)] would be a non sequitur as only disabled persons are institutionalized." Helen L. v. DiDario, 42 F.3d 325, 336 (3d Cir. 1995). The need for analysis of similarly-situated persons was thus eliminated when the Third Circuit adopted the notion that unjustified institutionalization is a form of discrimination, and the Supreme Court employed similar reasoning four years later in *Olmstead.*

164. *See Olmstead,* 119 S. Ct. at 2188.

165. 28 C.F.R. § 35.130(b)(7) (1997).

166. *See* Zimring v. Olmstead, 138 F.3d 893, 902 (11th Cir. 1998).

167. *See Olmstead,* 119 S. Ct. at 2188-89.

seeks."[168] Such an unreasonable outcome is not what Congress nor the Attorney General intended when enacting the ADA and promulgating the corresponding regulations.[169]

This Court's interpretation does not set out a bright-line rule for when modifications are reasonable, and therefore required, but rather sets guidelines under which decisions must be made on a case-by-case basis.[170] The Court explains, "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," particularly in light of the number of disabled individuals, with a multitude of various disabilities, for whom the State provides services.[171] So while the result of the first issue with which the Court dealt, discrimination, resulted in a broad, inclusive rule, the Court's ruling on the reasonable-modifications regulations sets limits on that rule. Therefore, the final holding in the case requires the states to "provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the need of others with mental disabilities,"[172] which is a reasonable and functional interpretation of Title II of the ADA.

E. Possible Negative Consequences of Court's Holding

One possible negative practical application of the Court's ruling in this case unfolds when comparing this case with several cases decided in the past under § 504 of the Rehabilitation Act. In both *Davis* and *Halderman*, the relief sought by the claimants did not exist in the given state and would require that state to create a new program.[173] The Court was not willing to place such a burden on the states without explicit instructions to do so from Congress, which the Court did not find to exist in the legislation in question in those cases.[174]

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168. *Id.* at 2188.

169. *See id.* at 2189-90 (discussing, in footnote 16, that the standard imposed by the Eleventh Circuit is impermissibly stricter than the "undue hardship" standard used in a similar regulation that corresponds to § 504 of the Rehabilitation Act).

170. *See id.*

171. *Id.* at 2189.

172. *Id.* at 2190.

173. *See* Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 27 (1981).

174. *See Davis*, 442 U.S. at 411; *Halderman*, 451 U.S. at 19.

On the other hand, in both *DiDario* and *Olmstead*, community-based programs already existed in their home states when the claimants brought suit.[175] Therefore, the state is bound to abide by the ADA while providing those services, as the Eleventh Circuit, in *Zimring*, explains, "having chosen to provide services to individuals with disabilities, the State — both the state officials charges with formulating the budget as well as the state agencies responsible for mental health services — must act 'in a manner [that] comports with the requirements of [the ADA].'"[176] Comparing the two lines of cases, one can conclude that once a state has a particular program in place to serve disabled individuals, the Court views subsequent requests for accommodations as within the "reasonable modifications" requirement. But if such program does not exist at the time suit is brought, requiring states to create one is a "fundamental alteration" and is beyond the power of the ADA.

Having drawn this conclusion, it is possible to imagine states opting not to create programs and services for the disabled in the first place, out of a fear of prosecution for ADA violations. While this possibility may seem unlikely, to states with financial troubles, the Court's decision in *Olmstead*, read in light of previous decisions, may indicate that services for the disabled is an area in which money could be saved, and possible litigation avoided, by simply not providing certain services. Obviously, the Court did not intend such a consequence as a result of its holding, however it is conceivable that the ruling may be interpreted in this way, particularly when comparing it to previous cases with opposite outcomes.

V. CONCLUSION

The Court in *Olmstead* broadened the definition of discrimination to include unjustified institutionalization.[177] Fortunately, this definition applies only in suits brought under Title II of the ADA and results in punishment for the states only if other conditions are also met.[178] Without these limiting requirements, the Court's holding could have opened the door to a deluge of litigation from patients in

175. *See Olmstead*, 119 S. Ct. at 2183; Helen L. v. DiDario, 42 F.3d 325, 329-30 (3d Cir. 1995).

176. Zimring v. Olmstead, 138 F.3d 893, 904 (11th Cir. 1998) (quoting *DiDario*, 46 F.3d at 339).

177. *See Olmstead*, 119 S. Ct. at 2185.

178. *See id.* at 2181.

varying degrees of institutionalization.[179] Instead, the Court added three pre-requisites to a court finding that a state's failure to place mentally disabled patients in community-based treatment constitutes a violation of the ADA's proscription on discrimination, successfully preventing a flood of litigation. As a result, the complete standard the Court developed for analyzing discrimination claims under Title II of the ADA is rational and equitable. In other words, the test adopted in *Olmstead* furthers one of the goals of the ADA: "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[180]

179. Institutionalization is a term this Court did not have to define, but which conceivably could be an issue in future cases under the per se definition adopted by the Court.

180. 42 U.S.C. § 12101(b)(2) (1994).