GOVERNMENT *In Brief*

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TOP STORIES...

INSIDE STORIES:

Government in Brief is published every two months as a vehicle to provide up-to-date coverage to NYSARC Chapters regarding current events in the field of developmental disabilities.

FROM WASHINGTON

WASTE IN ICF/MRs SAYS HHS
Inspector General Blasts High Institutional Rates

According to the Department of Health and Human Services' (HHS) Office of Inspector General (OIG), Medicaid reimbursement to states for large ICF/MRs - state run institutions serving persons with mental retardation and developmental disabilities - is out of control. Correcting that, according to the Inspector General, could save $683 million annually.

OIG cites enormous discrepancies in reimbursement for such services from state to state. According to OIG the range is anywhere from $27,000 per person annually to $158,000 annually. Further, the variation is unrelated to demographics or severity of disability of persons served. Nor can rate differences be traced to difference in the institutional facilities themselves.

Instead, according to the OIG, rate differences are due to differing state rate setting methodologies. OIG noted that those states with rate caps effectively control their institutional rate structures. "A lack of effective controls results in excessive spending," the OIG states in its recent annual update of its *Redbook*.

Currently, states set their own rules for Medicaid reimbursement to institutional ICF/MRs. Those rules, warn the OIG, allow states to manipulate rates to maximize federal Medicaid reimbursement leading to substantial overpayments.

OIG recommends that Congress adopt legislation to, among other things, mandate cost controls, set federal caps on rates, establish a national ceiling for federal payments to institutional ICFs/MR or limit a state's total reimbursement to an amount tied to its population. The

OIG also recommends that Congress enact legislation to control Medicaid costs associated with in-home care.

The OIG also notes that current federal rate setting rules for large ICFs/MR ignore per capita income as an indicator of a state's ability to fund its portion of institutional costs. If that factor were taken into account, says the OIG, $4 billion could be saved annually.

According to the report: HHS should "seek comprehensive legislation to restructure Medicaid reimbursement for both intermediate care facilities/mentally retarded and home and community-based waiver services for developmentally disabled people via global budgeting, block grants or financial incentive programs."

The Health Care Finance Administration (HCFA), the rate setting arm within HHS, rejected OIG's recommendations. HCFA states that existing Medicaid law limits HCFA's authority to control state rate-setting.

A copy of the OIG report has been sent to all state Medicaid directors.

HOUSE CRACKS DOWN ON IDEA
School Shootings Spark Action

Inspired by the shootings at Columbine High School, the House of Representatives followed similar Senate action and voted 300 to 128 to amend the Individuals with Disabilities Education Act (IDEA), the amendment permits school officials to suspend indefinitely any student with disabilities for possession of a weapon.

If signed into law, the amendment, sponsored by Rep. Charles Norwood, R-Ga, would remove the current IDEA mandate for schools to provide alternative educational placements for up to 45 days if a student with disabilities is found carrying a weapon to school. Rather, students with disabilities and students without disabilities who bring a weapon to school would be treated equally.

Under the 1994 Gun Free Schools Act, educators are required to expel any student bringing a gun to school for at least one year.

Said Representative Norwood: "Current federal law requires the student who brings a gun to school be suspended from school for a year....We rightly and should have a zero tolerance policy for guns at school" for all students with and without disabilities.

In May the Senate passed similar legislation. The Senate measure however, according to Rep. Jim Talent, R-Mo, "covered guns; this (the House action) covers all weapons." Talent said the House was responding to school superintendents who want the authority to remove all students carrying any weapons, whether or not they have a disability.

Students with Disabilities Scapegoated

In both the House and Senate, many Democrats opposed the Republican led measure. They blamed Republicans for singling out students with disabilities as the cause of school violence incidents.

"We are trying to deal with those children who are shooting other children ....." said Rep. George Miller, D-Calif., "and now we have chosen to target in some ways the most vulnerable population in those schools, those children with disabilities."

Rep. Bobby Scott, D-W.Va., added "schools can remove students for public safety...but must continue educational services, which may be provided in an alternative school, may be provided at home, might even be provided in prison."

The American Association of School Administrators (AASA) supports the Norwood amendment, but with reservations. Bruce Hunter, AASA lobbyist, said the Norwood amendment is the right idea but "permits cutting off services and we don't like that." States, Hunter argues, should be required to finance alternative placements for children removed from school for carrying weapons. Especially, Hunter notes, since "every state has a huge (financial) surplus."

Echoing the position of the AASA, the National Association of Secondary School Principals (NASSP) voiced support for the Norwood Amendment but called for federal and state funding for alternative educational and mental health services.

Reconciling Senate and House Bills

Before any final law can be sent to the President for his approval, the Senate and House must appoint conference committees to strike a compromise between their respective versions of the legislation. No such committees have been appointed and no further action is currently scheduled.

If and when the Senate and House begin to work out a compromise, defining what constitutes a weapon and determining whether to require continuing services after the removal of a child, will be central issues.

During the Senate debate, the Arc of the United States and the Consortium for Citizens with Disabilities argued that expulsion without services would backfire. Advocates cited law enforcement officials who believe that expelling troubled students without providing alternative services increases juvenile crime rates.

Senator James Jeffords, R-Vt, argued against amending IDEA. Jeffords said that the real motivation behind the amendment wasn't public safety but public funding.

Both New York State Senators, Moynihan and Schumer, voted against the Senate bill.

SENATE PASSES WORK INCENTIVE ACT
House Measure In Ways and Means Committee

By a vote of 99-0, the Senate overwhelmingly passed the Work Incentives Improvement Act. If passed by the House and signed by the President, the bill would allow persons with disabilities to continue to work without losing Medicaid benefits.

The House version of the Work Incentives Improvement Act, HR 1180, is now before the House Ways and Means Committee.

Under existing law, increased earnings disqualify individuals from continued Medicaid eligibility. Thus many individuals opt to stay in lower paying jobs rather take higher paying jobs and lose the health care coverage Medicaid provides.

However, the under Work Incentives Improvement Act persons with disabilities could earn up to 250% of the poverty level without losing Medicaid benefits.

Specifically, states would have the option of providing the extended coverage by allowing individuals to "buy-in" by purchasing a premium established according to a sliding scale.

States would also have the option to allow persons with disabilities who lose SSI or SSDI to continue to receive Medicaid.

Advocates have been urging Congress to liberalize work incentive rules for over a decade. The Senate bill, the Work Incentives Improvement Act of 1999 - S. 331 - was sponsored by Senators Jeffords (R-VT), Kennedy (D-MA), Roth (R-DE) and Moynihan (D-NY).

"There are still serious obstacles facing too many people with disabilities - obstacles that stand in the way of employment," said Senator Roth. The legislation would "help persons with disabilities to go to work if they want to go to work, without fear of losing their health insurance lifeline."

President Clinton noted that "this is a crazy system that we have allowed to develop. You lose government health insurance if you go to work and you make a certain amount of money...this is a profoundly important piece of legislation."

The House of Representatives has not yet passed its version of the legislation. However, the House Commerce Committee completed action on a more restrictive version of the legislation - H.R. 1091. H.R. 1091 is now pending in the House Ways and Means Committee. A sticking point could be the bill's price tag, estimated at $800 million over the next five years.

Advocates however maintain that the increased cost would be substantially off-set as individuals pay more tax as a result of opting into higher paying jobs they would otherwise be deterred from taking for fear of losing Medicaid.

MANAGED CARE REFORM BILL PASSES SENATE
Advocates Critical of Weak Bill

By a vote of 53-47, the US Senate passed the Republican's "Patient Bill of Rights Plus Act" (S. 1384) on July 15. While the vote was largely along party lines, two Republican Senators, John Chafee (Rhode Island) and Peter Fitzgerald (Ill.) defected to join all the Senate's Democrats to vote against the measure.

Disability advocates had favored the stronger Democratic "Patient Bill of Rights," S.6.

The Arc of The United States was opposed to the Republican measure, favoring the stronger Democratic proposal. The Democratic proposal would allow patients to sue their managed care plans and require that medical

professionals, not managed care plans, define "medical necessity." Neither of those provisions is contained in the Republican plan.

If "Congress insists on passing such an empty promise to the American people, I will not sign the bill...this should be about protecting patients not health insurance companies."

— President Clinton

Further, most of the protections in the bill would apply only to the 48 million persons in self-insured plans, not to the 161 million in private health insurance plans. The House is expected to take up the measure shortly.

Immediately upon passage of the bill by the Senate, President Clinton warned he would veto the measure if it passed the House and is sent to him for his approval. Said the President, if "Congress insists on passing such an empty promise to the American people, I will not sign the bill...this should be about protecting patients not health insurance companies."

President Clinton further noted: "For those id does cover, this bill fails to ensure patients access to the specialists they need, fails to ensure patients the right to keep their doctors throughout a course of treatment, fails to prevent insurance company accountants from making final calls on medical decisions and it fails to hold health care plans accountable for action that harm their patients".

Washington based disability advocates are continuing to work hard for the passage of a bill with strong consumer protection. For more information visit the Consortium for Citizens with Disabilities web-page at www.c-c-d.org/tf-health.htm or call the Arc of the US at (202) 785-3388.

STATE GOVERNMENT

NEW YORK MEDICAID MANAGED CARE MOVES FORWARD

Persons With Disabilities Still Exempt

The federal government gave New York State the go ahead to move nearly one million additional poor persons into Medicaid managed care plans. Still exempted from the program are persons with chronic illnesses and disabilities such as AIDS, diabetes and mental retardation.

Under a waiver approved by the United States Department of Health and Human Services (HHS), New York State began its mandatory Medicaid managed care program in New York City on August 9th. The process will include several phases and is expected to take two years to complete.

A total of 18 Medicaid Managed Care plans are participating in the New York City area.

The State's Governor, George Pataki, and New York City's Mayor, Rudolph Guiliani, praised the federal government's action as paving the way for additional Medicaid savings. Managed care deters reliance by the poor on expensive emergency room visits and limits access to expensive specialists. New York State's Medicaid program now costs nearly $28 billion, making it the most expensive Medicaid program in the country.

In a nine page letter to New York's Department of Health managed care chief, Ellen Anderson, the federal Health Care Finance Administration (HCFA) laid out 31 separate requirements to protect consumers slated for enrollment in the New York City area including:

- providing an "intense education effort" on exemptions and exclusions for all Medicaid providers and consumers;

- targeting training and oversight for New York City Human Resources Administration (HRA) workers to advise consumers on the new managed care program;

- examining how the welfare bureaucracy and managed care companies (MCOs) treat consumers - including chronically ill children - through monitoring and quality assurance initiatives over the coming months;

- implementing a telephone survey of managed care provider availability to determine which HMO doctors are accepting new patients and which are closed to new enrollees; and

- creation of a standard disenrollment form that any mandatory managed care enrollee can use to disenroll from an MCO.

Prior to the federal action, enrollees in the State's Medicaid program totaled about 650,000 individuals. That number is expected to double.

HHS placed certain limitations on the expansion effort. People with AIDS and other disabilities must be notified that they are not required to enroll in managed care plans. The federal decision to exempt people with disabilities came after an intensive review of New York's managed care plans. The federal government determined that New York's plans could not adequately handle special needs presented by persons with disabilities. That review, in part, was prompted by advocates for persons with disabilities concerned that managed care would skimp on costly services sometimes required by people with disabilities.

Advocates for persons with disabilities praised the continuing exemption. "The federal government is not taking an anything goes attitude," said Michael Kink of Housing Works, an advocacy organization for people with AIDS.

Of special concern to all health care advocates is the profound financial difficulties Medicaid managed care firms have experienced in New York State. New York State requires Medicaid managed care firms to provide very comprehensive benefit packages. However, Medicaid managed care firms criticize the State for paying rates insufficient to support those benefit packages. The financial uncertainty was underscored when Kaiser Permanente terminated its operations in the State, forcing Schenectady County to postpone planned implementation of Medicaid managed care.

Other events have underscored the fragile state of New York State's Medicaid managed plan. So while the State moves forward with Medicaid managed care in New York City, it has given more than half the State's counties a two year extension on Medicaid managed care implementation because of the scarcity of adequate plans.

NEW YORK STATE BUDGET FINALLY PASSES

It appears that the State Legislature just missed passing a record late State budget. The Assembly finished work 1:07 AM on August 4. Prior to that, August 4, 1996 was the latest budget enacted by the State Legislature. Then the State Assembly finished work a whopping thirteen hours later than it did this year, at approximately 2 PM.

The passage of the budget shattered many predictions that New York State would run for the entire state fiscal year with no budget.

The total State budget is also the biggest ever passed. It includes $73.3 billion in overall funding, a 3.8% increase over last year. That total was about $700 million more than the Governor wanted to spend and about $1 billion less than the Assembly wanted. The budget deal was made possible when the Assembly agreed to reduce its spending demands in exchange for the Governor's pledge not to engage in a wholesale line item veto of Democratic initiatives.

The new budget increases school aid by a record $913 million. It adds $1 billion in additional Medicaid spending. It restores $114 million to the Tuition Assistance Program (TAP) for low income college students. And, in accord with Assembly demands, it restores funding for the Universal Pre-Kindergarten Program and for an initiative to reduce class size in public schools.

Also included in the budget are $250 million in additional business tax cuts and $125 million in tax credits for the poor.

Many fiscal experts note that the State will lose billions of dollars in revenue as tax cuts enacted in prior fiscal years kick in. This, they note, will make it difficult, if not impossible, for New York State to pay for new tax cuts and additional spending added to this year's budget.

Financing the final package was helped in part by a $500 million one-shot revenue. Specifically that amount will be transferred to the State's General fund from a fund earmarked to help doctors pay for medical malpractice insurance. New York State has been severely criticized for its reliance on one shot revenues.

The Governor's fiscally conservative allies were highly critical of the Governor and the budget he agreed to.

"To have all those negative things happening when your sitting there with a very large surplus is difficult to justify," said Thomas Carroll, president of the anti-tax group, CHANGE NY.

Programs for Persons with Mental Retardation and Developmental Disabilities

New York State CARES Of greatest concern to advocates and providers throughout the State was the approval of New York State CARES, the Governor's program to eliminate the waiting list for out of home residential placements over the next 5 years.

While both Houses expressed their unwavering support for the program, the protracted budget process raised the prospects that implementation of New York State CARES would be substantially delayed.

However, now that the budget is finally approved, it appears that New York State CARES can move forward and that it will not be delayed, at least on account of a late State budget.

The Governor requested $24,550,000 for voluntary New York State CARES development and the Legislature appropriated exactly that amount.

However, led by the Senate, the Legislature added $5 million in capital funding for 100 state-operated residential placements for New York State CARES. Budget language did not indicate whether this development would be spread over the five year timetable for New York State CARES or is only intended for FY 99-2000. Historically State development has moved very slowly.

Other additions to OMRDD's budget included $900,000 to restore the Youth Opportunities Program (YOP) which provides work experience for young adults in developmental centers; $300,000 for statewide epilepsy services; $500,000 for various state-operated respite services; and, $500,000 for restoration of Westchester Institute for Human Development.

Also, nearly $3,000,000 in small local projects, or legislative member items was added to the budget request.

BUDGET LANGUAGE

The Legislature also added budget language to study some especially controversial issues. One was the 2.5% cost of living increase for low paid workers, enacted as part of the FY 98-99 budget. The Legislature added the COLA after a series of rallies at the Capitol. Providers however claimed that requirements for COLA implementation was cumbersome and costly.

The COLA study language reads: "The commissioner shall prepare a written report on implementation of a 2.5 percent cost of living adjustment applied to salaries of staff of voluntary non-profit providers. Such report shall include but not be limited to the methodology used by the commissioner to determine the application of the cost of living adjustment; the total amount disbursed, the number of recipient agencies, the time-line of the phase-in of the cost of living adjustment and unusual and or complicating factors encountered during implementation.

Such report shall be submitted to the chair of the assembly ways and means committee and the senate finance committee on or before February 15, 2000."

It is doubtful that the study will result in any retroactive change to the 2.5% COLA already disbursed to non trended programs or reimbursement for additional costs incurred, for example, to give all programs a 2.5% COLA.

Language was also added requiring a report on the New York State CARES program. That language reads: "The commissioner of the office of mental retardation and developmental disabilities shall prepare a written report on implementation of the New York State cares initiative. Such report shall include but not be limited to the following: the number and distribution of beds added during the preceding state fiscal year and those planned for development in the current fiscal year; an analysis of the impact of new residential opportunities on the at-home waitlist for residential placement; identification of any siting difficulties; and the extent to which consumers participated in the planning and development process. Such report shall be submitted to the chairs of the assembly ways and means committee and senate finance committee on or before July 1, 2000 and annually through July 1, 2004."

EDUCATION

The Legislature approved language to extend the moratorium on development of segregated center-based section 4410 Pre-School programs for three years and to streamline the process for expansion of existing integrated programs.

The Legislature also approved minor reforms in the special education funding formula to promote integrated education in public school. Also $6 million was added to the Educationally Related Support Service Aid program which is designed to avoid unnecessary placement into special education.

These changes are intended to comply with requirements of IDEA 97 and avoid federal sanctions, primarily including the cut-off of substantial federal special education funding.

DOLE, PATAKI HONORED AT NYSARC 50TH ANNIVERSARY
Event Dominates State Capital

On June 11th advocates, consumers, parents and professionals from across New York State converged in Albany to celebrate NYSARC's 50th anniversary. For that day, the event overshadowed the endless budget battle that went on to dominate the State Capital for over half a year.

The day featured a black tie gala and the conclusion of Laurel Run on the front steps of the State Capital.

Laurel Run began nearly six weeks before as runners ran the length and breadth of the State carrying county flags which were presented on the Capital steps at noon before legislators and other public officials and an enthusiastic crowd of nearly 1100 individuals.

"Laurel Run was perhaps the most successful public relations event the Association has ever held," said NYSARC's executive director, Marc Brandt. "Passing through nearly every part of the State, it brought together thousands of persons from all walks of life and focused public attention on the Association and its 50 years of outstanding achievement like no other event ever has."

"We got to show the entire State who we are. And the entire State took note," said Brandt.

The evening was just as spectacular. A gala dinner held at the State Museum across from the Capital was attended by nearly 700 persons. United States Senator Robert Dole, a long time advocate for persons with disabilities and himself disabled in combat during the Second World War, was the keynote speaker.

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>
> — Marc N. Brandt

Frank Sesno, CNN's Washington Bureau Chief, whose sister Laura has mental retardation, was the master of ceremonies.

Governor George E. Pataki accepted NYSARC's Humanitarian of the Year Award for his New York State CARES initiative to end the waiting list for out-of-home residential care in five years.

Also in attendance was Assembly Minority Leader John Faso and Office of Mental Retardation and Developmental Disabilities Commissioner Tom Maul.

Sesno Talks of Sister, Pataki Accepts Award

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Frank Sesno opened the evening by reminding the audience that his participation "was not just a task, but a personal pleasure....a family matter."

Sesno dedicated the evening to his sister Laura, "a person with Down Syndrome who has never let that get in the way of who she wants to be."

Turning to Senator Dole, Senso said "Senator if you encountered Laura when you ran for President, you might of wished that you decided not to run. She can be tough, penetrating. Senator Dole, she's like a reporter."

"Laura lives the reality of budget cuts and knows how hard it is to find direct care workers when jobs are tight and money is in short supply."

Sesno then introduced NYSARC president Blanche Fierstein, who presented NYSARC's Humanitarian of the Year Award to Governor Pataki.

> ***"Parents came to me and said 'what will happen to my child when I'm not there to care for him'...young adults with disabilities came to me and said they wanted to be independent."***
>
> — Governor George Pataki

Upon accepting the award Governor Pataki noted "I'm getting to accept this award only because I'm the Governor of New York State" but, Governor Pataki added, the real credit for NYS CARES lies with the parents, consumers and advocates who fought so hard for out-of-home residential care for people living at home on the waiting list.

The Governor went on to recall how "parents came to me and said `what will happen to my child when I'm not there to care for him'...young adults with disabilities came to me and said they wanted to be independent."

The Governor asked: "how could you look them in the eye...how could you say that in this State, which has always cared for its citizens, we can't do more?"

Pataki went on to praise Commissioner Maul for helping to develop the New York State CARES proposal. Characterizing the Commissioner as compassionate and caring, the Governor said "he came to me and said this State will do something no other State has done before."

Governor Pataki then said that if New York State CARES doesn't work, he would propose New York State CARES II.

"The Governor's commitment to this issue," noted NYSARC executive director, Marc Brandt, "is impressive indeed. On the eve of our Association's 50th Anniversary, we were especially proud to be able to honor the Governor for the New York State CARES program."

Dole Speaks of Sixth Sense

With characteristic humor, former Senator Robert Dole opened his remarks by stating "it's an honor to be here....but of course when you're unemployed it's an honor to be anywhere."

Dole also lauded Governor Pataki for New York State CARES.

The former Senator recalled how he never noticed people with disabilities when he was a young man. But, upon returning from the Second World War with his own combat related disabilities, he developed "a sixth sense" about persons with disabilities. When their struggle became his struggle he acquired a sensitivity he had never known before.

Dole recalled how thirty years ago he made his first or "maiden" speech before the United States Senate. It was on disabilities. Then persons with disabilities "couldn't even get into the United States Capitol" for lack of accessibility, he noted. The struggle for disability rights was a long one. "Back then, people didn't even want to talk about it."

Dole noted that the Americans with Disabilities Act (ADA) was conceived long before it was passed.

NYSARC "knows better than I" how long it took to make a difference. "Times have changed," Dole said. "But only with hard work, persistence and leadership that for NYSARC began with Ann Greenberg fifty years ago in her living room with ten other parents" and has proceeded ever since "under the leadership of people like Blanche Fierstein and Marc Brandt "

'People like me come in and say a few words and we're gone. But you're still here. The cause is still here. The fight is still here."

— Senator Robert Dole

Dole emphasized patience, bi-partisanship and leadership.

Noting that the tenth anniversary of the signing of the ADA was approaching, Dole reminded the audience that "the ADA was just a first step" and much remained to be accomplished on behalf of persons with disabilities.

"People like me," he said, "come in and say a few words and we're gone. But you're still here. The cause is still here. The fight is still here."

FROM THE COURTS

HIGH COURT RULES THAT DISABILITY BENEFITS NO BAR TO ADA CLAIM

Can an individual claim to be too disabled to perform a job while also claiming that, as a victim of disability based discrimination, they have been denied the chance to perform that same job? If that individual files for disability benefits based on the former can he or she also file an ADA suit based on the later?

Until now, courts have widely said "no."

Filing for disability benefits requires an individual to certify that he or she is too disabled to work. Thus, until now, courts have concluded that persons cannot also file an Americans with Disabilities (ADA) suit stating the real reason they can't work is because of disability based discrimination.

However, in the case of *Cleveland v. Policy Management Systems Inc.*, the United States Supreme Court ruled that claiming disability benefits does not necessarily prohibit an individual from claiming discrimination in employment based on disability. It is possible, the Court argued, for an individual not to be able to work both because he or she is too disabled to work and because of discrimination attributable to that same disability.

The ADA, the Court went on, authorizes an employment suit in the event that an individual can perform a given task given "reasonable accommodation." Claiming disability benefits only requires an individual to prove that, for whatever reason, a disability prevents them from working. That may be because they were not given the reasonable accommodations required by the ADA and necessary for them to perform the job.

Advocates anxiously anticipated the Supreme Court decision. Carolyn Cleveland had a stroke in 1994 then filed for disability benefits stating that she was "disabled" and "unable to work." Her condition improved. She went back to work. Four days later, she was terminated. Again she filed for disability benefits claiming she was too "disabled" to work. Simultaneously she filed an ADA suit claiming that she was terminated because she had a disability.

The United States District Court saw this sequence of events as contradictory. It ruled that Cleveland could not claim that she couldn't work both because she was too disabled to work and because of discrimination. Therefore, it ruled, Cleveland was not qualified to file a discrimination suit under the terms of the ADA. That decision was upheld by the U.S 5th Circuit Court of Appeals.

Cleveland appealed the ruling to the United States Supreme Court.

The High Court, in a unanimous verdict, agreed with Cleveland. Writing for the Court, Justice Steven Breyer said that the two claims presented by Cleveland "do not inherently conflict to the point where the court should apply a special negative presumption like the one applied by the Court of Appeals." Breyer went on to say "there are too many situations in which an SSDI claim and an ADA claim can comfortable exist side by side."

Breyer explained further that "an ADA suit claiming that the plaintiff can perform her job with reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job or other jobs without it."

Further, the High Court noted that because an individual is too disabled to perform a job when he or she applies for benefits does not mean that the individual is too disabled to perform the same job when filing a discrimination suit. Indeed, the High Court noted, there may be other ways to explain the discrepancy, based on the facts of a particular case.

Still, the Court conceded that there may be instances in which the two claims are inconsistent and ordered the lower court to reconsider Cleveland's claim.

How much easier will the Supreme Court's ruling make it for plaintiffs to file ADA employment discrimination cases? According to Washington DC attorney, Jonathon Mook, "All the Supreme Court did was to lower the bar somewhat.....I think many plaintiffs are going to find it rather difficult to explain away statements made to governmental agencies or private insurers."

OLMSTEAD RULING A MAJOR VICTORY FOR PERSONS WITH DISABILITIES

Decision Much Anticipated

On June 22, persons with disabilities were awarded a major victory by the Supreme Court.

The Court, in a 6-3 decision, ruled that the ADA requires deinstitutionalization of individuals into community based settings. Writing for the majority, in the case of *Olmstead v. LC and EW*, Justice Ruth Bader Ginsburg said the Americans with Disabilities Act requires states to "place people with mental disabilities in community settings rather than in institutions" provided that "the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a least restrictive setting is not opposed by affected individuals, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with disabilities."

Advocates throughout the country closely followed the case, anxiously awaiting the High Court's ruling. Many believed that the Court's decision could make or break the ADA as it affects persons in institutions and the legal status of community based care.

Upon initial review of the Court's decision, the Arc of the United States stated "this is a major victory for community based services and the Arc."

The Olmstead case was brought by two Georgia women confined to a state institution. Both have mental retardation and mental illness. They sued the State of Georgia claiming that the ADA required them to be placed into the community.

Commenting on the case President Clinton said "I am pleased that the Supreme Court's decision in the Olmstead

case upholds the purpose of the ADA by recognizing that unjustified isolation of institutionalized persons with disabilities is prohibited discrimination..... Our ultimate goal is a nation that integrates people with disabilities into the social mainstream, promotes equality of opportunity and maximizes individual choice."

Preliminary analysis indicated that Olmstead will not have a significant influence on New York State due to the massive deinstitutionalization which has taken place in the State over the last twenty years.

Court Examines Integration, Reasonable Accommodations

Integration of persons with disabilities was key to the High Court's decision.

To support its decision, the Court cited an exhaustive list of existing law and regulation requiring integration.

Justice Ginsburg cited Section 504 of the Rehabilitation Act requiring recipients of federal funds - including Georgia, a state government - to "'administer programs and activities in the most integrated setting appropriate to the needs of the individual.'"

Justice Ginsburg further noted that "the preamble to the (ADA's) regulations defines 'the most integrated setting appropriate to the needs of qualified individuals with disabilities' to mean 'a setting that enables individuals with disabilities to interact with non-disabled peers to the fullest extent possible' (and) public entities to `make reasonable modifications' to avoid `discrimination on the basis of disability.'"

Clearly, institutions do not enable "individuals with disabilities to interact with non-disabled peers to the fullest extent possible."

"Historically society has tended to isolate and segregate persons with disabilities . . . such forms of discrimination against persons with disabilities continue to be a serious and pervasive social problem."

— Justice Ruth Bader Ginsburg

Ginsburg added: "ultimately, in the ADA ... Congress not only required all public entities to refrain from discrimination....Congress explicitly identified unjustified `segregation' of persons with disabilities as a `form of discrimination.'" Congress specifically states in the ADA "historically society has tended to isolate and segregate persons with disabilities .... such forms of discrimination against persons with disabilities continue to be a serious and pervasive social problem."

How does institutionalization fit into this?

Wrote Justice Ginsburg: "unjustified institutional isolation of persons with disabilities is a form of discrimination" which "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in the community" and "severely diminishes the everyday life activities of individuals."

Georgia Medicaid Argument

In its defense the State of Georgia stated that the historic institutional bias of the Medicaid program "reflected a congressional policy preference for treatment in the institution over treatment in the community" and therefore institutional care is appropriate care.

However, the High Court rejected that argument. Justice Ginsburg wrote "the State (Georgia) correctly used the past tense. Since 1981, Medicaid has provided for state-run home and community based care through a waiver program (the Home and Community Based Services - HCBS - Waiver).

Justice Ginsburg added that the Department of Health and Human Services (HHS) has compiled a long record of aggressively approving new community based waiver placements for states and therefore Medicaid's institutional bias had faded away.

Cost

The High Court said that cost may constitute a legitimate reason not to place people into the community. Most important, states can legitimately provide institutional over community based care after "taking into account the resources available to the State and the needs of others with disabilities" and concluding that expenditure on community based placement would "fundamentally alter" the state's service system.

Meeting this test requires a state to show that funding community based services would undermine "the responsibility the state has undertaken for the care and treatment of a large diverse population of persons with mental disabilities."

However, Georgia had no such case to make. The High Court noted that the District Court "compared the cost of caring for the plaintiffs in a community-based setting with the cost of caring for them in an institution. That simple comparison showed that community placements cost less than institutional confinements."

Institutionalization as Discrimination, Future Issues

Never before has the High Court equated institutionalilzation with discrimination. Nevertheless key issues raised by the Court must be resolved.

The High Court's opinion that "the state's responsibility, once it provides community based treatment to qualified persons with disabilities is not boundless" begs the question: what are the boundaries of state responsibility?

Further, the Court's opinion that states must use the judgements of treatment professionals to assess whether individuals will benefit from community placement calls into question the matter of which professionals. Professionals employed by an institution could lose their jobs by recommending the placement of individuals out of an institution. Are they appropriate?

What level of professionalism is appropriate?

Finally, the High Court stated that if a state "were to demonstrate that it had a comprehensive, effectively working plan for placing individuals ....and a waiting list that moved at a reasonable pace not controlled by the state's endeavors to keep its institutions fully populated" it would not be obligated to place specific individuals into the community until their turn on the waiting list had arrived.

But the Court's wording raises questions. Exactly under what conditions does a state's waiting list move at a "reasonable pace?" What does "effectively working plan" mean?

In fact part of the ruling were sufficiently ambiguous for the Arc of the United States to conclude "while the Arc and others view the Court's decision as a victory in favor of integration, the Court's decision is framed in such a way that those with a pro-institution bias are also claiming victory. This unique dynamic...will mean that future actions based on the decision will be especially important in the future development of the law in this area."

Coalition Pushes Community Programs

To encourage states to move towards greater community programming in the wake of the *Olmstead* decision, a coalition has formed to prod states into action. The coalition includes the National Association of Protection and Advocacy Systems (NAPAS) and various mental disabilities advocacy groups.

Coalition leaders have set July 26, 2000 to have all states adopt a community-placement plan. For those states that say "come back and talk to us in three years," the coalition will consider legal action, says Curt Decker, one of the coalition leaders and executive director of NAPAS.

Despite potential loopholes in the Supreme Court decision, Decker says "we think the *Olmstead* case does mandate states to move quickly toward a community service system." Decker added that the coalition wants to avoid litigation and coax states to move forward on their own. He believes that, since institutional care is more expensive than community care, states will have a difficult time arguing against community care based on cost.

Further, many persons now in state institutions have been officially approved for community placement, so arguing against deinstitutionalization on clinical grounds will also be problematic.

The coalition is now developing talking points for advocates to use with state policy makers.

In the meantime the High Court's ruling generally appears to give the movement toward community based services and away from institutional services the official sanction of the highest court in the land. That's a stamp of approval which has advocates throughout the nation celebrating, albeit cautiously.

Save these dates to celebrate NYSARC's 50th Anniversary!

Annual Convention

October 21 - October 24, 1999

NYSARC, Inc. Annual Convention
Kutsher's Country Club
Monticello, New York

"Our Golden Past . . . Our Shining Future"

Convention Highlights:

* Recognition of founding members, chapter staff, consumers, legislators, families and friends of NYSARC.

* Convention exhibits and trade show.

* Multi-tracked convention program for family, staff and consumers!